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

ONTARIO
SUPERIOR COURT OF JUSTICE
[COMMERCIAL LIST]

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

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

Applicants

RESPONDING BOOK OF AUTHORITIES OF DORAL HOLDINGS LIMITED AND 430635 ONTARIO INC.

(Motion to accept filing of a Plan and Authorize Creditors' meeting to vote on the Plan)

(Returnable December 21, 2015)

Date: December 16, 2015

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Bradford and Greenberg's

CANADIAN BANKRUPTCY ACT

(Annotated)

Containing references to all relevant decisions rendered by the Courts throughout Canada

Third Edition

by

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With a Foreword by

HIS HONOUR ROBERT FORSYTH
Senior Judge, County of York

TORONTO
1951

BURROUGHS &. CO. [EASTERN] LIMITED
TORONTO, ONTARIO

BURROUGHS & CO. LIMITED
CALGARY, ALBERTA

(a) in the province of Alberta, the Trial Division of the Supreme Court of the province;

(b) in the provinces of British Columbia, Nova Scotia and Newfoundland, the Supreme Court of the province;

(c) in the province of Prince Edward Island, the Supreme Court of Judicature of the province;

(d) in the provinces of Manitoba and Saskatchewan, the Court of King's Bench of the province;

(e) in the province of Ontario, the Supreme Court of Ontario;

(f) in the province of New Brunswick, the King's Bench Division of the Supreme Court of the province;

(g) in the province of Quebec, the Superior Court of the province;

(h) in the Yukon Territory, the Territorial Court of the Yukon Territory; and

(i) in the Northwest Territories, a stipendiary magistrate.

(2) The several courts of appeal throughout Canada, within their respective jurisdictions, are invested with power and jurisdiction at law and in equity, according to their ordinary procedures, except as varied by this Act or General Rules, to hear and determine appeals from the courts vested with original jurisdiction under this Act.

(3) The Supreme Court of Canada likewise has jurisdiction to hear and to decide according to its ordinary procedure any appeal so permitted and to award costs.

Subsec. (1) corresponds to sec. 152(1) of the former Act.

Subsec. (2) corresponds to sec. 152(3)(4) of the former Act.

See Bankruptcy Rules 62-64.

Subsec. (3) corresponds to sec. 174(3) of the former Act. There is no change.

See Bankruptcy Rules 65, 66.

(1) Inherent jurisdiction of the Bankruptcy Court: See *In re Loxtave Buildings of Can., Ltd.*, 25 C.B.R. 22 (Sask.).

In *In re Tlustie*, 3 C.B.R. 654 (Ont.), Holmested, K.C., Registrar, pointed out that for the purpose of carrying out the Act there must be deemed to be vested in the court the necessary power and jurisdiction to authorize and sanction acts necessary to be done by the trustee for the due administration and protection of the estate, even though there be no specific provision in the Act conferring such power and jurisdiction.

The court in its bankruptcy jurisdiction is a court of equity and may, under certain circumstances, give equitable relief to suitors entitled thereto in proceedings in bankruptcy: *In re Gold*

Medal Mfg. Co., 8 C.B.R. 39; 169 (Ont.); *In re Heron*; *Ex parte Robertson*, 15 C.B.R. 39, at 51 (Ont.).

In *In re Kwong Tai Chong Co.*, 3 C.B.R. 1 (B.C.), it was pointed out that the Bankruptcy Court was the inheritor of the joint principles of equity and common law, and had the power of those courts, one of which was the inherent power over costs, subject only to legislative reconstruction, and therefore there was jurisdiction in the court to award costs against the bankruptcy trustee of his unsuccessful opposition to an appeal where he intervened.

This section invests the Bankruptcy Court with such jurisdiction at law and in equity as will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in all other proceedings authorized by the Act, but its jurisdiction is confined to the administration by a trustee of an insolvent's estate, that is, an estate brought into the Bankruptcy Court for administration, and it does not apply to persons or matters outside of the Act: *In re Reynolds*; *Ex parte Thistle*, 10 C.B.R. 127 (Ont.).

As to jurisdiction of Bankruptcy Court where litigation concerned assets not forming part of the estate in bankruptcy: *In re Halikas*, 25 C.B.R. 67 (Que.).

If a question arises which is outside the administration of a bankrupt estate and which only affects third parties, the proceedings should not be brought before the Bankruptcy Court but the usual procedure of the courts should be followed (see *Re Frost*, [1899] 2 Q.B. 50, 68 L.J.Q.B. 663). But where the result would have been binding upon the trustee in bankruptcy and his action in following the decision would have been justified and protected, and where all parties affected were brought before the Bankruptcy Court, it was held that in view of secs. 42 [now 12(1)] and 84 [now 15] of the Act, the proceedings were properly brought before the Bankruptcy Court. It was held further, that where the facts were simple the court might decide matters involving rights as between creditors and their assigns in bankruptcy proceedings: *Re Maple Leaf Fruit Co.* (1949), 30 C.B.R. 23 (N.S.).

Jurisdiction of Bankruptcy Court where matter at issue between trustee and debtor's wife not a matter in bankruptcy but a matter of property and civil rights: *In re Lofsky*, 28 C.B.R. 164 (Ont.).

Whether jurisdiction in Bankruptcy Court to make declaration as to rights of adverse claimants to certain property of debtor: *In re Maritime Mining Co.*; *Ex parte F. P. Weaver Coal Co.*, 21 C.B.R. 319 (N.B.).

Where no assignment has been made the court has no jurisdiction to determine the ownership of property in dispute between a debtor and one of his creditors: *In re Geller Bros.*, 4 C.B.R. 108 (Ont.).

In *In re Sternberg*; *Ex parte Triefus & Stripp, Ltd.*, 4 C.B.R. 528, 5 C.B.R. 237 and 5 C.B.R. 608 (Ont.), it was held that where

tab 2

Horsberger + DaRe, Debt Restructuring

There is a danger in CCAA proceedings that sympathy for a well-intentioned debtor and a concern for the continuing employment of its workforce may create a temptation to overlook the need for good faith.

Good faith in CCAA proceedings usually involves questions of fairness to creditors, commercial morality and going beyond the perspective which the statute is intended to operate. To permit good faith to be "the gatekeeper of the equity court", the court is given a wide discretion. This often involves the consideration of such equitable maxims as: (1) "He who seeks equity must do equity"; (2) "He who comes to equity must come with clean hands"; (3) "Equality is equity"; and (4) "Equity regards the intent, not the form".

The Act only mentions "good faith" once and that is in s. 11 where it states that the court shall not make an order staying proceedings unless the applicant satisfies the court that it is acting in good faith and with due diligence. However, the inclusion of the words "good faith" in s. 11 adds nothing as good faith is always necessary, particularly in a court of equity. The mere fact, however, that the words "good faith" or "*bona fide*" do not appear elsewhere in the Act does not mean that a court does not have the obligation or right to raise the question of good faith.[4] This was confirmed by the Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)*.[4a] The court held as follows:

> The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence . . .
>
> The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

Good faith is a factor that courts may use to determine whether or not to direct meetings of creditors to be called to permit a debtor to submit a proposed arrangement to them, whether or not to order a stay of proceedings against the debtor by creditors, whether or not to permit late filing of claims by creditors, and whether or not to sanction an arrangement approved by the creditors.[5] The statute is not imperative that meetings be directed, proceedings be stayed, claims bar dates be extended[5a] or approved arrangements be sanctioned. The exercise of the discretion by the court in this regard will be based on the facts, guided by the law and its intent and by what is just and proper under the circumstances.

A court, for example, may refuse to direct that meetings of creditors be held if the proceedings are not commenced in good faith. Evidence of lack of good faith could be: the financial condition of the debtor is hopeless and there is a lack of any reasonable prospects for its economic rehabilitation; the proceedings appear to have commenced merely to "stall" creditors with the hope that something will come along; the debtor sought to become qualified under the Act through the creation of obligations that became claims of questionable validity, the proposed arrangement has no substantial benefit to creditors and seems designed primarily to protect and benefit the owners and management;[6] a meeting to consider the arrangement would serve no useful purpose[7] in that there is little possibility of obtaining some measure of success as there is no or very little chance that the creditors would accept the arrangement;[8] the debtor has made an earlier arrangement under the Act,[9] or has failed to make a full disclosure of the facts and circumstances bearing upon the provisions of the order requested and upon which a court might exercise its discretion.[10] To order a meeting in any of these circumstances could be unfair to creditors[11] who in equity are the *cestui que trust* of the property of an insolvent debtor and would be an abuse of the proceedings contemplated by the Act.

Evading an Act of Parliament or so arranging one's affairs to come within a statute sometimes has been criticized as showing a lack of good faith, but as Lord Cranworth L.C. once said:[12]

> . . . I never understand what is meant by evading an Act of Parliament. Either you are within the Act or you are not; if you are not within it, you are right; if you are within it, the course is clear, and it cannot be said that you are not within it because the very words of the Act may not have been violated.

This may be correct when a right bestowed by a statute is imperative. However, if a right depends upon a discretion, the manner that an applicant got within the terms of a statute may be a relevant factor in exercising the discretion.

The 1952 amendments to the CCAA restricted its application to a debtor company that had an outstanding issue of secured or unsecured bonds issued under a trust deed, or other instrument running in favour of a trustee, and where the arrangement proposed included a compromise or arrangement between the debtor company and the holders of an issue of that debt.

During the 1980s many debtor companies, with secured but no public debt, which needed to restructure their debts found that they could not use the proposal provisions of the *Bankruptcy and Insolvency Act*, as they did not apply to secured creditors until the 1992 amendments, and they could not use the CCAA as they did not have any public debt. As a result, resort was made to "sham" debentures and "instant trust deeds" to come within the definition of a debtor company permitted to use the CCAA. It would seem to be not to be within the spirit and intent of the Act to have a debtor create a sham issue of public debt through an "instant trust deed" to qualify itself to use the CCAA, which would not otherwise be available to it and, then, before the ink is dry on

Creditors Arrangement Act" (1989), 15 C.B.L.J. 89.

4a. [2010] 3 S.C.R. 379, 72 C.B.R. (5th) 170 *sub nom. Ted Leroy Trucking Ltd. (Re)*, at paras. 69-70.

5. In the United States, good faith is necessary to maintain an order staying proceedings, where a proceeding was not commenced in good faith an automatic stay was vacated: *Little Creek Development Co. (Re)*, 779 F.2d 1068, 13 C.B.C. 2d 1231 (U.S.C.A., 5th Cir., 1986); *Albany Partners Ltd. (Re)*, 749 F.2d 670, 12 C.B.C. 2d 244 (U.S.C.A., 11th Cir., 1984).

5a. See **9:1904A**, "Late Claims", *infra*.

6. *Ursel Investments Ltd. (Re)* (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.), appeal to Sask. C.A. abandoned.

7. *Cove (Re)*, [1990] 1 All E.R. 949 (Ch. D.).

8. *Nova Metal Products Ltd. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 *sub nom. Elan Corp. v. Comiskey* (C.A.); *Cove (Re)*, *supra*.

9. *Norseman Products Ltd. (Re)* (1950), 30 C.B.R. 71, [1950] O.W.N. 81 (S.C.). This and other cases held that the statute only gave one chance to a debtor to use the Act. This would not seem correct, but the fact that the debtor had previously used the statute is a significant fact upon which the court relies when considering whether to exercise its discretion.

10. *Jax Marine Pty. Ltd. and Companies Act (Re)*, [1967] 1 N.S.W.L.R. 145, at p. 146.

11. *Norseman Products Ltd. (Re)*, *supra*, endnote 9.

12. *Edwards v. Hall* (1855), 6 De G.M. & G. 74 at p. 89, 43 E.R. 1158 at p. 1164 (L.C.).

12a. *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 42 C.B.R. (5th) 90, 45 B.L.R. (4th) 201, *sub nom. ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (Ont. S.C.J. (Comm. List)), at para. 28.

13. *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24 at p. 31, 9 B.L.R. (2d) 275 (Ont. Ct. (Gen. Div.)).

14. *P.R.O. Holdings Ltd. (Re)* (1994), 24 C.B.R. (3d) 1 at p. 4, 45 N.B.R. (3d) 7 (C.A.).

15. *Norm's Hauling Ltd. (Re)* (1991), 6 C.B.R. (3d) 16, [1991] 3 W.W.R. 23 (Sask. Q.B.), leave to appeal to Sask. C.A. refused February 11, 1991.

16. *Supra*, at p. 19 C.B.R.

17. *Supra*, Gerwing J.A. stated, in refusing leave, that she would be extremely reluctant to interfere with a discretionary judgment of the lower court where *prima facie* discretion had been properly exercised. See *Stephanie's Fashions Ltd. (Re)* (1990), 1 C.B.R. (3d) 248 (B.C.S.C.), which held that there was nothing improper in the use of an instant trust deed or sham debenture; *Banque Royal v. Bftisses d'Acier Novac Inc.* (1990), 5 C.B.R. (3d) 140 (Que. S.C.), which was followed in *Philip's Manufacturing Ltd. (Re)* (1991), 9 C.B.R. (3d)

(*The next page is* 9-35)

9:1303 Application to Direct Meetings to Be Held

In the usual case, there will be a two-step procedure to commence proceedings. An initial application, discussed in **9:1302**, *supra*, is made in which the court will be asked to fix a date for a plan to be filed and to order a stay of proceedings. A stay of proceedings is discussed in **9:14**, *infra*. The second step, which is incorporated into the first step where proceedings have been commenced by filing a plan, is to apply to the court to direct meetings to be held for those affected by the plan in order to consider it.

An application to direct meetings to be held to consider a plan of compromise or arrangement is made in a "summary" way by petition, by originating summons or by notice of motion in accordance with the practice of the court in which the application is made.[1] The application will be supported by an affidavit and, where there is a monitor, by a report of the monitor.

The affidavit, if the court has not made a declaration that the debtor is a corporation to which the CCAA applies, should depose to such facts as will demonstrate that the debtor company is qualified to use the Act. This will include a list of provable claims totalling in excess of five million dollars and a statement that the application is made in good faith and that the proposed plan is fair and reasonable.[2] There should be full disclosure of all relevant facts and circumstances that will assist the court in the exercise of its discretion to give directions respecting the holding of meetings of those affected by the plan.[3] This will include a history of how the debtor got into financial difficulty and how the proposed plan is expected to turn around its affairs.

The proposed plan of compromise or arrangement should be attached as a schedule to the affidavit, which should explain the nature of the compromise or arrangement, the classes to be affected and how they will be affected. The time and place of the meeting should be proposed and a chairman and an alternate nominated to preside over each meeting and to report the result to the court. The method of notifying creditors should be suggested and, if advertising is proposed, the various newspapers in which notices are suggested to be published and the time and number of publications also should be described. Forms of notices and advertisements are often attached to the affidavits as schedules, as well as proposed forms of proxies. Court approval of the same will be requested. The court also might settle the form of a proof and how it should be filed. Reference to any other matter in respect of which the court will be requested to give directions should be included in the affidavit.

If a monitor has been appointed it will usually file a report on the state of the company's business and financial affairs containing prescribed information.[4] This will assist the court in the exercise of its discretion.

If the debtor company has commenced proceedings by filing a plan but would like more time to negotiate with creditors and possibly to amend the plan, it might consider requesting the court to extend the date of the meetings as far as possible. This will give time, if needed, to amend the plan and to apply to the

definite conflict between the debtor and principal creditor or the plan is unlikely to succeed, permission to call a meeting of creditors to consider it will be denied.[7]

There is no requirement under the Act that all proposed plans of arrangement be put before the meetings of creditors and shareholders for their consideration particularly if the plan is doomed to failure.[8]

NOTES

1. CCAA, s. 10.
2. See **9:11**, *supra*, for a discussion of the necessity of good faith.
3. *Langley's Ltd. (Re)* [1938] 3 D.L.R. 230, [1938] O.R. 123 at p. 132 (C.A.); *229531 B.C. Ltd. (Re)* (1989), 72 C.B.R. (N.S.) 310 (B.C.S.C.).
4. *Northland Properties Ltd. (Re)* (1988), 69 C.B.R. (N.S.) 266, 29 B.C.L.R. (2d) 257 (S.C.).
5. *Langley's Ltd. (Re)*, endnote 3, *supra*.
6. *Bargain Harolds Discount v. Paribas Bank of Canada* (1992), 10 C.B.R. (3d) 23, 7 O.R. (3d) 362 (Gen. Div.).
7. *Ursel Investments Ltd. (Re)*, (1990), 2 C.B.R. (3d) 260 (Sask. Q.B.) (appeal to Sask. C.A. abandoned). (A liquidation plan that benefited only the debtor and was to the detriment of the creditors was held to be contrary to the object and purpose of the Act.) See also *First Treasury Financial Inc. v. Cango Petroleum Inc.* (1991), 3 C.B.R. (3d) 232, 78 D.L.R. (4th) 585 (Ont. Ct. (Gen. Div.)), *per* Austin J. (the plan was unlikely to succeed); *Diemaster Tool Inc. v. Zukov* (1991), 3 C.B.R. (3d) 133 (Ont. Ct. (Gen. Div.)); *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 *sub nom. Elan Corp. v. Comiskey* (C.A.) (major secured creditor whose indebtedness accounted for 99.8% of the secured debt which opposed the proposed arrangement). *Bargain Harolds Discount v. Paribas Bank of Canada, supra* (there was no reasonable prospect of the debtor being able to devise a plan which would meet the approval requirements of the Act. The debtor did not know the precise nature of the problem which caused its present financial circumstances. It had no specific idea how its operations could be salvaged. It needed further borrowings to continue business and no source for funds was suggested. It had failed and abandoned efforts to raise equity and there was a complete lack of confidence in management), and see **9:10**, "Companies Qualified to Use the CCAA", *supra*.
8. *Royal Bank v. Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 230 (Alta. C.A.).

9:1304 Notice to Creditors

The order of the court directing meetings of creditors to be held to consider a proposed plan of compromise or arrangement will direct that notice of the meetings and appended material, such as an information circular which would include the proposed plan, proof of claim and a form of proxy, be served upon all creditors affected by the proposed plan. The order will specify the length of the notice to be given and how the notice is to be served. As a rule, notice will be by mail to known creditors and by publication of the notice in a newspaper to unknown or unidentified creditors such as unregistered debenture holders.

Notice of the application to sanction the plan if accepted by the creditors usually will be given at the same time as the notice of the meetings of creditors. The court will direct how the notice of the application will be given. This is usually by way of the information circular and by an announcement at the meetings.

places the creditors in different classes, the proper way to challenge the classification of creditors is by way of appeal of the initial order.

36. *Hellenic and General Trust Ltd. (Re), supra*, endnote 31 ("vendors consulting together with a view to their common interest in an offer made by a purchaser would look askance of the presence among them of a wholly owned subsidiary of the purchaser").

37. Commenting on the recent amendments in *Re SemCanada Crude Co., supra*, endnote 29e, at para. 45, Romaine J. noted that these "factors do not change in any material way the factors that have been identified in the case law".

9:1203 Directors

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 the 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.[1]

A provision for the compromise of claims against directors, however, may not include claims that: (a) relate to contractual rights of one or more creditors; or (b) are based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct of directors.[2] In *Re Canadian Airlines Corp.*,[3] the plan of arrangement made provision for the release of claims against directors but did not include this exception created by s. 5.1(2) and did not make it clear that claims against directors were only released if they arose prior to the date of the commencement of the CCAA proceedings. On the application for sanction of the plan, the court amended the plan by adding the words "excluding the claims excepted by s. 5.1(2) of the CCAA" and that claims against directors should only be released if they arose prior to the commencement date of the CCAA proceedings.

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.[4] In *Bluestar Battery Systems International Corp. (Re)*,[5] Farley J. allowed the claim against directors for unpaid GST to be compromised and refused to exercise the discretion under s. 5.1(3). However, had Canada Customs and Revenue moved on a more timely basis to prove that it was not fair and reasonable to compromise the GST claim, he stated that he may have been inclined to find that the claim fell within s. 5.1(3). Farley J. also stated in *obiter* that the language of s. 5.1 was broad enough to allow the "picking and choosing" amongst both the directors and the individual claims that may have the protection of s. 5.1.

The protection afforded directors under the provision was also considered in *NBD Bank, Canada v. Dofasco Inc.*[6] In the case, the director and parent company of the debtor corporation were held to be jointly and severally liable for negligent misrepresentations. They argued that allowing them to be individually liable would undermine the CCAA process, under which the debtor corporation was protected. The plan of arrangement under the CCAA contained a provision whereby each creditor released the debtor corporation and its directors, officers, employees and advisors from all claims or causes of action

tab 3

1938 CarswellOnt 9
Ontario Supreme Court [Court of Appeal]

Langley's Ltd., Re

1938 CarswellOnt 9, [1938] 3 D.L.R. 230, [1938] O.R. 123

Re Langley's Ltd.

Middleton, Masten and Henderson JJ.A.

Heard: January 19-20, 1938
Judgment: February 24, 1938

Counsel: *Hon. C. P. Fullerton*, K.C., for the Dominion Scottish Investments Ltd., a preferred shareholder, appellant.
R. C. H. Cassels, K.C., for the company, respondent.

Subject: Insolvency; Corporate and Commercial

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

Headnote

Corporations --- Shareholders — Meetings — Conduct of meeting — Proxies

Corporations --- Arrangements and compromises — With shareholders

Corporations --- Arrangements and compromises — With shareholders — Reorganization

Companies — Compromise or arrangement between a company and its shareholders or any class of them — The Companies Act, R.S.O. 1937, ch. 251, sec. 64 — Proxies — Notice to shareholders stated that persons named in form of proxy enclosed would vote in favour of arrangement — Suggested modification of proposed arrangement — Inability of named proxy holders to vote concerning modification of arrangement — Whether meeting of shareholders adequately represented views of the shareholders — Procedure and function of the Court in applications under sec. 64, considered.

By an order of McTague J., dated June 18th, 1937, made pursuant to what is now sec. 64(1) of The Companies Act, R.S.O. 1937, ch. 251, a meeting of the common and preferred shareholders of Langley's Ltd. was directed to be summoned to consider, and, if thought fit, to approve, with or without modification thereof, a proposed compromise or arrangement to be made between the company and its shareholders. This order prescribed the form of notice of the meeting to be sent to the shareholders but did not prescribe any particular form of proxy. Forms of proxies were however sent to the shareholders with the notice. One form of enclosed proxy for preference shareholders contained the names of A or B or C and this form of proxy authorized A or B or C to act for and on behalf of the shareholder who signed the proxy in the same manner as if the shareholder were personally present at the meeting. But the notice of the meeting stated that A or B or C named in this form of proxy would, unless specifically directed to the contrary, vote in favour of the proposed arrangement.

Prior to the meeting an alteration or modification of the proposed arrangement was suggested and was agreed to by A, but at the meeting the solicitor for the company advised that any alteration or modification of the proposed arrangement could not be voted upon with the proxies from shareholders held by A or B or C; the solicitor advised that, except as to minor changes not of substance, these proxies could not be used on a vote for any modification of the proposed arrangement and that they could only be used to vote for the proposed arrangement. Thereupon a vote was taken and A voted the proxies in favour of the arrangement with the result that three-quarters of the preference shareholders represented at the meeting approved the arrangement.

Subsequently by an order of McTague J. dated September 10th, 1937, made under sec. 64(2) the arrangement approved at the meeting of shareholders was sanctioned.

A dissenting preference shareholder appealed to the Court of Appeal from the order of McTague J., dated September 10th, 1937, and it was held by the Court of Appeal that the appeal should be allowed and the order of McTague J. sanctioning the arrangement should be vacated.

By sec. 64(2) of The Companies Act, if the shareholders or class of shareholders present at the meeting by person or proxy by three-quarters of the shares of each class represented agree to the arrangement "either as proposed or as altered or modified at such meeting" the arrangement may be sanctioned by a Judge. By virtue of the provisions in the notice to the shareholders, A as the holder of proxies was placed in the position that he could not vote the proxies which he held in favour of any alteration or modification of the proposed arrangement, although it appeared that, had A been able to do so, he would have voted for a modification of the plan. Being advised that he could vote the proxies only for the plan he voted them for the plan. In the result therefore the meeting was not one contemplated by the statute since sec. 64(2) contemplates an approval of an arrangement "either as proposed or as altered" and there could be no real consideration at the meeting of any alteration of the plan. Moreover if the restriction in the notice were considered as a condition precedent to the use of a proxy by A, the restriction became part of the proxy and was invalid as contrary to sec. 52(4) of the Act which provides that a proxy shall not contain anything but the appointment of the proxy or a revocation of a former instrument appointing the proxy.

In the result the conduct of the proceedings and the meeting were such that it was impossible for the Court to say that the report, presented as the foundation for the order sanctioning the scheme, fairly and adequately represented the views of the preference shareholders. Therefore, the order of McTague J. sanctioning the arrangement should be vacated.

Observations by the Court as to the procedure and form of order on an application under sec. 64(1) for an order calling a meeting of shareholders to consider a proposed arrangement between a company and its shareholders and as to the duty and function of the Court on the subsequent application under sec. 64(2) to sanction the arrangement which has been approved by the necessary percentage of each class of shareholders.

The appeal was heard by Middleton, Masten and Henderson JJ.A.

Hon. C. P. Fullerton, K.C., for the Dominion Scottish Investments Ltd., a preferred shareholder, appellant. Section 64*a* was added to The Ontario Companies Act, R.S.O. 1927, ch. 218 by sec. 7 of 1928, 18 Geo. V, ch. 32 (Ont.), and was designed to provide for meetings of shareholders to consider compromises, and the regulation of voting thereat. This section is based upon a similar section in the English Companies Act and according to the English decisions, great care must be taken at such meetings to prevent an organized minority from controlling a disorganized majority: *In re English, Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, at 396; *In re South Durham Steel and Iron Co. Ltd.*, [1934] Ch. 635, at 657; *In re Alabama etc. Ry. Co.*, [1891] 1 Ch. 213. The special proxy used at the meeting in the case at bar was obviously designed to prevent the preferred shareholders from voting against the scheme proposed by the company. Accordingly it is contrary to the whole spirit of sec. 64*a* and is a violation of sec. 53(4) of The Ontario Companies Act. Reference to *In re The Magadi Soda Co., Ltd.*, [1925] W.N.

50. In any event the scheme proposed is neither fair nor reasonable in that it allows a solvent company to confiscate the rights of preferred shareholders: *Re Second Standard Royalties Ltd.* (1930), 66 O.L.R. 288; *Re Dairy Corporation of Canada Ltd.*, [1934] O.R. 436; *Re Canada Bread Co. Ltd.*, [1935] O.W.N. 429, 17 C.B.R. 80.

R. C. H. Cassels, K.C., for the company, respondent, argued that sec. 53(4) of The Ontario Companies Act, R.S.O. 1927, ch. 218, was not mandatory and that accordingly the special proxy was proper.

The notice therein was purposely designed to inform the shareholders that if they gave the proxy it could only be voted in favour of the plan. Reference to *In re Dorman, Long and Co. Ltd.*, [1934] Ch. 635. Moreover the shareholders were told the terms of the plan and also that they could send in any form of proxy that they wished. Once the proxy was given, however, the nominee could only vote in favour of the scheme and would be compelled to oppose any alterations. Reference to *Re Waxed Papers, Ltd.*, [1937] 2 All E.R. 117 and 481. The scheme itself is perfectly fair and was approved unanimously by the company directors and by the learned trial Judge.

Fullerton, K.C., in reply.

***Middleton J.A.*:**

1 An appeal from an order made by the Honourable Mr. Justice McTague on the 10th September, 1937, under The Ontario Companies Act, R.S.O. 1927, ch. 218, sec. 64*a*, as enacted by 1928, 18 Geo. V, ch. 32, sec. 7, sanctioning an arrangement. The appeal is by leave of the learned Judge granted on the 23rd September, 1937.

2 Langley's Limited is a company incorporated under The Ontario Companies Act on the 17th day of May, 1929, having 6,000 shares of preferred stock and 20,000 shares of common stock. In the view that I take of this application it is not necessary that the preference given to the 6,000 shares should be detailed. Suffice it to say that the preference is onerous upon the common stock.

3 The holders of the common stock, desiring to seek relief from a situation deemed by them to be unfair and not in the best interest of the company as a whole, prepared a scheme of arrangement propounded by them and approved by a majority of a meeting of shareholders of each class and sanctioned by the order appealed from. An appeal is had from this order upon a number of grounds but, as indicated, I do not think it necessary to enter upon a discussion of them all.

4 The statutes governing this application are conveniently found consolidated in the R.S.O. 1937, ch. 251, sec. 64. This statute is, of course, not applicable, but in the revision of 1937 the various amendments are set forth in unchanged form.

5 This statute provides that where an arrangement is proposed between a company and its shareholders or any class of them affecting the rights of shareholders or any other class, a Judge of the Supreme Court may order a meeting of the shareholders, or of any class of shareholders, to be summoned in such manner as the Judge directs. It is pursuant to this authority that the Honourable Mr. Justice McTague made an order summoning a meeting of all the shareholders of the company.

6 The learned Judge in this order directed a special general meeting of the shareholders of the company to be called by notice in the form attached to the order which was thereby approved. The meeting called was one made of all preferred and common shareholders, but it was provided that, at the meeting, the arrangement be submitted separately to the holders of preferred stock and to the holders of the common shares. The notice annexed provided for the appointment of proxies and provided:

> Any proper form of instrument appointing a proxy may be used but for the convenience of shareholders forms of proxy are enclosed herewith. The first of the forms of proxy with respect to preference shares is a proxy in favour of persons who are holders of preference shares and who, for the convenience of the preference shareholders, have consented to act as proxies. Any notice in their favour will unless specifically directed to the contrary be voted in favour of the said arrangement. The first of the forms of proxy with respect to common shares is a proxy in favour of persons who are holders of common shares and who, for the convenience of the common shareholders, have consented to act as proxies. Any proxies in their favour will unless specifically directed to the contrary be voted in favour of the said arrangement. A preference or common shareholder desiring to appoint any other person as his proxy may either complete the second of the said forms of proxy

with respect to preference or common shares, as the case may be, or may use any other proper form of instrument for that purpose. Any shareholder unable to be present at the meeting may deliver his proxy to the person appointed to represent him at such meeting for production thereat or may deposit his proxy at any time prior to the time of the holding of such meeting at the office of the company, 241 Spadina Road, Toronto, Ontario. A preference shareholder should appoint as proxy only a person who is himself a preference shareholder, and a common shareholder should appoint as proxy only a person who is himself a common shareholder.

7 The meeting was held in due course on the 19th July, 1937. The minutes of the meeting were produced. The solicitor of the company stated that, in his opinion, in view of the terms of the notice and of the note appended to the forms of proxy, proxies received in favour of the named individuals without any special directions to the contrary could be voted only in favour of the arrangement as submitted to the meeting. Minor changes, but not of substance, could be made. Thereupon the motion for agreement to the arrangement was declared to be carried upon a show of hands. The solicitor present demanded a poll and a poll was then taken of the preference shareholders. The motion was then submitted to the common shareholders, and upon a show of hands, the chairman declared it carried. A poll was then demanded and taken of the common shareholders. Scrutineers then reported and the chairman declared that three-quarters of the preference shares represented had approved of the arrangement and further that three-quarters of the common stock represented had approved of the arrangement.

8 Pursuant to the terms of the order calling the meeting, the chairman and secretary of the meeting reported the result, stating that there were six preference shareholders representing 411 preference shares, and one common shareholder representing 100 common shares dissenting from the arrangement. According to an affidavit made by Mr. Langley, the total number of preference shares represented in person or by proxy was 4,107 shares, and the total number of common shares represented in person or by proxy was 15,792 shares.

9 A motion was made before the Honourable Mr. Justice McTague to approve the arrangement, and on the 10th September, 1937, an order was made approving it, notice having been given to the dissenting shareholders. Upon this order, the present appeal is taken.

10 By the statute already referred to (64*a*(2)) if the shareholders or class of shareholders, as the case may be, present in person or by proxy at the meeting by three-quarters of the shares of each class represented agree to the compromise or arrangement "either as proposed or as altered or modified at such meeting" the compromise or arrangement may be sanctioned by a Judge.

11 I have already pointed out (*Re Dairy Corporation of Canada Ltd.*, [1934] O.R. 436) that the functions of a Judge upon the preliminary application are merely to provide for the holding of the meeting of the shareholders, or class of shareholders, and to provide that notice be given to all concerned. The Judge was not, by the statute, called upon to settle the form of notice or to provide for the form of proxies. It is, I think, unwise for him to do so. The statute also calls for separate meetings of the different classes of shareholders concerned. Departure from this is not necessarily fatal if proper precautions are taken. The danger of holding one meeting of all shareholders and taking a vote thereat of the different classes is quite apparent to anyone perusing the decision of *Carruth v. Imperial Chemical Industries Ltd.*, [1937] A.C. 707, and the decision of the Court of Appeal in [1936] Ch. 587. Unless separate meetings are held it may be impossible to secure full and frank discussion.

12 A far graver irregularity in this case arose upon the question of proxies. By the circular it was stated that, unless specifically directed to the contrary, the proxies given in favour of the named individuals would be voted in favour of the arrangement. Prior to the meeting, negotiations had taken place looking to some compromise or, in the words of the statute, an arrangement either as proposed or as altered or modified by such meeting. The solicitor present at the meeting advised that the scheme could not be voted upon under these proxies in any altered or modified form. This was, in my opinion, a result not contemplated or authorized by the statute and vitiates the whole proceedings. The shareholders who were represented by proxy were placed in the position that their proxies were bound by the terms of the circular letter and could not vote for any modification or alteration of the scheme. The meeting was not such a meeting as was contemplated by the statute.

13 I refer to *In re Dorman, Long and Co. Ltd.*, [1934] Ch. 635, a case actually decided before *Re Dairy Corporation of Canada Ltd.*, [1934] O.R. 436, but unknown to me and not reported at that time. The decisions are probably in no way conflicting. I

there said, at p. 439, that "there is, I think, the duty imposed upon the Court to criticize the scheme and ascertain whether it is in truth fair and reasonable." This has been sometimes misunderstood. I did not intend to say, and I do not think the words used fairly mean, that the Court should criticize the reasonableness of the scheme from a business standpoint. What I meant is far better explained in the words of Mr. Justice Maugham in the *Dorman, Long* case, *supra*, at pp. 655-656, where the duty of the Court is explained in a way that altogether commends itself to me. The scheme propounded must scrupulously regard the rights of minority shareholders and must under all the circumstances be fair to them. What is fair from a business standpoint can generally best be judged by the opinions of business men rather than Judges. In the language of the House of Lords in the *Carruth* case [1937] A.C. 707, the Court must see "that the scheme is fair to both classes of shareholders", not in the sense that the scheme is bound to preserve the rights of every individual as they were; there may be a compromise, but it must be an honest compromise, and it must be fair.

14 I also desire to draw attention to the fact that in the Ontario statute there is a provision, which, so far as I know, does not exist in the English Act, that a proxy shall not contain anything but the appointment of the proxy. See R.S.O. 1937, ch. 251, sec. 52(4). In effect the instructions here given to the proxy were taken by the company to limit the right of the proxy to vote. This, I think, is contrary to this section.

15 Another matter that should be mentioned is that the vote taken at the meeting, though not the vote acted upon, was by a show of hands. Sec. 52(3) also provides an absent shareholder has not the right to vote on a show of hands. Sec. 64, I think, contemplates a meeting at which all those present in person or by proxy shall have the right to vote, and so prohibits a vote by a show of hands.

16 For the reasons given, this resolution was carried by a vote at which absent shareholders voting by proxy were not permitted to vote for any altered or modified scheme but only for or against the scheme as propounded. The appeal must be allowed and the order vacated. The appellants must be paid their costs of the appeal, but I would not make any order as to the costs in the Court below. This order will, of course, be entirely without prejudice to the calling of a further meeting in accordance with the provisions of the statute.

***Masten J.A.*:**

17 This is an appeal by the Dominion-Scottish Investments Ltd., a dissenting holder of preference shares of Langley's Limited, from an order made by McTague J. on September 19th, 1937, pursuant to the provisions of sec. 64*a* of The Ontario Companies Act, R.S.O. 1927, ch. 218, as enacted by 1928, 18 Geo. V, ch. 32, sec. 7, sanctioning an arrangement alleged to have been approved by the several classes of shareholders of the company at a special meeting held on July 19th, 1937. The special meeting was held in pursuance of an order made by McTague J., and dated the 18th day of June, 1937.

18 I have had the privilege of reading the reasons for judgment prepared by my brothers Middleton and Henderson, and I agree with them that in the result this appeal must be allowed and the order in question vacated. But, as I arrive at that conclusion by an approach differing somewhat from that pursued by my brethren, and as the practice and procedure in connection with applications of this character is a matter of importance at the present juncture, it seems desirable that I should state fully the views which I entertain.

19 I observe, in the first place, that this is an application under sec. 64*a* of The Ontario Companies Act (now sec. 64 of R.S.O. 1937, ch. 251). Its provisions are in certain respects similar to the provisions of secs. 122 and 123 of The Dominion Companies Act, 1934, 24-25 Geo. V, ch. 33 and to The Companies Creditors' Arrangement Act, 1932-33, 23-24 Geo. V, ch. 36; The Winding-up Act, R.S.C. 1927, ch. 213; sec. 15(i) of The Judicature Act, R.S.O. 1937, ch. 100, and to sec. 153 of the English Companies Act, 1929, 19-20 Geo. V, ch. 23, but as these Acts differ in many of their provisions, care is to be exercised in applying to sec. 64*a* the cases decided under them.

20 In the present case the company is solvent, is not in process of winding-up and the proposed arrangement relates solely to alterations in its capital structure and in the respective rights of the several classes of shareholders.

21 As pointed out by Maugham J. in *Re Dorman, Long & Co.*, [1934] Ch. 635, at p. 655, the first duty of the Court is to see that the resolutions of the several classes of shareholders are passed by the statutory majority in accordance with sec. 64*a* at a meeting or meetings duly convened and held, for upon that depends the jurisdiction of the Court to confirm the scheme.

22 I begin, therefore, with a consideration of the preliminary order made by McTague J., dated the 18th of June, 1937, directing a meeting of the shareholders to be summoned. That order provided that a special general meeting of the shareholders of the company to be held at the head office of the company on Monday, the 19th day of July, 1937, should be summoned

> By notice in the form hereto annexed as Schedule 'A' (which form of notice is hereby approved) to be given by mailing a copy of the said notice by ordinary mail, postage prepaid, to each holder of the 7 per cent. Cumulative Redeemable Convertible Preference Shares and to each holder of Common Shares in the capital stock of the Company at the last address appearing on the Register at least twenty days before the holding of such meeting.
>
> 2. And it is further ordered that such meeting may adjourn from time to time and that no notice of any such adjournment shall be required to be given.
>
> 3. And it is further ordered that at the said meeting the arrangement referred to in the said notice be submitted separately to the holders of the 7 per cent. Cumulative Redeemable Convertible Preference Shares and to the holders of the Common Shares in the capital stock of the Company and that a report of such meeting be rendered by the Chairman of such meeting and the Secretary thereof in due course.

23 Subsec. (1) of 64*a* provides that where such a compromise or arrangement as is here in question is proposed, a Judge of the Supreme Court may order a meeting of the shareholders of the company or any class of shareholders, as the case may be, "to be summoned in such manner as the said judge directs". These words are of a broad and general character and their effect is considered by Maugham J. in the *Dorman, Long* case, [1934] Ch. 635, at pp. 658-663. In considering whether under the order of the 18th of June, 1937, the meeting of shareholders was effectively summoned, I have perused the observations of Maugham J. in the *Dorman, Long* case at the pages above referred to, and my conclusion is that, while the greatest care should be exercised in framing the provisions of the preliminary order calling the meeting, it is undesirable for this Court to limit the generality of the words of the statute prescribing that the meeting shall be "summoned in such manner as the said judge directs."

24 Whether the preliminary order for holding the meeting should be issued *ex parte*, or whether the Judge ought to direct that notice of the application should be served on certain shareholders, is a matter which, in my opinion, should be left to the unfettered discretion of the Judge to whom the application is first made. In any case, the affidavits in support of the application might well state whether or not the scheme has been discussed with persons representing the class or classes of shareholders concerned, and if so, whether the scheme meets with the approval of such persons.

25 It is perhaps needless to point out that, as in all *ex parte* applications, the responsibility rests on the applicant to place candidly and frankly before the Judge all facts and circumstances bearing on the provisions of the order giving leave to summon the meeting or meetings. It should never be overlooked that the preliminary order, the notice to shareholders, the proceedings at the meeting or meetings of shareholders and the report of the result of the meetings are all conditions precedent to the sanctioning of the scheme when it is ultimately brought before the Court. The responsibility necessarily rests on the applicant of making sure that all conditions precedent are observed, that the meeting is effectively summoned, organized and constituted so as effectively to transact its business, and that every shareholder affected by the proposed scheme receives such fair, candid and reasonable notice of the proposed arrangement as will afford him proper and adequate opportunity for its consideration prior to the meeting.

26 How far the preliminary order directing the meeting to be summoned should assist the applicant in fulfilling its responsibilities must rest in the sound discretion of the Judge before whom the application comes. I think his discretion extends to whatever relates to the summoning of the meeting or is fairly incidental to the purposes above stated, but the statute contains nothing to give the Court control over the proceedings at the meeting or meetings.

27 In the present case, the order summoning the meeting did not prescribe any particular form of proxy; it merely approved of the form of notice calling the meeting. The fact that clauses 2 and 3 of the order purport to deal with the conduct of the meeting, does not render the other provisions of the order invalid. The provisions of that notice, so far as they touch the rights of preferred shareholders and deal with the subject matter of proxies, are as follows:

> The said meeting is called pursuant to the provisions of an Order made in the Supreme Court of Ontario, pursuant to The Companies Act (Ontario) Section 64(*a*) by Mr. Justice McTague dated Friday, the 18th day of June, 1937, for the purpose of considering and, if thought fit, of passing a resolution or resolutions agreeing with or without alteration or modification to the Arrangement endorsed hereon proposed to be made between the Company and its Shareholders.
>
> The holders of 7 per cent. Cumulative Redeemable Convertible Preference Shares and the holders of Common Shares may attend the meeting in person or may be represented thereat by proxy. Any proper form of instrument appointing a proxy may be used but for the convenience of Shareholders forms of proxy are enclosed herewith. The first of the forms of proxy with respect to Preference Shares is a proxy in favour of persons who are holders of Preference Shares and who, for the convenience of the Preference Shareholders, have consented to act as proxies. Any proxies in their favour will *unless specifically directed to the contrary* be voted in favour of the said Arrangement. . . . A Preference or Common Shareholder desiring to appoint any other person as his proxy may either complete the second of the said forms of proxy with respect to Preference or Common Shares, as the case may be, or may use any other proper form of instrument for that purpose. Any Shareholder unable to be present at the meeting may deliver his proxy to the person appointed to represent him at such meeting for production thereat or may deposit his proxy at any time prior to the time of the holding of such meeting at the office of the Company, 241 Spadina Road, Toronto, Ontario.

28 The forms of proxy enclosed with the notice, read as follows:

> Langley's Limited
>
> Special General Meeting of Shareholders of Langley's Limited to be held on the 19th day of July, 1937.
>
> Proxy in respect of
>
> Preference Shares
>
> which may be used if Preference Shareholder wishes to appoint Preference Shareholders who have consented to act as proxy.
>
> The undersigned, being the registered holder of 7 per cent. Cumulative Redeemable Convertible Preference shares of the par value of $100 each, hereby nominates, constitutes and appoints S. R. Mackellar or, failing him, B. N. Barrett, or, failing him, F. O. Mitchell, proxy of the undersigned to attend the Special General Meeting of Shareholders of Langley's Limited to be held on the 19th day of July, 1937, and at any adjournments thereof, and to act thereat for and on behalf and in the name of the undersigned in respect of all matters that may come before the meeting in the same manner as the undersigned could do if personally present thereat, with full power to such proxy to appoint any substitute or substitutes for the purpose aforesaid, the undersigned hereby ratifying and confirming and agreeing to ratify and confirm all that such proxy may lawfully do by virtue hereof.
>
> Witness the hand of the undersigned this ..... day of....., 1937.
>
> (Please fill in date).....
>
> Signature of Preference Shareholder

Proxy in respect of Preference Shares

which may be used if Preference Shareholder wishes to appoint some person, other than those whose names are given in the above proxy, as his proxy.

The undersigned, being the registered holder of 7 per cent. Cumulative Redeemable Convertible Preference shares of the par value of $100 each, hereby nominates, constitutes and appoints ..... or, failing him, ... or, failing him, ..., proxy of the undersigned to attend the Special General Meeting of Shareholders of Langley's Limited to be held on the 19th day of July, 1937, and at any adjournments thereof, and to act thereat for and on behalf and in the name of the undersigned in respect of all matters that may come before the meeting in the same manner as the undersigned could do if personally present thereat, with full power to such proxy to appoint any substitute or substitutes for the purpose aforesaid, the undersigned hereby ratifying and confirming and agreeing to ratify and confirm all that such proxy may lawfully do by virtue hereof.

Witness the hand of the undersigned this ..... day of ....., 1937.

(Please fill in date).....

Signature of Preference Shareholder

Any proper form of instrument appointing a proxy may be used, but for the convenience of Preference Shareholders the above forms are furnished, either of which will be sufficient. The persons named in the first of the above forms are Preference Shareholders who, for the convenience of Preference Shareholders, have consented to act as proxies. Any proxies in their favour will, unless specifically directed to the contrary be voted in favour of the Arrangement to be submitted to the meeting.

A Shareholder desiring to appoint any other person as his proxy may either complete the second of the above forms of proxy or may use any other proper form of instrument for that purpose.

In the case of a corporation, the proxy must be under seal or under the hand of some officer duly authorized to sign.

A Preference Shareholder should only appoint as proxy a person who is a holder of Preference shares.

29 The shareholder thus had the fullest opportunity of giving whatever kind of proxy he chose and to whom he chose.

30 Applying the views above expressed to the consideration of the order of McTague J., dated the 18th June, 1937, to the notice of meeting approved thereby and generally to the proceedings anterior to the meeting, I am of the opinion that no objection can effectively be taken to the provision of the order as issued, or to the notice, and that the meeting was validly summoned.

31 I turn next to a consideration of the conduct of the meeting of shareholders held on the 19th day of July, 1937, and to the proceedings there taken. The meeting appears to have been constituted and conducted as a joint meeting of all shareholders, preferred and common, though, as will appear from the minutes, a separate vote and ballot by each class of shareholders was taken regarding the proposed arrangement; but so far as I understand the situation, the motion for adjournment of the meeting was voted on promiscuously by all shareholders. Such a proceeding appears to me to be highly undesirable, but having regard to the decision of the House of Lords in *Carruth v. Imperial Chemical Industries Ltd.*, [1937] A.C. 707, no objection having been taken by any shareholder at the meeting, I am unable to say that this procedure vitiates the proceedings or renders the report invalid.

32 The minutes of the meeting, so far as they bear on the question before the Court, are as follows:

Moved by Mr. G. F. Mayes, seconded by Mr. Vernon G. Gaby that the Arrangement endorsed upon the notice to shareholders calling this meeting and initialled for identification by the Chairman and ordered to be spread upon the

minutes, be and the same is hereby agreed to and the directors of the Company are hereby authorized to take the necessary steps to make the said Arrangement binding upon the Company and its shareholders.

The Chairman thereupon declared the motion open for discussion.

Mr. E. J. Bennett complained that the Arrangement was too much in favour of the Common shareholders and accordingly it was moved by Mr. E. J. Bennett, seconded by Mr. J. de N. Kennedy as an amendment to the motion that the meeting do adjourn to August 25th, 1937, at 2.30 p.m. (Daylight Saving Time) and that a Committee be appointed to consider and submit a new Plan, the Committee to consist in part of representatives of the Preference shareholders who are not also Common shareholders.

A general discussion took place. Thereafter the Chairman submitted the amendment to the meeting and upon a show of hands declared that the amendment had been lost.

Mr. E. J. Bennett thereupon demanded a poll on the amendment.

During the discussion which followed Mr. Crowell, of Messrs. Blake, Lash, Anglin & Cassels, the Solicitors for the Company herein, stated that in his opinion, in view of the terms of the notice and of the note appended to the forms of proxy, proxies received in favour of the named individuals without any special directions to the contrary could be voted only in favour of the Arrangement as submitted to the meeting. Minor changes, but not of substance, could be made.

Mr. E. J. Bennett withdrew his demand for a poll.

The motion for agreement to the Arrangement was thereupon submitted to the Preference shareholders and the Chairman declared the motion carried upon a show of hands.

Mr. S. G. Crowell demanded a poll and such demand was seconded by Mr. E. J. Bennett.

The Scrutineers then distributed ballots and a poll was taken of the Preference shareholders.

The motion was subsequently submitted to the Common shareholders and upon a show of hands the Chairman declared the motion carried.

Mr. S. G. Crowell demanded a poll and such demand was seconded by Mr. E. J. Bennett.

The Scrutineers then distributed ballots and a poll was taken of the Common shareholders.

33 The scrutineers at the meeting reported as follows:

We, the undersigned Scrutineers appointed by the Shareholders of Langley's Limited at the Special General Meeting of the Shareholders of the said Company held on Monday, the 19th day of July, 1937, report as follows:

(a) That the votes of the 7 per cent. Cumulative Redeemable Convertible Preference Shareholders and of the Common Shareholders on the Arrangement were separately taken;

(b) That the total number of the said Preference Shares represented by Shareholders present in person or by proxy was 4,107 shares;

(c) That on the poll 3,696 of the said Preference Shares held by 173 Shareholders were voted in favour of the resolution and 411 of the said Preference Shares held by 6 Shareholders were voted against the resolution.

(d) That the total number of Common shares represented by Shareholders present in person or by proxy was 15,792 shares;

(e) That on the poll 15,692 Common shares held by 52 Shareholders were voted in favour of the resolution and 100 Common shares held by 1 Shareholder were voted against the resolution.

Dated at Toronto, Ontario, this 19th day of July, 1937.

(Sgd.) H. J. Welch

(Sgd.) A. E. Brown.

34 The chairman and secretary of the meeting reported:

7. The Arrangement was submitted separately to the holders of the said Preference Shares of the Company and the holders of the said Common Shares of the Company and in each case on a poll duly had was agreed to by the vote of three-fourths of the Shareholders of each class represented at the meeting in person or by proxy.

8. There were dissentient votes on the resolution for the approval of the said Arrangement as follows:

Votes of 6 Preference Shareholders representing 411 Preference Shares;

Votes of 1 Common Shareholder representing 100 Common Shares.

35 At the meeting the bulk of the proxies of preferred shareholders stood in the name of S. R. Mackellar, one of the directors of the company.

36 On July 16th, 1937, three days before the meeting of shareholders, Mackellar and another director named Barrett, met E. J. Bennett representing the present appellant, and a modification of the original arrangement attached to the notice and submitted to shareholders was agreed upon between these three parties representing diverse interests, and Mackellar agreed that he would, at the meeting of shareholders, vote his proxies in favour of the arrangement as then modified, provided Bennett would do likewise, and Bennett then agreed; but at the meeting, Mackellar was advised that, under the terms of the notice, he was bound to vote his proxies in favour of the arrangement originally proposed, without any modification. A motion to adjourn the meeting till August 25th was then proposed, and defeated, and the original arrangement without modification was approved.

37 In paragraphs 7 and 8 of the memorandum filed by the appellant in support of his appeal, this procedure is attacked in the following words:

7. The notice of the special general meeting of the shareholders states that any proxies in favour of the shareholders named in the upper of the two forms of proxy '*will unless specifically directed to the contrary* be voted in favour of the said Arrangement.' The forms of proxy sent by the company to its shareholders are very wide in their terms, but there is a footnote to the effect that any proxies in favour of the persons named in the upper form '*will unless specifically directed to the contrary* be voted in favour of the Arrangement.' The said notice and the proxy forms were misleading and are contrary to the letter and the spirit of section 64*a* of the Ontario Companies Act, which expressly provides for the making at the meeting of alterations or modifications in an arrangement.

8. The said forms of proxy are contrary to the provision of sub-section 4 of section 53 of the Ontario Companies Act that they 'shall not contain anything but the appointment of the proxy.'

38 The answer of the respondent appears at paragraph 4 of their memorandum:

4. The form of proxy sent by the Company to Preference shareholders was not governed by Section 53 of the Ontario Companies Act which is not applicable to class meetings of shareholders called pursuant to an Order made under the authority of Section 64*a*, and a statutory right to vote by proxy being given by Section 64*a* any general form of proxy may be used; alternatively the Company's by-laws dispense with the use of Form 6 in The Companies Act, R.S.O. 1927,

ch. 218; alternatively, Section 53 is permissive in its provisions and not mandatory; alternatively the form of proxy used contains no provisions forbidden by Section 53.

39 Subsection 4 of sec. 53 is as follows:

An instrument appointing a proxy may be according to Form 6 or such other form as may be prescribed by the by-laws of the corporation and shall not contain anything but the appointment of the proxy or a revocation of a former instrument appointing a proxy.

40 I am unable to accede to the argument of the respondent with respect to sec. 53 of The Ontario Companies Act. The section appears to me to be entirely general in its terms, and while I have no doubt that it was drawn and passed by the Legislature without having in mind such a situation as here exists, nevertheless being general in its terms, I think that we are bound to apply it in this case, and to say that the proxy to be given for a vote under 64*a* is subject to the limitation contained in sec. 53(4), viz., that the proxy cannot contain anything but the appointment of the proxy or a revocation of a former instrument appointing a proxy.

41 That being so, Mackellar was in an embarrassing position. The proxy itself is not irregular on account of the agent to vote being named in the form as issued: *In re English, Scottish and Australian Chartered Bank*, [1893] 3 Ch. 385, at p. 419. It is unlimited in its scope, giving to Mackellar full power to act in all respects as the shareholder himself could have done if personally present, while at the same time the note appended to the proxy stated that the proxies given to Mackellar (unless specifically directed to the contrary) would be voted in favour of the arrangement which was enclosed with the notice. The proxy must be taken to have been given upon and subject to that term or condition, and the question then arises whether the condition is dependent or independent. In either event the vote given by Mackellar is bad. If dependent and forming a condition precedent to the exercise of the power, it becomes part and parcel of the proxy and is bad as being in contravention of the statute, thus rendering the proxy itself nugatory and vitiating the vote given under it by Mackellar.

42 In the alternative, assuming that it is an independent and collateral direction by the shareholder, the ambiguity and conflict between the proxy itself and the appended note results, in my opinion, as follows. At the date when the proxy was sent out it was the intention of the applicant and, subsequently, of the shareholder, that Mackellar should vote in favour of the arrangement appended to the notice of meeting, but as the proxy itself gives full power to Mackellar to vote for any modification that meets with his approval in the same way as the giver of the proxy if present might have done, that is, to vote for any modification of the original arrangement which he deemed advantageous or desirable, then, as trustee of the power under such a general proxy, it was his duty at the meeting to exercise the power in such a way as he deemed in the interest of his *cestui que trust*. That way was to vote for the modified arrangement which he and Barrett had agreed with Bennett on July 16th as a proper and desirable modification. He failed to vote it in that way and voted for the original arrangement.

43 The result is that, in the circumstances as detailed above, the conduct of the meeting and the proceedings taken were such that it is impossible for the Court to say that the report presented to it as the foundation of the order to sanction the arrangement, fairly and adequately represents the views and wishes of the preference shareholders.

44 It is a condition precedent to the making of any order sanctioning the arrangement, that the Court should have evidence that the result of the proceedings presents to the Court a true representation of the views of the shareholders or the classes of shareholders concerned. That condition not having been fulfilled, the Court had no jurisdiction to make the order sanctioning the arrangement.

45 Under these circumstances, it is unnecessary and therefore undesirable for me to consider or pass judgment on the merits of the arrangement as being fair or unfair.

46 With regard to the manner in which the Court should approach the consideration of fairness or unfairness of the arrangement, and the general rule to be applied in granting or refusing its sanction, I agree with what has been said by my brother Middleton.

47 The appeal should be allowed with costs and without prejudice to any new or further proceedings which may hereafter be taken

***Henderson J.A.*:**

48 I have had the privilege of reading the opinions of my brother Middleton and my brother Masten, and I agree with the conclusion which they have reached, and also with the ground upon which that conclusion is based.

49 Section 64*a*(2) of The Ontario Companies Act, R.S.O. 1927, ch. 218, as enacted by 1928, 18 Geo. V, ch. 32, sec. 7, provides in certain circumstances for the sanction by a Judge of a compromise or arrangement either as proposed or as altered or modified at a meeting of shareholders called and held in accordance with the Act.

50 It appears to me that, as in this case the bulk of the shareholders through their proxies were prevented on the ruling of the solicitor for the company from voting for any alteration or modification of the compromise or arrangement as proposed, such meeting could not be said to have been held in accordance with the statute.

51 I agree with what my brother Masten has said, to the effect that it is not desirable to seek to limit the words of the statute that a meeting shall be "summoned in such manner as the said Judge directs". The form of order should, I think, be left to the discretion of the Judge to whom the preliminary application is made, so that among other things he may determine whether it is wise to assume the responsibility of approving the form of notice, the form of proxy and such matters or to leave that responsibility upon the solicitor.

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

53 As I read the opinions of the learned Judges in *Carruth v. Imperial Chemical Industries Ltd.*, [1937] A.C. 707, and the *Dorman* case, [1934] Ch. 635, and the Canadian cases referred to in the opinions of my brethren, this is not in conflict with the views there expressed.

Appeal allowed.

tab 4

1993 CarswellOnt 241
Ontario Court of Justice (General Division), In Bankruptcy

Armbro Enterprises Inc., Re

1993 CarswellOnt 241, [1993] O.J. No. 4482, 22 C.B.R. (3d) 80

Re ARMBRO ENTERPRISES INC.

R.A. Blair J.

Judgment: November 1, 1993

Counsel: *Geoffrey B. Morawetz* and *Craig J. Hill*, for applicants.
Irving Marks, for opposing creditor.
Michael S.F. Watson and *Lilly A. Wong*, for Royal Bank of Canada.

Subject: Corporate and Commercial; Insolvency

Table of Authorities

Cases considered:

Ayer's Ltd., Re (December 9, 1991), (Nfld. T.D.) [unreported] — *referred to*

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

Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce (1992), 11 C.B.R. (3d) 161, 90 D.L.R. (4th) 285 (Ont. Gen. Div.) — *considered*

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

Inducon Development Corp., Re (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.) — *referred to*

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

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

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

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

Silcorp Ltd. v. Canadian Imperial Bank of Commerce (June 26, 1992), Doc. B152/92 (Ont. Gen. Div.) — *referred to*

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621 (Ont. Gen. Div.) — *referred to*

Woodward's Ltd., Re (1993), 20 C.B.R. (3d) 74, 84 B.C.L.R. (2d) 206 (S.C.) — *referred to*

Statutes considered:

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

s. 6

Motion for order sanctioning and approving plan of compromise and arrangement.

R.A. Blair J. **(Endorsement):**

1 This is a motion by the Applicants for an Order pursuant to s. 6 of the CCAA for sanction and approval of the plan of compromise and arrangement filed by the Applicants on September 24, 1993, as amended. On that date, I made an Order granting the Applicants the protection of a stay of proceedings under the Act, in order to permit them to restructure their operations and develop a plan of compromise or arrangement for presentation to their Creditors.

2 The Plan has now been negotiated and put to meetings of the classes of creditors established under the Sept. 24th Order. With certain amendments it has been voted on and approved by creditors of sufficient numbers and in sufficient value amounts in each class to meet the requirements of s. 6 of the Act. One creditor, a landlord — 803774 Ontario Limited — opposes the sanctioning and approval of the Plan.

3 In considering whether to sanction a Plan of this sort, the Court must have regard to the following criteria, namely:

1) whether there has been complete compliance with all statutory requirements;

2) whether any material filings or procedures have been done or are purported to have been done otherwise than as authorized by the CCAA; and,

3) whether the proposed Plan is fair and reasonable.

See: *Re Dairy Corp. of Canada*, [1934] O.R. 436 (S.C.); *Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.).

4 I am satisfied that this Plan meets the foregoing criteria. The position put forward on behalf of the opposing creditor needs to be addressed, however.

5 As I apprehend the Landlord's position, it is essentially twofold, namely

a) that the landlord ought to have been placed in a separate class of creditors, and ought not to have been grouped with the unsecured creditors, generally; and,

b) that the Plan purports to terminate the tenancy, and there is no power in the Court under the CCAA to sanction a Plan which purports to do so.

6 Counsel for the opposing creditor advanced an additional argument under the "fairness" criterion to the effect that the "new common shares" to be issued under the Plan were not evenly allocated amongst the unsecured creditors, and that Royal Bank of Canada ("RBC") — the major creditor, and also a secured creditor for part of its claim — was being favoured. I am not persuaded that there is a sufficient tilt in the allocation of these new common shares in favour of RBC to justify the Court in interfering with the business decision made by the creditor classes in approving the proposed Plan, as they have done. RBC's

co-operation is a *sine qua non* for the Plan, or any Plan, to work, and it is the only creditor continuing to advance funds to the Applicants to finance the proposed re-organization. It does not seem unfair or unreasonable to me that it should receive some additional incentive to support the Plan.

Classification

7 In the circumstances of this case, it is not, in my view, inappropriate to have classified the landlord in the same class of creditors as the unsecured creditors. The landlord's claim has two bases: it is a judgment creditor for approximately $1 million as a result of a default judgment obtained against Armbro Inc. for arrears of rent; and it has a contingent claim for unliquidated damages arising out of the termination of the lease. A landlord has a right of distraint under a lease, but I am told that this right is academic for present purposes. Thus, it seems to me that 803774 Ontario Limited is not in a materially different position than other unsecured creditors who have either a claim for liquidated damages or an unliquidated claim for damages which is contingent or which has crystallized.

8 There is, in my view, a sufficient community of interest and rights between the Landlord here objecting and the other unsecured creditors to warrant their inclusion in the same class of creditors and to avoid an unnecessary fragmentation of creditors into an unwieldy patchwork or into a patchwork which may — as it would here — give one creditor an undue advantage and influence over the negotiations. The Landlord's claim is sizeable — between $3.5 million and $4.5 million, depending on whose version prevails — but it is nonetheless relatively insignificant in an overall blanket of approximately $130 million in indebtedness. See: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.); *Re Northland Properties Ltd.* (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada*) (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.); *Re Woodward's Ltd.* (1993), 20 C.B.R. (3d) 74 (B.C. S.C.).

9 There is another factor to be considered at this juncture, as well. The Applicants have been assiduous in their efforts to negotiate in good faith and in advance of their Application with all of their creditors — and the opposing creditor falls within this category. The Landlord had notice of the Application which was returnable on Sept. 24 and of the Order which was sought, including the classification of creditors into three groups: Secured, Unsecured, and RBC. It did not attend and oppose or make submissions at that time regarding its classification with the unsecured creditors. It did not avail itself of the "come back" clause within the Sept. 24th Order, to raise the issue be fore the creditor's meetings. It did not appeal. In my opinion, one of those avenues should have been followed. To await the sanctioning hearing is too late, unless it can be said — which it cannot, in this case — that the classification has given rise to a "substantial injustice": *Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.).

Termination of Leases within CCAA Proceedings

10 This brings me to the second major issue raised on behalf of the objecting creditor, namely that the Court does not have the power under the CCAA to sanction or approve a Plan which terminates leases as part of its arrangement.

11 I do not accept this submission.

12 The CCAA is broad, remedial legislation, designed to facilitate a re-organization of a debtor company's affairs in a way that is in the interests of the company, its creditors and the public. It is to be liberally construed. See: *Nova Metal Products Inc. v. Comiskey (Trustee of)* (sub nom. *Elan Corp. v. Comiskey*) (1990), 1 O.R. (3d) 289 (C.A.); *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (C.A.).

13 It is true that there is no specific provision in the CCAA which states openly that the Court has the power to sanction the termination of leases. This, I think, is what Houlden J.A. must have been contemplating when he noted, in *Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce* (1992), 90 D.L.R. (4th) 285 (Ont. Gen. Div.) [at p. 287], that "[i]t is difficult to make a plan of compromise for such a company (a chain of retail clothing stores in rented premises) under the C.C.A.A., because there is no way ... to terminate leases and to limit the amount of the claims of landlords." Section 6 of the Act is discretionary, however, and provides that "the compromise or arrangement *may be sanctioned* by the court" — assuming the statutory requirements respecting voting have been met, as they have here. There are a number of examples where the Courts

have granted their approval to arrangements which involve the repudiation, surrender and ultimate termination of leases — including, incidentally, *Re Grafton-Fraser* itself in its ultimate disposition. See also: *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia, supra; Re Ayer's Ltd.* (unreported, December 9, 1991, Nfld. T.D.); *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 306 (Ont. Gen. Div.); *Silcorp Ltd. v. Canadian Imperial Bank of Commerce* (June 26, 1992), Doc. B152/92 (Ont. Gen. Div.) (unreported). I see nothing in principle which precludes a Court from interfering with the rights of a landlord under a lease, in the CCAA context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices.

14 In this case the sanction and approval of the Court is warranted, for the reasons I have articulated, and an Order will issue to that effect in terms of the draft Order filed on which I have placed my fiat.

15 In addition, an Order will go directing the Registrar of Deeds to discharge and vacate the registration of certain Instruments described in a companion draft Order on which I have placed my fiat, and directing the Sheriff to withdraw certain Writs of Seizure and Sale also described therein. This Order is to issue immediately upon the filing of an Affidavit on behalf of the Applicants deposing that the conditions to implementation referred to in Article 5.3 of the Plan have been satisfied and that the Applicants are proceeding to implement the Plan. The Court office shall issue, enter and return this Order to the Applicants on the day on which the Order is presented for signing and entry.

Motion allowed.

tab 5

1992 CarswellOnt 164
Ontario Court of Justice (General Division)

Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce

1992 CarswellOnt 164, [1992] O.J. No. 812, 11 C.B.R. (3d) 161, 33 A.C.W.S. (3d) 69, 90 D.L.R. (4th) 285

Re GRAFTON-FRASER INC.; GRAFTON-FRASER INC. v. CANADIAN IMPERIAL BANK OF COMMERCE, ROYAL BANK OF CANADA, BANK OF NOVA SCOTIA, HONGKONG BANK OF CANADA, ROYLEASE LIMITED, GREYWINDS INVESTMENTS LIMITED, JOAN W. REYNOLDS (Trustee of certain Debentures issued by Grafton-Fraser Inc. under a certain Trust Deed) and GREYWINDS INVESTMENTS LIMITED in its capacity as holder of the Debentures issued pursuant to the said Trust Deed

Houlden J.A.

Judgment: April 16, 1992
Docket: Doc. B378/91

Counsel: *Ward R. Passi, Douglas E. Grundy* and *Alfred Apps*, for applicant, Grafton-Fraser Inc.
Robert J. Arcand, for Trilea Centres Inc., Cambridge Leaseholds Ltd. and Burnac Corp.
David E. Baird, Q.C., and *Kenneth D. Kraft*, for Cadillac Fairview Corp. and Marathon Realty Co.
Jules N. Berman, Q.C., for Tritor Developments Ltd.
Peter H. Griffin, for John Forsyth Co.
Geoffrey Morawetz, for monitor under the plan.

Subject: Corporate and Commercial; Insolvency

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

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Classification of creditors — Landlords properly placed in separate class — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

The debtor operated a chain of retail stores in rented premises across the whole of Canada. Pursuant to a previous court order, 130 leases had been abandoned. Under the plan, the creditors were divided into three classes: (1) secured creditors, (2) landlords, and (3) unsecured creditors. When the plan was put before the court for approval, a large unsecured creditor argued that the landlord class should be deleted and that there should only be the two remaining classes, secured and unsecured creditors.

Held:

The plan was approved with three classes of creditors.

It was proper to separate the landlords and the unsecured creditors into two classes. If the landlords were grouped with the unsecured creditors, there would be great difficulty in ascertaining the amount of the landlords' claims because of the large number of leases that had been abandoned. With the landlords treated as a separate class, the method of valuing their claims would be clearly spelled out and could proceed without difficulty. Furthermore, under the plan the landlords were enjoined from exercising the contractual and statutory remedies that they would ordinarily enjoy when a tenant becomes insolvent.

Motion for directions regarding meeting of creditors.

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

1 For some months I have been endeavouring to keep Grafton-Fraser Inc. ("GFI") in business and to assist it in making a fair and realistic plan of compromise under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("C.C.A.A."). The first order I made in this matter was on December 23, 1991. At that time I made a stay order under s. 11 of the Act. Paragraph 6(1) of that order reads as follows:

> 6. THIS COURT ORDERS THAT the Applicant be and is hereby authorized:
>
> (1) to abandon such of its leased store locations and, on seven (7) days notice in writing to the relevant landlord, surrender the lease in respect of such store locations and thereby cause the termination of the related lease agreement, as and when the Applicant, in its sole discretion, deems appropriate, and to make provision for any consequences thereof in the Plan;

2 As can be seen, para. 6(1) substantially interfered with the rights of landlords and contemplated that when the plan was presented, it would make provision for the landlords whose premises had been abandoned. Without para. 6(1), GFI could not have continued in business but would have had to declare bankruptcy.

3 During the time that has elapsed since the making of my original order, one of the landlords, the Cadillac Fairview Corp. Ltd. has agreed, together with Glenn Stonehouse, the executive vice-president of GFI, to invest $6,000,000 in GFI to assist the company in carrying on its operations in the event that the plan is accepted by creditors.

4 The motion before me today is, among other things, to give directions regarding the holding of the meeting of creditors to consider the plan. The parties appeared before me last Friday and at that time we were able to resolve all the outstanding issues except for one matter, namely, the classification of the unsecured creditors.

5 Under the plan the creditors are divided into three classes: (1) secured creditors, (2) landlords and (3) unsecured creditors. A large unsecured creditor, the John Forsyth Co. Ltd., contends that the landlord class should be deleted and that there should be only two classes of creditors, namely, secured creditors and unsecured creditors.

6 GFI operated a chain of retail clothing stores in rented premises across the whole of Canada. It is difficult to make a plan of compromise for such a company under the C.C.A.A., because there is no way, as there is under the *Bankruptcy Act*, R.S.C. 1985, c. B-3 or the *Winding-up Act*, R.S.C. 1985, c. W-11, to terminate leases and to limit the amount of the claims of landlords.

7 Under the plan the landlords will be required:

> (a) to accept the repudiation by GFI of leases in connection with premises abandoned by GFI prior to approval of the plan in consideration of payments to be made through the period the plan is in effect, if GFI generates sufficient cash flow;
>
> (b) to grant significant rental concession in respect of certain of the continuing GFI stores, on terms satisfactory to GFI;

(c) to abide by an order to be sought by GFI restricting them, following implementation of the plan, from terminating, rescinding or repudiating leases due to the fact that GFI has obtained relief under the Act; and

(d) to the extent landlords have claims against GFI that arise other than as a result of the repudiation of leases, to accept payments in the unsecured creditor class through the period the plan is in effect, if GFI generates sufficient cash flow, in a manner that is identical to the treatment of all other unsecured creditors of GFI.

8 The unsecured creditors of GFI, apart from the landlords, are required to accept a simple compromise of their claims against GFI in consideration for payments on account of their compromised claims through the period the plan is in effect, if GFI generates sufficient cash flow. They are not required to continue to supply goods or services to GFI, nor are any concessions on the pricing or terms for payment of any future supply of goods or services required of them.

9 I find the argument of the Forsyth Co. that the landlords and unsecured creditors should comprise one class somewhat strange, since, on the figures presently available, it appears that unsecured creditors if they remain as a separate class will receive a higher dividend than the landlords. The other side of the coin is, however, why do the landlords want to remain as a separate class if they could receive a higher dividend by being treated as unsecured creditors? I believe that there are valid reasons for the landlords wishing to remain as a separate class and for permitting them to be a separate class under the plan. Section 4 of the C.C.A.A. contemplates that there can be separate classes of unsecured creditors. The reasons why I believe that the landlords are entitled to be treated as a separate class in this particular plan are the following:

10 First, if the landlords are grouped with the unsecured creditors there will be great difficulty in ascertaining the amounts of their claims. Some 130 leases have been abandoned. I agree with counsel for GFI that the valuation of the claims of the landlords of these premises would be a tremendous task. However, under the plan with the landlords being treated as a separate class, the method of valuing the claims of the landlords is clearly spelled out and can proceed without difficulty.

11 Secondly, under the plan, the landlords are enjoined from exercising the contractual and statutory remedies that they would ordinarily enjoy where a tenant becomes insolvent. This, I believe, also warrants the landlords being treated as a separate class.

12 I am, therefore, of the opinion that it is proper in this case to separate the landlords and the unsecured creditors into two classes. An order will go approving the plan in its present form for presentation to creditors. The other provisions in the draft order, as amended, are also approved.

13 In the circumstances, there will be no order as to costs.

Order accordingly.

End of Document

tab 6

Court of Queen's Bench of Alberta

Citation: Re: San Francisco Gifts Ltd. (*Companies' Creditors Arrangement Act*), 2004 ABQB 705

Date: 20040929
Docket: 0403 00170
Registry: Edmonton

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SAN FRANCISCO GIFTS LTD. ("SAN FRANCISCO"), SAN FRANCISCO RETAIL GIFTS INCORPORATED (PREVIOUSLY CALLED SAN FRANCISCO GIFTS INCORPORATED), SAN FRANCISCO GIFT STORES LIMITED, SAN FRANCISCO GIFTS (ATLANTIC) LIMITED, SAN FRANCISCO STORES LTD., SAN FRANCISCO GIFTS & NOVELTIES INC., SAN FRANCISCO GIFTS & NOVELTY MERCHANDISING CORPORATION (PREVIOUSLY CALLED SAN FRANCISCO GIFTS AND NOVELTY CORPORATION), SAN FRANCISCO (THE ROCK) LTD. (PREVIOUSLY CALLED SAN FRANCISCO NEWFOUNDLAND LTD.) and SAN FRANCISCO RETAIL GIFTS & NOVELTIES LIMITED (PREVIOUSLY CALLED SAN FRANCISCO GIFTS & NOVELTIES LIMITED) (COLLECTIVELY "THE COMPANIES")

Reasons for Judgment
of the
Honourable Madam Justice J.E. Topolniski

INTRODUCTION

[1] The San Francisco group of companies (San Francisco) obtained *Companies' Creditors Arrangement Act*[1] (*CCAA*) protection on January 7, 2004 under a consolidated Initial Order. The Initial Order has been extended and the companies continue in business. They now propose a compromise of their debt that is spelled out in a plan of arrangement ("Plan") that has been

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[1] R.S.A. 1985, c. C-36, as am.

circulated to their creditors. Like all *CCAA* plans of arrangement, this Plan proposes classes of creditors for voting purposes. Two-thirds in value and a majority in number of the creditors in each class must cast a positive vote for the Plan in order for it to pass muster. If approved, the Plan will then be presented to the Court for sanctioning at what is commonly referred to as a "fairness hearing".[2] These steps have been delayed by the present application.

[2] The six applicants are landlords (the "objecting landlords") of retail premises in Ontario, New Brunswick, Nova Scotia and Newfoundland that were leased to San Francisco. The leases were either abandoned by San Francisco before the *CCAA* proceedings began or were later terminated with court approval. The objecting landlords seek to reclassify the creditors of San Francisco for purposes of voting on the Plan. They rely on three grounds for their application. First, they argue that they should be placed in a separate class because they have distinct legal rights, their claims are difficult to value and they are preferred over other creditors in the class. Second, they believe that their reclassification is warranted as a result of inequitable treatment of certain creditors under the Plan. Third, they seek to ban closely related creditors, or "related persons", as that phrase is defined in s. 4 of the *Bankruptcy and Insolvency Act*[3] (*BIA*), from voting on the Plan at all. They submit that, at the very least, related persons should be placed in a separate class to prevent them from controlling the creditor vote.

BACKGROUND

[3] San Francisco operates a national chain of novelty goods stores. It currently has 450 employees working from 84 locations. The head office is in Edmonton, Alberta.

[4] The group of companies is comprised of the operating company San Francisco Gifts Ltd., and a number of nominee companies. The operating company, which is 100 percent owned by Laurier Investments Corp. ("Laurier"), holds all of the group's assets. In turn, Laurier is 100 percent owned by Barry Slawsky ("Slawsky"), the driving force behind the companies. He is the president and sole director of virtually all of the companies, and is one of the companies' two secured creditors, the other being Laurier. The nominee companies are hollow shells incorporated for the sole purpose of leasing premises.

[5] The Monitor reports that the reviews by its counsel of Slawsky and Laurier's security documents "do not indicate any deficiencies in the security position" and that the combined book value of their loans to the companies is $9,767,000.00. San Francisco's debt at the date of the

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[2] The considerations at this hearing are typically whether there has been strict compliance with statutory requirements, whether any unauthorized acts have occurred, and whether the plan is fair and reasonable: see ***Re Sammi Atlas Inc.*** (1998), 3 C.B.R. (4th) 171 (Ont. Ct. (Gen.Div.)).

[3] R.S.C. 1985, c. B-3, as am.

Initial Order was $5,300,000.00, not including any unsecured deficiency claims by the secured creditors. There are 1183 creditors in total.

[6] Like many consolidated *CCAA* plans of arrangement, this Plan contemplates the compromise of all of the participant companies' debts from one pool of assets. The Plan places all non-governmental unsecured creditors into one class and proposes a compromise payment of roughly $.10 on the dollar by dividing $500,000 between all unsecured creditors in this class on a *pro rata* basis, after payment of the first $200.00 of each proven claim. The Plan also provides that Slawsky and Laurier's claims will survive the reorganization. They are defined in the Plan as "unaffected creditors" who will not share in the payment to creditors. They may, however, value their security and vote as unsecured creditors for their deficiency claims.

[7] There is little common ground between the parties on this application, except for their ready recognition that a separate landlords' class will secure its members the power to veto the creditor vote.

ANALYSIS

Classification of Creditors Generally

[8] The *CCAA* does not direct how creditors should be classified for voting purposes. It does nothing more than define what a secured versus an unsecured creditor is[4] and specify that a plan of arrangement must be approved by the various classes of creditors affected by it.[5] However, a "commonality of interest" test and well-defined guidelines for classification have been set out in the case law.

[9] In ***Sovereign Life Assurance Co. v. Dodd***,[6] Lord Esher M.R. articulated the rationale for the commonality of interest test:

> ...It seems plain that we must give such a meaning to the term "class" that will prevent the section being so worked as to prevent a confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

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[4] *CCAA*, s. 2.

[5] *CCAA*, s. 6.

[6] ***Sovereign Life Assurance Co. v. Dodd***, [1892] 2 Q.B. 573 at 583 (C.A.).

[10] The objecting landlords focus their argument on the two themes in this passage: the need for meaningful consultation between class members, something the objecting landlords say will not occur because their rights are different from other creditors in the proposed class; and avoidance of injustice by "confiscation of rights", something the objecting landlords say is preordained if there is no reclassification.

[11] The commonality of interest test has evolved over time and now involves application of the following guidelines that were neatly summarized by Paperny J. (as she then was) in ***Resurgence Asset Management LLS v. Canadian Airlines Corp.*** ("***Canadian Airlines***")[7]:

1. Commonality of interest should be viewed based on the non-fragmentation test,[8] not on an identity of interest test .

2. The interests to be considered are the legal interests that a creditor holds *qua* creditor in relationship to the debtor prior to and under the Plan as well as on liquidation.

3. The commonality of interests should be viewed purposively, bearing in mind that the object of the *CCAA*, namely to facilitate reorganizations if possible.

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[7] ***Resurgence Asset Management LLS v. Canadian Airlines Corp.*** (1990), 19 C.B.R. (4th) 12 (Alta. Q.B.), leave to appeal denied (1990) 19 C.B.R. (4th) 33 (Alta. C.A.), cited in the Court of Appeal's subsequent decision in ***Canadian Airlines*** (2000), 261 A.R. 120, 2000 ABCA 149 at para. 27: see also ***Sklar-Peppler Furniture Corp v. Bank of Nova Scotia*** (1991), 86 D.L.R. (4th) 621, 8 C.B.R. (3d) 312 (Ont. Ct. Gen. Div.)).

[8] "Non-fragmentation" means that a multiplicity of classes should be avoided if possible. The notion was first expressed in the Canadian context in ***Norcen Energy Resources v. Oakwood Petroleums Ltd.*** (1988), 72 C.B.R. 20 (Alta. Q.B.), but does not appear to have gained wide acceptance until 1993 when ***Re Woodward's Ltd.*** (1993), 20 C.B.R. (3d) 74 at 81 (B.C.S.C.) was decided. There were five creditor groups in ***Re Woodward's***, including one group of landlords of abandoned premises and another of creditors holding cross-corporate guarantees or joint covenants, which sought separate classes. The court ruled that, given there was sufficient commonality of interest among the general body of creditors and the applicant landlords, a separate class was unwarranted. Tysoe J. rejected the landlords' proposition that their legal interests differed from that of the other creditors in that repudiation of an anchor tenant's lease would cause the landlord to be in breach of other tenant obligations. He did, however, order a separate class for the holders of cross-corporate guarantees, observing that their unique rights were "confiscated without compensation" under the plan. Interestingly, Tysoe J. rejected the suggestion that the issue be dealt with at the fairness hearing because he was convinced that the scheme was so unfair that he would refuse to sanction a successful outcome, rendering the creditors' vote pointless.

4. In placing a broad and purposive interpretation on the *CCAA*, the Court should be careful to resist classification approaches that would potentially jeopardize viable Plans.

5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.

6. The requirement of creditors being able to consult together means being able to assess their legal entitlement as creditors before or after the Plan in a similar manner.

[12] To this pithy list, I would add the following considerations:

(i) Since the *CCAA* is to be given a liberal and flexible interpretation, classification hearings should be dealt with on a fact specific basis and the court should avoid rigid rules of general application.[9]

(ii) In determining commonality of interests, the court should also consider factors like the plan's treatment of creditors, the business situation of the creditors, and the practical effect on them of a failure of the plan.[10]

Landlord Classifications Generally

[13] The objecting landlords rely on the affidavit of Walter R. Stevenson, a Toronto lawyer who acts for them. I find it odd that counsel for a party would swear an affidavit in support of his client's motion. It is a risky proposition that is strongly discouraged in this Court. In any event, Mr. Stevenson deposes that he has thirteen years of experience representing clients in insolvency matters. He says that he has been involved in nine cases where national tenants abandoned leased premises and their landlords were placed in a separate class. Presumably, all of this information was intended to persuade me that a separate landlord class is now or should be the norm. It does not.

[14] Mr. Stevenson's list is not, nor does it purport to be, an exhaustive review of classifications in multi-location *CCAA* restructurings across Canada. Further, he provides no insight as to whether it was the debtor company or the court which decided that a separate class was appropriate in each of the cases to which he referred. Nor does not provide any information as to why a particular classification decision was made in the first place. There may be valid reasons for a debtor to segregate landlords. For example, in ***Grafton-Fraser Inc. v. Canadian***

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[9] ***Re Fairview Industries Ltd.*** (1991), 109 N.S.R. (2d) 32, 11 C.B.R. (3d) 71 (S.C.T.D.).

[10] ***Re Woodward's*** at p. 81.

Imperial Bank of Commerce,[11] the court refused to disturb a separate class proposed by the debtor company for 130 landlords. A landlord in that case was funding the Plan.

[15] ***Grafton-Fraser*** is cited as authority for the general proposition that landlords should be entitled to a separate class. In his brief reasons, Houlden J. indicated that he was allowing the separate class to remain on the basis that, as compared to other creditors, landlords would have difficulty valuing their claims and would be enjoined from exercising the contractual and statutory claims that they would ordinarily enjoy on a tenant's insolvency. ***Grafton-Fraser***, like all *CCAA* cases, was doubtless decided on its facts. It was considered, but not applied, in ***Re Woodward's***, a case that brought widespread attention to the non-fragmentation and contextual approach in classification.[12]

[16] Landlords are not entitled to a separate class simply because of who they are. There must be sufficient evidence that their claims are materially different from the claims of other creditors in the class to warrant that. To find otherwise would require that I ignore the contextual and non-fragmentation approach (which I observe does not appear to have firmly take hold until after ***Grafton-Fraser*** was decided), and give excessive power to one creditor group in relation to a plan of arrangement designed for the benefit of all of the creditors. This concern was expressed by Borins J. in ***Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia***[13] in dismissing a landlord's plea for a separate class so that it's intended negative vote would not be fruitless. A similar caution was voiced by Blair J. in ***Re Ambro Enterprises Inc.***[14]. He too found that a separate class for landlords was unwarranted in that case.

Distinct Legal Rights and Valuation Issues

[17] Depending on their particular circumstances, the objecting landlords assert that they have one or more of three distinct legal rights that will be eroded or confiscated if they are unsuccessful in their application: (1) the right to follow and seize assets removed from abandoned premises; (2) the right to claim damages against any person who aided the tenant in clandestinely removing goods from their reach; and (3) the right to terminate a lease for default under what is commonly called an "insolvency clause" in their leases. At the risk of stating the obvious, objecting landlords who had leases terminated with court approval after the Initial Order cannot advance these arguments.

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[11] ***Grafton-Fraser Inc. v. Canadian Imperial Bank of Commerce*** (1992), 90 D.L.R. (4th) 285, 11 C.B.R. (3d) 161 (Ont. Ct. (Gen. Div.)).

[12] Peter B. Birkness, "Re Woodward's Limited - The Contextual Commonality of Interest Approach to Classification of Creditors" (1993), 20 C.B.R. (3d) 91 at 92.

[13] ***Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia*** (1991), 86 D.L.R. (4th) 621, 8 C.B.R. (3d) 312 (Ont. Ct. (Gen. Div.)).

[14] ***Re Ambro Enterprises Inc.*** (1993), 22 C.B.R. (3d) 80 (Ont. Ct. (Gen. Div.)).

1. Rights Arising from Clandestine Removal of Goods

[18] Before applying for *CCAA* protection, San Francisco removed assets and abandoned 14 of the 16 premises leased from the objecting landlords.

[19] Ontario and New Brunswick's legislation allows a landlord the right to follow and seize goods that were fraudulently and clandestinely removed to prevent the landlord from distraining for rental arrears. There is a thirty day time limit on this right to seize. The landlord is also granted a right of action against any person who knowingly aided in the removal or concealment of the goods.[15] These remedies are akin to those provided in the 1737 ***Distress for Rent Act*** of England,[16] commonly called ***The Statute of George***, 11 Geo. II, c. 19. Nova Scotia's legislation differs from that in Ontario and New Brunswick in that it does not provide for the third party right of action and the time period for following the goods and seizing is twenty-one rather than thirty days.[17] Newfoundland lacks any specific legislation granting these remedies, and it is questionable if ***The Statute of George***, although incorporated into the laws of Newfoundland before December 31, 1831, remains in effect there.[18]

[20] To succeed in an action under these statutory schemes (and perhaps under the common law in Newfoundland), there must be sufficient evidence to establish that: (1) rent payments are in arrears; (2) goods owned by the tenant were removed from the premises; (3) this conduct was clandestine or fraudulent; and (4) the goods were removed for the purpose of preventing the landlord from seizing them for arrears of rent.

[21] The issue arises whether the objecting landlords must prove their claims for classification purposes or simply show that they have an arguable case. Clearly, the court is not interested in ruling on hypothetical matters, but it would be unreasonable at this stage to require an applicant

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[15] *Commercial Tenancies Act*, R.S.O.1990, c. L-7, ss. 48-50 and *Landlord and Tenant Act*, R.S.N.B. 1973, c. L-1, ss. 27, 29.

[16] *Distress for Rent Act 1737*, 11 Geo. 2, c. 19, s. 1, which provides: "In case of any tenant or tenants, lessee or lessees ... upon the demise or withholding whereof, any rent is or shall be reserved due or payable, shall fraudulently or clandestinely, convey away, or carry off or from such premises, his or her or their goods or chattels, to prevent the landlord or lessor ... from distraining the same for arrears of rent, it shall or may be lawful for every landlord or lessee ... to take or seize such goods and chattels wherever the same shall be found as distress for the said arrears of rent. "

[17] *An Act Respecting Tenancies and Distress for Rent*, R.S.N.S. 1989, c. 464, ss. 13 and 14.

[18] ***Buyer's Furniture Ltd. v. Barney's Sales & Transport Ltd.*** (1982),137 D.L.R. (3d) 320 (Nfld. S.C.T.D.), affirmed (1983) 3 D.L.R. (4th) 704 (Nfld. C.A.).

in a reclassification hearing to actually prove their claim. Proof will be required at a later date to establish entitlement to membership in a new class, if one is ordered. What must be presented at this point is sufficient evidence to show that there is an arguable case that would justify a separate class.

[22] The objecting landlords rely on two leases, which they say are typical of the leases entered into between them and San Francisco (or its nominee corporations), to demonstrate that there were arrears owing at the date of abandonment. The alleged arrears are comprised of accelerated rent which, under the terms of the leases, became due on termination and are contractually deemed arrears. Without deciding on the correctness of the objecting landlords' assertion, I find that there is sufficient evidence to establish at least an arguable case that there are arrears of rent.

[23] Insofar as evidence of clandestine removal is concerned, two landlords depose that, without their knowledge and without notice to them, San Francisco vacated and removed all of its assets from their premises. Although it would have been preferable to have more detail of the circumstances of the alleged removal of assets, this evidence again is sufficient to establish an arguable case. The merits of the objecting landlords' position will be fully aired and determined in quantifying their claims.

[24] I have concluded that the objecting landlords have an arguable case. Their rights to pursue distraint and sue a person for aiding in clandestine removal of goods are unique ones. However, the uniqueness of a right is, in and of itself, insufficient to warrant a separate class. The right must be adjudged worthy of a separate class after considering the various factors outlined above. In essence, it must preclude consultation between the creditors.

[25] The Initial Order specifically preserved all creditors' rights to take or continue an action against San Francisco if their claims were subject to statutory time limitations.[19] The objecting landlords elected not to pursue their statutorily time limited remedy of following and seizing goods within the time permitted. As a result, it is unreasonable to allow them to now assert that entitlement as the justification for a separate class. Moreover, in the context of a bankruptcy, the remedy is generally academic since there are no goods available for distraint. For these reasons, the inability to follow and seize goods cannot support the ordering of a separate class.

[26] The Plan requires that all creditors give up claims against the company, its officers, employees, agents, affiliates, associates and directors. This requirement is subject to the qualification that an action based on allegations of misrepresentations made by a director to creditors or of wrongful or oppressive conduct by a director is preserved (emphasis added).[20]

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[19] The amendment on January 12, 2004 does not affect the issues at bar.

[20] Article 6.1 of the Plan provides as follows: "On the Effective Date, and except as provided below, each of the Companies, the Monitor, and the past and present directors, officers, employees, agents, affiliates and associates of each of the foregoing parties (the "Released

While candidly acknowledging that their best chance of financial recovery on a successful action would be against Slawsky, the objecting landlords contend that preserving their right of action only against him would be insufficient protection given that they do not know at the moment whether he alone was the person who orchestrated or aided in the removal of San Francisco's goods. In view of Slawsky's apparent level of control over the companies, it might be reasonable to conclude that he was involved in the decision to abandon the premises. However, that is speculative at this point and others may well have been involved.

[27] Although the Initial Order did not stay actions against San Francisco's employees or agents, the landlords' failure as yet to pursue the employees or agents does not end the matter. This aspect of a removal action is quite different from the statutorily time limited ability of a landlord to follow and seize their tenant's goods, which the objecting landlords chose not to exercise. Only general limitations legislation and the practical effects of the Releases contained in the Plan affect this aspect of the claim.

[28] I find that the Plan does not adequately address the objecting landlords' unique legal entitlement to claim damages against persons who aided their tenant in clandestinely removing goods from the premises. In making this finding, I considered the following to be significant factors:

1. Unlike the ability to follow and seize goods, which has been rendered academic, this right of action is potentially meaningful.

Parties") shall be released and discharged by all Creditors, including holders of Unsecured Creditor Claims, and Goods and Services Tax Claims from any and all demands, claims, including claims of any past and present officers, directors or employees for contribution and indemnity, actions, causes of action, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, charges and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any person may be entitled to assert, including, without limitation, any and all claims in respect of any environmental condition or damage affecting any of the property or assets of the Companies, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, dealing or other occurrence existing or taking place on or prior to the Effective Date relating to, arising out of or in connection with any Claims, the business and affairs of the Companies, whenever and however conducted, this Plan and the *CCAA* Proceedings, and any Claim that has been barred or extinguished by the Claims Procedure Order shall be irrevocably released and discharged, provided that this release shall not affect the rights of any Person to pursue any recoveries for a Claim against a director or the Companies that: (a) relates to contractual rights of one or more creditors against a director; or
(b) are based on allegations of misrepresentations made by a director to creditors or of wrongful or oppressive conduct by a director."

2. The Plan does not offer compensation for deprivation of this right of action, resulting in a "confiscation" of the objecting landlords' right as described in ***Sovereign Life***.

3. Unlike claims that would be extinguished on a bankruptcy of the companies, this right of action would survive since it is against third parties.

[29] The *CCAA* is designed to be fluid and flexible, and the Court is given wide discretion to facilitate that flexibility. Alternatives to establishing a separate voting class should be explored. I can envision at least three other options: (1) direct an amendment to the Plan to compensate the objecting landlords for the loss of their potential rights of action against persons other than Slawsky; (2) direct an amendment to the Plan to expand the survival of actions provision (clause 6.1 (b)) to include potential defendants other than Slawsky; or (3) deal with the matter at the fairness hearing.

[30] Ordering a separate class would clearly recognize and protect the objecting landlords' potential causes of action against third parties other than Slawsky. Further, it would overcome potential hurdles in consultation among the unsecured creditors. However, a separate class would give the objecting landlords a veto power over the Plan. This flags the principle that courts should be careful to resist classification approaches that might jeopardize viable plans of arrangement.

[31] Directing that the Plan be amended to compensate the objecting landlords for the loss of their potential rights of action is not a viable option. It would require that the Court blindly enter into San Francisco's strategic arena. Such a direction would interfere with the right of the companies to make their own Plan and would purport to cloak the Court with knowledge of the companies' resources, strategies and plans, knowledge which it simply does not posses. Interference of this sort should be avoided.

[32] Directing an amendment to the Plan to expand the survival of actions provision to include potential defendants other than Slawsky certainly would be less intrusive than compensating the objecting landlords for the loss of their potential right of action. It would preserve their right to pursue the removal action against persons other than Slawsky and would enhance consultation with other creditors in the class. On the other hand, it would impose an obligation on the companies that they may not have contemplated or may have been unwilling to voluntarily assume.

[33] As to dealing with the matter at a fairness hearing, I note that the *CCAA* does not require that debtors present a 'guaranteed winner' of a plan to their creditors. Debtors can make any proposal to their creditors and take whatever chances they might consider appropriate. However, to succeed, they must act in good faith and present a plan of arrangement at the end of the day which is fair and reasonable. If they fail to do so, the process is a waste of time and valuable

resources. It accomplishes nothing but an erosion of assets that otherwise would be available to creditors on liquidation. This is precisely what Tysoe J. sought to avoid when he ordered a separate class for guarantee holders in ***Re Woodward's***, on being convinced that the plan in that case was unfair to them.[21]

[34] The opposite result occurred in ***Canadian Airlines***, where Madam Justice Paperny deferred the classification issue to the fairness hearing. ***Canadian Airlines*** presented quite a different scenario to that in ***Re Woodward's*** or the one before me. The concern in ***Canadian Airlines*** was with Air Canada voting in the same class as other unsecured creditors when it had appointed the board which directed the *CCAA* proceedings, was funding the Plan, and fears existed about its acquisition of deficiency claims to secure a positive vote. The court was not concerned about a confiscation of legal rights but was attempting to safeguard against "ballot stuffing".[22]

[35] In the particular circumstances of the present case, I find it preferable to protect the objecting landlords' remedy by directing that there be an amendment to the Plan to preserve any cause of action they might have against any party who aided San Francisco in clandestinely removing its assets from their premises. This measure balances the need to avoid giving unwarranted power to one creditor group and the need to protect a unique legal entitlement. It avoids the potential of valuable resources being expended on creditors' meetings when the potential exists that at the end of the day I would find the Plan to be unfair on the basis of this aspect of the objecting landlords' argument. Finally, it avoids significant interference with the debtor's financial strategy in formulating its Plan.

2. Loss of Default/Insolvency Clause Remedy

[36] Some, if not all, of the leases allow the landlord to terminate the lease in the event of the tenant's insolvency. The objecting landlords argue that this is another unique right which is not compensated for in the Plan.

[37] The Initial Order enjoined all of San Francisco's landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to the proceedings in the first place.[23] The objecting landlords complain that their rights are permanently lost because of the Release contained in the Plan. They do not

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[21] At para. 11.

[22] ***Re Olympia & York Developments Ltd.***, [1994] O.J. No.1335 at para. 24 (QL) (Ont. Ct. (Gen. Div.)).

[23] See for example: ***Norcen Energy Resources Ltd.***, where one of the debtor's joint venture partners was enjoined from relying on an insolvency clause to replace the operator under a petroleum operating agreement.

acknowledge that the stay is essential to the longer-term feasibility of the *CCAA* restructuring and something which courts have granted with increasing regularity to give effect to the remedial nature of the *CCAA*.[24] Even ignoring this pragmatic consideration, the objecting landlords' argument fails. The contractual right that is affected is neither unique, nor of any practical use. Thirteen other creditors, mainly equipment lessors and utility providers, have similar contractual default provisions. Further, all of the leases have already been terminated.

3. Difficulty in Valuing Claim

[38] The objecting landlords rely on ***Grafton-Fraser*** for the proposition that landlords' claims are difficult to value and therefore a separate class is warranted. Unfortunately, the brief reasons given by Houlden J. do not provide any insight as to how the company in that case proposed to value the landlords' claims. No doubt, Houlden J. had the specific facts before him clearly in focus as he made his decision. I reject the contention that ***Grafton-Fraser*** is a decision of sweeping application, being mindful that rigid rules of general application are to be avoided in *CCAA* matters.

[39] The Claims Procedure Order, issued on June 22, 2004 in this matter, establishes a mechanism for valuing landlords' abandoned premises claims that reflects the methodology established by the Supreme Court of Canada in ***Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.***[25] The valuation mechanism, set out in para. 12 of the Order,[26] is straightforward. A

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[24] As noted by Spence J. in ***Re Playdium Entertainment Corp.*** (2001), 31 C.B.R. (4th) 309 at para. 32 (Ont. Sup. Ct. Just.): "If no permanent order could be made under s. 11(4) it would not be possible to order, for example, that the insolvency defaults which occasioned the *CCAA* order could not be asserted by the Famous Players after the stay period. If such an order could not be made the *CCAA* regime would prospectively be of no value even though a compromise of creditor claims might be worked out in the stay period." See also ***Luscar Ltd. v. Smoky River Coal Ltd.*** (1999), 237 A.R. 326 (Alta. C.A.).

[25] ***Highway Properties Ltd. v. Kelly, Douglas and Co. Ltd.,*** [1971] S.C.R. 562.

[26] 12(a) With respect to Proofs of Claim to be filed with the Monitor by a Landlord of retail premises currently or formerly occupied by the Companies ("Landlord"), a Landlord is to value and calculate its claim ("Landlord's Claim") as being the aggregate of:

(i) Arrears of rent, if any, owing under a lease as at January 7, 2004;
(ii) In instances where a lease has been repudiated by the Companies (whether or not the repudiation occurred before or after January 7, 2004), the value of rent payable under the lease from the date of repudiation to the date of the Proof of Claim (if any) less any revenue received from any reletting of the premises (in whole or in part) as at the date of the Proof of Claim;
(iii) In instances where a lease has been repudiated by the Companies

claimant simply follows the formula. There is a clear cut-off date for mitigation efforts and a readily calculable present value. The landlords' claims will not be difficult to value.

Inequitable Treatment of Creditors

1. Preferential Treatment of Some Landlords

[40] The objecting landlords make the curious complaint that the Plan prefers them to other unsecured creditors in that it contemplates the duty to mitigate, for valuation purposes, ending at the claims bar date.

[41] Presumably, the objecting landlords could re-let the premises the following day and still base their claim on the value of unpaid rent for the unexpired portion of the term of their lease. While they might receive a benefit, it is trite that there must always be a cut-off date for mitigation when future losses are the subject of a *CCAA* creditor claim. San Francisco chose the claims bar date for ease of analyzing claims for voting purposes. Its choice makes practical sense and is not facially offensive. As noted in ***Re Alternative Fuel Systems Inc.***,[27] courts have approved a variety of solutions to quantifying landlords' claims. That approach is in keeping with the distinct purpose of the *CCAA*. Further, the treatment of landlords' claims under a plan of arrangement is an issue for negotiation and, ultimately, court approval.

[42] The objecting landlords also say that they are preferred in that the Plan is a consolidated one that proposes a compromise regardless of whether a landlord's claim against a hollow nominee company would have been worthless outside of the *CCAA*. This issue will be of interest to other creditors as they consider their vote and position on the fairness hearing. However, it does not warrant creation of a separate class. If anything, it might warrant San Francisco

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> (whether or not the repudiation occurred before or after January 7, 2004), the present value (using an interest factor of 3.65%) of rents payable under the lease as at the date of the Proof of Claim through to the end of the unexpired term of the lease (if any) less any revenue to be received during that time period from any reletting of the premises (in whole or in part) which has occurred prior to the date of the Proof of Claim.
>
> (b) For the purposes of a Landlord's Claim, where a lease contains an option in favour of the Companies authorizing the Companies to treat that lease as terminated and at an end prior to the otherwise stated termination date of that lease, the Companies shall be deemed to have exercised that option and the Landlord's Claim with respect to that lease shall be calculated having regard to the early termination date.

[27] ***Re Alternative Fuel Systems Inc.*** (2004), 236 D.L.R. (4th) 155 at paras. 64-69, 2004 ABCA 31.

revisiting the Plan, which some of the beneficiaries appear to think is too generous in the circumstances.

2. Preferential Treatment of Slawsky and Laurier

[43] The objecting landlords take issue with Slawsky and Laurier being classified as "unaffected creditors" whose claims survive the reorganization despite their ability to value their security for voting purposes and to vote as unsecured creditors for their deficiency claims. Slawsky and Laurier's view is that the Plan does not prefer them because they do not share in the payment available to the general pool of unsecured creditors under the Plan and they are, by deferring payment of their secured claims, effectively funding the Plan.

[44] The Plan's treatment of Slawsky and Laurier does not serve as a reason to segregate the landlords. Whether it is a reason to place Slawsky and Laurier into a separate class is discussed under the next heading.

Related Parties

[45] The objecting landlords take umbrage with Slawsky, his son Aaron, Laurier, and other corporate entities in which Slawsky has an interest, voting on the Plan. They want to import into the *CCAA* proceedings the *BIA* prohibition against "related persons" voting in favour of a proposal, urging that the same policy considerations apply against allowing an insider to control the vote.[28]

[46] The Alberta Court of Appeal in ***Re Alternative Fuel Systems Inc.*** declined to import *BIA* landlord claim calculations into a *CCAA* proceeding. The court found that the section of the *CCAA* at issue did not mandate importation of *BIA* provisions and, more significantly, the court found that to do so would not pay sufficient attention to the distinct objectives of the *CCAA* (remedial) and *BIA* (largely liquidation). In conducting its contextual analysis, the court acknowledged the need to maintain flexibility in *CCAA* matters, discouraging importation of any statutory provision that might impede creative use of the *CCAA* without a demonstrated need or statutory direction. There is no such direction or need in this case.

[47] The objecting landlords find support for their position in ***Re Northland Properties Ltd.***[29] Trainor J. in that case refused to allow a subsidiary to vote on its parent's *CCAA* plan. While care

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[28] The *BIA*, s. 4(3)(c) definition of "related person" includes a controlling shareholder of a corporation. Section 54(3) provides that a creditor related to the debtor may vote against but not for the acceptance of a proposal.

[29] ***Re Northland Properties Ltd.*** (1988), 73 C.B.R. (N.S.) 166 at 170 (B.C.S.C.). See also: ***Re The Wellington Bldg. Corp. Ltd.***, [1934] O.R. 653 (H.C.J.) and ***Re Dairy Corporation of Canada Limited***, [1934] O.R. 436 (C.A.), referred to in ***Re Northland Properties***.

should be exercised to avoid a corporation "stuffing the ballot boxes in its own favour",[30] a blanket ban on insider voting is not always necessary or desirable. Safeguards against potential abuses can be built into a plan and the voting mechanism. For example, the Monitor could procure sworn declarations from insiders as to their direct and indirect shareholdings in order to help track voting. That information, together with proofs of claim, proxies, and ballots, which relate to the insiders' claims could then be presented at the fairness hearing. This type of safeguard was taken in ***Canadian Airlines***. Paperny J. observed in that case that "absent bad faith, who creditors are is irrelevant".[31]

[48] Safeguards such as this are applicable only if the court is satisfied that there is sufficient commonality of interest between the insiders and the other creditors to place them in the same class. That was the case in ***Canadian Airlines***. There, all of the creditors in the class were unsecured creditors. They were treated in the same way under the plan, and would have been treated the same way on a bankruptcy. The plan called for the insider, Air Canada, to compromise its claim, just like all of the other creditors.

[49] Here, there is no compromise by Slawsky or Laurier. Further, they would, but for a security position shortfall, be unaffected by a bankruptcy of the companies, whereas all of the other creditors in the class would receive nothing. Slawsky has created a Plan which gives him voting rights that he doubtless wants to employ if he senses the need to sway the vote. In return, he gives up nothing. It stretches the imagination to think that other creditors in the class could have meaningful consultations about the Plan with Slawsky and, through him, with Laurier. For that reason, Slawsky and Laurier must be placed in a separate class.

CONCLUSIONS

[50] The right of the objecting landlords to pursue distraint is unique as is their right to sue a person for aiding in clandestine removal of goods from the leased premises. For the reasons stated, loss of the objecting landlords' right to follow and seize goods cannot support the ordering of a separate class. However, I find that the Plan does not adequately address their right to claim damages against persons who aided a tenant in clandestinely removing goods from the premises. Rather than create a separate voting class for the objecting landlords, I direct that the Plan be amended to preserve any cause of action the objecting landlords and others in their position might have against any party who aided San Francisco in clandestinely removing its assets from their premises.

[51] The right or ability of the objecting landlords to terminate the leases in question in the event of their tenants' insolvency is neither unique nor of any practical effect at this point. It is not a sufficient ground for creation of a separate voting class. Nor have I accepted the argument of the

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[30] ***Re Olympia & York Developments Ltd.*** at para.24, per Farley J.

[31] At para. 37.

objecting landlords that a separate class should be established because their claims will be difficult to value. The Claims Procedure Order provides a mechanism for valuing their claims.

[52] I have determined that, to the extent there is preferential treatment of the landlords or of Slawsky and Laurier under the Plan, such preferential treatment does not justify segregating the objecting landlords. However, as Slawsky and Laurier do not share a commonality of interest with other unsecured creditors, they must constitute a separate class for voting purposes.

[53] Although success on this application has been somewhat divided, the objecting landlords have enjoyed greater success. There are no provisions in the *CCAA* dealing with costs, however, the Court has the discretion to award costs under the *Rules of Court* and its inherent jurisdiction.[32] The nature of the relief granted to the objecting landlords is akin to declaratory relief and accordingly, costs under Column 1 of Schedule C to the *Rules of Court* are appropriate. The costs are payable forthwith.

Heard on the 1st day of September, 2004.
Additional submissions received on the 21st and 24th days of September, 2004.

Dated at Edmonton, Alberta this 28th day of September, 2004.

J.E. Topolniski
J.C.Q.B.A.

[32] ***Re Jackpine Forest Products Ltd.***, 2004 BSSC 20.

Appearances:

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Jeremy H. Hockin
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tab 7

CITATION: Re: Canwest Global Communications Corp. 2010 ONSC 4209
COURT FILE NO.: CV-09-8396-00CL
DATE: 20100728

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF SECTION 11 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS AND THE OTHER APPLICANTS

BEFORE: Pepall J.

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

ORAL REASONS FOR DECISION

[1] This is the culmination of the *Companies' Creditors Arrangement Act*[1] restructuring of the CMI Entities. The proceeding started in court on October 6, 2009, experienced numerous peaks and valleys, and now has resulted in a request for an order sanctioning a plan of compromise, arrangement and reorganization (the "Plan"). It has been a short road in relative terms but not without its challenges and idiosyncrasies. To complicate matters, this restructuring

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

was hot on the heels of the amendments to the CCAA that were introduced on September 18, 2009. Nonetheless, the CMI Entities have now successfully concluded a Plan for which they seek a sanction order. They also request an order approving the Plan Emergence Agreement, and other related relief. Lastly, they seek a post-filing claims procedure order.

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

The Plan and its Implementation

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

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

(a) the Noteholders; and

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

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

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

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

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

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

[10] In furtherance of the Minutes of Settlement that were entered into with the Existing Shareholders, the articles of Canwest Global will be amended under section 191 of the CBCA to facilitate the settlement. In particular, Canwest Global will reorganize the authorized capital of Canwest Global into (a) an unlimited number of new multiple voting shares, new subordinated voting shares and new non-voting shares; and (b) an unlimited number of new non-voting preferred shares. The terms of the new non-voting preferred shares will provide for the mandatory transfer of the new preferred shares held by the Existing Shareholders to a designated entity affiliated with Shaw for an aggregate amount of $11 million to be paid upon delivery by Canwest Global of the transfer notice to the transfer agent. Following delivery of the transfer notice, the Shaw designated entity will donate and surrender the new preferred shares acquired by it to Canwest Global for cancellation.

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

Creditor Meetings

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

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

Sanction Test

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

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

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

(c) the Plan must be fair and reasonable.

See *Re: Canadian Airlines Corp.*[2]

(a) Statutory Requirements

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

[16] Section 6(3), 6(5) and 6(6) of the CCAA provide that the court may not sanction a plan unless the plan contains certain specified provisions concerning crown claims, employee claims and pension claims. Section 4.6 of Plan provides that the claims listed in paragraph (l) of the definition of "Unaffected Claims" shall be paid in full from a fund known as the Plan

[2] 2000 A.B.Q.B. 442 at para. 60, leave to appeal denied 2000 A.B.C.A 238, aff'd 2001 A.B.C.A 9, leave to appeal to S.C.C. refused July 12, 2001.

Implementation Fund within six months of the sanction order. The Fund consists of cash, certain other assets and further contributions from Shaw. Paragraph (l) of the definition of "Unaffected Claims" includes any Claims in respect of any payments referred to in section 6(3), 6(5) and 6(6) of the CCAA. I am satisfied that these provisions of section 6 of the CCAA have been satisfied.

(b) Unauthorized Steps

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

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

(c) Fair and Reasonable

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

> The court's role on a sanction hearing is to consider whether the plan fairly balances the interests of all stakeholders. Faced with an

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

> insolvent organization, its role is to look forward and ask: does this plan represent a fair and reasonable compromise that will permit a viable commercial entity to emerge? It is also an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan.[4]

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

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

(a) whether the claims were properly classified and whether the requisite majority of creditors approved the plan;

(b) what creditors would have received on bankruptcy or liquidation as compared to the plan;

(c) alternatives available to the plan and bankruptcy;

(d) oppression of the rights of creditors;

(e) unfairness to shareholders; and

(f) the public interest.

[22] I have already addressed the issue of classification and the vote. Obviously there is an unequal distribution amongst the creditors of the CMI Entities. Distribution to the Noteholders is expected to result in recovery of principal, pre-filing interest and a portion of post-filing

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[4] Ibid, at para. 3.

accrued and default interest. The range of recoveries for Ordinary Creditors is much less. The recovery of the Noteholders is substantially more attractive than that of Ordinary Creditors. This is not unheard of. In *Re Armbro Enterprises Inc.*[5] Blair J. (as he then was) approved a plan which included an uneven allocation in favour of a single major creditor, the Royal Bank, over the objection of other creditors. Blair J. wrote:

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

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

[24] I am prepared to accept that the recovery for the Noteholders is fair and reasonable in the circumstances. The size of the Noteholder debt was substantial. CMI's obligations under the notes were guaranteed by several of the CMI Entities. No issue has been taken with the

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[5] (1993), 22 C.B.R. (3rd) 80 (Ont. Gen. Div.).

[6] *Ibid*, at para. 6.

[7] (2003), 43 C.B.R. (4th) 254 (QEUE. S.C.).

guarantees. As stated before and as observed by the Monitor, the Noteholders held a blocking position in any restructuring. Furthermore, the liquidity and continued support provided by the Ad Hoc Committee both prior to and during these proceedings gave the CMI Entities the opportunity to pursue a going concern restructuring of their businesses. A description of the role of the Noteholders is found in Mr. Strike's affidavit sworn July 20, 2010, filed on this motion.

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

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

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

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

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

[30] In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. Fraud, wilful misconduct and gross negligence are excluded. I have

[8] (2008), 92 O.R. (3rd) 513 (C.A.).

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

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

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

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

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

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

[11] (2007), 35 C.B.R. (5th) 1.

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

> (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to
>
> (e) create new classes of shares;
>
> (h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series.

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

[36] In exercising its discretion to approve a reorganization under section 191 of the CBCA, the court must be satisfied that: (a) there has been compliance with all statutory requirements;

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[12] (1996), 43 CBR (4th) 10.

[13] (2003), 39 CBR (4th) 239.

(b) the debtor company is acting in good faith; and (c) the capital restructuring is fair and reasonable: *Re: A & M Cookie Co. Canada*[14] and *Mei Computer Technology Group Inc.*[15]

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

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

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

Pepall J.

Released: July 28, 2010

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

[15] [2005] Q.J. No. 2293 at para. 9.

tab 8

CanLII

Metcalfe & Mansfield Alternative Investments II Corp., (Re) , 2008 ONCA 587 (CanLII)

Date: 2008-08-18
Docket: C48969; M36489
Other citations: 92 OR (3d) 513; 296 DLR (4th) 135; 47 BLR (4th) 123; 45 CBR (5th) 163; [2008] OJ No 3164 (QL); 168 ACWS (3d) 698; 240 OAC 245
Citation: Metcalfe & Mansfield Alternative Investments II Corp., (Re) , 2008 ONCA 587 (CanLII), <http://canlii.ca/t/20bks> retrieved on 2015-12-14

Metcalfe & Mansfield Alternative Investments II Corp. (Re)

92 O.R. (3d) 513

Court of Appeal for Ontario,
Laskin, Cronk and Blair JJ.A.
August 18, 2008

Debtor and creditor -- Companies' Creditors Arrangement Act -- Companies' Creditors Arrangement Act permitting inclusion of third-party releases in plan of compromise or arrangement to be sanctioned by court where those releases are reasonably connected to proposed restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

In response to a liquidity crisis which threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"), a creditor-initiated Plan of Compromise and Arrangement was crafted. The Plan called for the release of third parties from any liability associated with ABCP, including, with certain narrow exceptions, liability for claims relating to fraud. The "double majority" required by s. 6 of the Companies' Creditors Arrangement Act ("CCAA") approved the Plan. The respondents sought court approval of the Plan under s. 6 of the CCAA. The application judge made the following findings: (a) the parties to be released were necessary and essential to the restructuring; (b) the claims to be released were rationally related to the purpose of the Plan and necessary for it; (c) the Plan could not succeed without the releases; (d) the parties who were to have claims against them released were contributing in a tangible and realistic way to the Plan; and (e) the Plan would benefit not only the debtor companies but creditor noteholders generally. The application judge sanctioned the Plan. The appellants were holders of ABCP notes who opposed the Plan. On appeal, they argued that the CCAA does not permit a release of claims against third parties and that the releases constitute

an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867.

Held, the appeal should be dismissed.

On a proper interpretation, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. That conclusion is supported by (a) the open-ended, flexible character of the CCAA itself; (b) the broad nature of the term "compromise or arrangement" as used in the CCAA; and (c) the express statutory effect of the "double majority" vote and court sanction which render the plan binding on all creditors, including those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the CCAA in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to interpretation. The second provides the entrée to negotiations between the parties [page514] affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity to fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

While the principle that legislation must not be construed so as to interfere with or prejudice established contractual or proprietary rights -- including the right to bring an action -- in the absence of a clear indication of legislative intention to that effect is an important one, Parliament's intention to clothe the court with authority to consider and sanction a plan that contains third-party releases is expressed with sufficient clarity in the "compromise or arrangement" language of the CCAA coupled with the statutory voting and sanctioning mechanism making the provisions of the plan binding on all creditors. This is not a situation of impermissible "gap-filling" in the case of legislation severely affecting property rights; it is a question of finding meaning in the language of the Act itself.

Interpreting the CCAA as permitting the inclusion of third- party releases in a plan of compromise or arrangement is not unconstitutional under the division-of-powers doctrine and does not contravene the rules of public order pursuant to the Civil Code of Quebec. The CCAA is valid federal legislation under the federal insolvency power, and the power to sanction a plan of compromise or arrangement that contains third-party releases is embedded in the wording of the CCAA. The fact that this may interfere with a claimant's right to pursue a civil action or trump Quebec rules of public order is constitutionally immaterial. To the extent that the provisions of the CCAA are inconsistent with provincial legislation, the federal legislation is paramount.

The application judge's findings of fact were supported by the evidence. His conclusion that the benefits of the Plan to the creditors as a whole and to the debtor companies outweighed the negative aspects of compelling the unwilling appellants to execute the releases was reasonable.

APPEAL from the sanction order of C.L. Campbell J., 2008 CanLII 27820 (ON SC), [2008] O.J. No. 2265, 43 C.B.R. (5th) 269 (S.C.J.) under the Companies' Creditors Arrangement Act.

See Schedule "C" -- Counsel for list of counsel.

Cases referred to Steinberg Inc. c. Michaud, 1993 CanLII 3991 (QC CA), [1993] J.Q. no 1076, 42 C.B.R. (5th) 1, 1993 CarswellQue 229, 1993 CarswellQue 2055, [1993] R.J.Q. 1684, J.E. 93-1227, 55 Q.A.C. 297, 55 Q.A.C. 298, 41 A.C.W.S. (3d) 317 (C.A.), not folld Canadian Airlines Corp. (Re), [2000] A.J. No. 771, 2000 ABQB 442 (CanLII), [2000] 10 W.W.R. 269, 84 Alta. L.R. (3d) 9, 265 A.R. 201, 9 B.L.R. (3d) 41, 20 C.B.R. (4th) 1, 98 A.C.W.S. (3d) 334 (Q.B.); NBD Bank, Canada v. Dofasco Inc. (1999), 1999 CanLII 3826 (ON CA), 46 O.R. (3d) 514, [1999] O.J. No. 4749, 181 D.L.R. (4th) 37, 127 O.A.C. 338, 1 B.L.R. (3d) 1, 15 C.B.R. (4th) 67, 47 C.C.L.T. (2d) 213, 93 A.C.W.S. (3d) 391 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 2001 BCSC 1721 (CanLII), 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Stelco Inc. (Re) (2005), 2005 CanLII 42247 (ON CA), 78 O.R. (3d) 241, [2005] O.J. No. 4883, 261 D.L.R. (4th) 368, 204 O.A.C. 205, 11 B.L.R. (4th) 185, 15 C.B.R. (5th) 307, 144 A.C.W.S. (3d) 15 (C.A.); Stelco Inc. (Re), 2005 CanLII 41379 (ON SC), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297, 143 A.C.W.S. (3d) 623 (S.C.J.); Stelco Inc. (Re), 2006 CanLII 16526 (ON CA), [2006] O.J. No. 1996, 210 O.A.C. 129, 21 C.B.R. (5th) 157, 148 A.C.W.S. (3d) 193 (C.A.); consd Other cases referred to Air Canada (Re), 2004 CanLII 34416 (ON SC), [2004] O.J. No. 1909, [2004] O.T.C. 1169, 2 C.B.R. (5th) 4, 130 A.C.W.S. (3d) 899 (S.C.J.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.); Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, 2002 SCC 42 (CanLII), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, J.E. 2002-775, 166 B.C.A.C. 1, 100 B.C.L.R. (3d) 1, 18 C.P.R. (4th) 289, 93 C.R.R. (2d) 189, 113 A.C.W.S. (3d) 52, REJB 2002-30904; [page515] Canadian Red Cross Society (Re), 1998 CanLII 14907 (ON SC), [1998] O.J. No. 3306, 72 O.T.C. 99, 5 C.B.R. (4th) 299, 81 A.C.W.S. (3d) 932 (Gen. Div.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, 1990 CanLII 529 (BC CA), [1990] B.C.J. No. 2384, [1991] 2 W.W.R. 136, 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, 23 A.C.W.S. (3d) 976 (C.A.); Cineplex Odeon Corp. (Re) (2001), 2001 CanLII 32746 (ON CA), 24 C.B.R. (4th) 201 (Ont. C.A.); Country Style Food Services (Re), 2002 CanLII 41751 (ON CA), [2002] O.J. No. 1377, 158 O.A.C. 30, 112 A.C.W.S. (3d) 1009 (C.A.); Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associés ltée, 2003 CanLII 33980 (QC CS), [2003] J.Q. no 9223, [2003] R.J.Q. 2157, J.E. 2003-1566, 44 C.B.R. (4th) 302, [2003] G.S.T.C. 195 (C.S.); Dylex Ltd. (Re), 1995 CanLII 7370 (ON SC), [1995] O.J. No. 595, 31 C.B.R. (3d) 106, 54 A.C.W.S. (3d) 504 (Gen. Div.); Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180, 41 O.A.C. 282, 1 C.B.R. (3d) 101, 23 A.C.W.S. (3d) 1192 (C.A.); Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., 1976 CanLII 142 (SCC), [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, 75 D.L.R. (3d) 63, 14 N.R. 503, 26 C.B.R. (N.S.) 84, [1977] 1 A.C.W.S. 562; Fotini's Restaurant Corp. v. White Spot Ltd., 1998 CanLII 3836 (BC SC), [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251, 78 A.C.W.S. (3d) 256 (S.C.); Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.); Muscletech Research and Development Inc. (Re), 2006 CanLII 34344 (ON SC), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231, 152 A.C.W.S. (3d) 16 (S.C.J.); Olympia & York Developments Ltd. (Re) (1993), 1993 CanLII 8492 (ON SC), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1, 38 A.C.W.S. (3d) 1149 (Gen. Div.); Ravelston Corp. (Re), [2007] O.J. No. 1389, 2007 ONCA 268 (CanLII), 31 C.B.R. (5th) 233, 156 A.C.W.S. (3d) 824, 159 A.C.W.S. (3d) 541; Reference re: Constitutional Creditors Arrangement Act (Canada), 1934 CanLII 72 (SCC), [1934] S.C.R. 659, [1934] S.C.J. No. 46, [1934] 4 D.L.R. 75, 16 C.B.R. 1; Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1, [1935] 1 W.W.R. 607 (P.C.), affg [1933] S.C.R. 616, [1933] S.C.J. No. 53, [1934] 1 D.L.R. 43; Resurgence Asset Management LLC v. Canadian Airlines Corp., [2000] A.J. No. 1028, 2000 ABCA 238 (CanLII), [2000] 10 W.W.R. 314, 84 Alta. L.R. (3d) 52, 266 A.R. 131, 9 B.L.R. (3d) 86, 20 C.B.R. (4th) 46, 99 A.C.W.S. (3d) 533 (C.A.)[Leave to appeal to S.C.C. refused [2001]

S.C.C.A. No. 60, 293 A.R. 351]; Rizzo & Rizzo Shoes Ltd. (Re) (1998), 1998 CanLII 837 (SCC), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 154 D.L.R. (4th) 193, 221 N.R. 241, J.E. 98-201, 106 O.A.C. 1, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC Â210-006; Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.); Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 2000 CanLII 16921 (ON CA), 50 O.R. (3d) 688, [2000] O.J. No. 3993, 137 O.A.C. 74, 20 C.B.R. (4th) 160, 100 A.C.W.S. (3d) 530 (C.A.); T&N Ltd. and Others (No. 3) (Re), [2006] E.W.H.C. 1447, [2007] 1 All E.R. 851, [2007] 1 B.C.L.C. 563, [2006] B.P.I.R. 1283, [2006] Lloyd's Rep. I.R. 817 (Ch.) Statutes referred to Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 Business Corporations Act, R.S.O. 1990, c. B.16, s. 182 Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 192 [as am.] Civil Code of Québec, C.c.Q. Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 4, 5.1 [as am.], 6 [as am.] Companies Act 1985 (U.K.), 985, c. 6, s. 425 Constitution Act, 1867 (U.K.), 30 & 31 Victoria, c. 3, s. 92, (13), (21) Winding-up and Restructuring Act, R.S.C. 1985, c. W-11 Authorities referred to Dickerson, Reed, The Interpretation and Application of Statutes (Boston: Little, Brown and Company, 1975) [page516] Houlden, L.W., and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, 3rd ed., looseleaf (Scarborough, Ont.: Carswell, 1992) Driedger, E.A., Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) Smith, Gavin, and Rachel Platts, eds., Halsbury's Laws of England, 4th ed. reissue, vol. 44(1) (London, U.K.: Butterworths, 1995) Jacskson, Georgina R., and Janis P. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Descretionary Power and Inherent Jurisdiction in Insolvency Matters" in Sarra, Janis P., ed., Annual Review of Insolvency Law, 2007 (Vancouver: Carswell, 2007) Driedger, E.A., and R. Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ont.: Butterworths, 2002) House of Commons Debates (Hansard), (20 April 1933) at 4091 (Hon. C.H. Cahan)

The judgment of the court was delivered by

BLAIR J.A.: -- A. Introduction

[1] In August 2007, a liquidity crisis suddenly threatened the Canadian market in Asset Backed Commercial Paper ("ABCP"). The crisis was triggered by a loss of confidence amongst investors stemming from the news of widespread defaults on U.S. sub-prime mortgages. The loss of confidence placed the Canadian financial market at risk generally and was reflective of an economic volatility worldwide.

[2] By agreement amongst the major Canadian participants, the $32 billion Canadian market in third-party ABCP was frozen on August 13, 2007, pending an attempt to resolve the crisis through a restructuring of that market. The Pan-Canadian Investors Committee, chaired by Purdy Crawford, C.C., Q.C., was formed and ultimately put forward the creditor-initiated Plan of Compromise and Arrangement that forms the subject-matter of these proceedings. The Plan was sanctioned by Colin L. Campbell J. on June 5, 2008.

[3] Certain creditors who opposed the Plan seek leave to appeal and, if leave is granted, appeal from that decision. They raise an important point regarding the permissible scope of a restructuring under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended ("CCAA"): can the court sanction a Plan that calls for creditors to provide releases to third parties who are themselves solvent and not creditors of the debtor company? They also argue that, if the answer to this question is yes, the [page517] application judge erred in

holding that this Plan, with its particular releases (which bar some claims even in fraud), was fair and reasonable and therefore in sanctioning it under the CCAA.

Leave to appeal

[4] Because of the particular circumstances and urgency of these proceedings, the court agreed to collapse an oral hearing for leave to appeal with the hearing of the appeal itself. At the outset of argument, we encouraged counsel to combine their submissions on both matters.

[5] The proposed appeal raises issues of considerable importance to restructuring proceedings under the CCAA Canada- wide. There are serious and arguable grounds of appeal and -- given the expedited timetable -- the appeal will not unduly delay the progress of the proceedings. I am satisfied that the criteria for granting leave to appeal in CCAA proceedings, set out in such cases as Cineplex Odeon Corp. (Re) (2001), 2001 CanLII 32746 (ON CA), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, 2002 CanLII 41751 (ON CA), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

[6] For the reasons that follow, however, I would dismiss the appeal. B. Facts

The parties

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

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

[9] The lead respondent is the Pan-Canadian Investors Committee which was responsible for the creation and negotiation of the Plan on behalf of the creditors. Other respondents include various major international financial institutions, the five largest Canadian banks, several trust companies and some smaller holders of ABCP product. They participated in the market in a number of different ways. [page518]

The ABCP market

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

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

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

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

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

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

[16] When the market was working well, cash from the purchase of new ABCP Notes was also used to pay off maturing ABCP [page519] Notes; alternatively, Noteholders simply rolled their maturing notes over into new ones. As I will explain, however, there was a potential underlying predicament with this scheme.

The liquidity crisis

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

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

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

The Montreal Protocol

[20] The liquidity crisis could have triggered a wholesale liquidation of the assets, at depressed prices. But it did not. During the week of August 13, 2007, the ABCP market in Canada froze -- the result of a standstill arrangement orchestrated on the heels of the crisis by numerous market participants, including Asset Providers, Liquidity Providers, Noteholders and other financial industry representatives. Under the standstill agreement -- known as the Montreal Protocol -- the parties committed [page520] to restructuring the ABCP market with a view, as much as possible, to preserving the value of the assets and of the notes.

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

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

[23] Beginning in September 2007, the Committee worked to craft a plan that would preserve the value of the notes and assets, satisfy the various stakeholders to the extent possible and restore confidence in an important segment of the Canadian financial marketplace. In March 2008, it and the other applicants sought CCAA protection for the ABCP debtors and the approval of a Plan that had been pre-negotiated with some, but not all, of those affected by the misfortunes in the Canadian ABCP market.

The Plan
(a) Plan overview

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

[25] The Plan aims to improve transparency by providing investors with detailed information about the assets supporting their ABCP Notes. It also addresses the timing mismatch between the notes and the assets by adjusting the maturity provisions and interest rates on the new notes. Further, the Plan [page521] adjusts some of the underlying credit default swap contracts by increasing the thresholds for default triggering events; in this way, the likelihood of a forced liquidation flowing from the credit default swap holder's prior security is reduced and, in turn, the risk for ABCP investors is decreased.

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

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

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

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

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

> [31] The releases, in effect, are part of a quid pro quo. Generally speaking, they are designed to compensate various participants in [page522] the market for the contributions they would make to the restructuring. Those contributions under the Plan include the requirements that:
> (a) Asset Providers assume an increased risk in their credit default swap contracts, disclose certain proprietary information in relation to the assets and provide below- cost financing for margin funding facilities that are designed to make the notes more secure; (b) Sponsors -- who in addition have co-operated with the Investors' Committee throughout the process, including by sharing certain proprietary information -- give up their existing contracts; (c)

the Canadian banks provide below-cost financing for the margin funding facility; and (d) other parties make other contributions under the Plan.

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

The CCAA proceedings to date

[33] On March 17, 2008, the applicants sought and obtained an Initial Order under the CCAA staying any proceedings relating to the ABCP crisis and providing for a meeting of the Noteholders to vote on the proposed Plan. The meeting was held on April 25. The vote was overwhelmingly in support of the Plan -- 96 per cent of the Noteholders voted in favour. At the instance of certain Noteholders, and as requested by the application judge (who has supervised the proceedings from the outset), the monitor broke down the voting results according to those Noteholders who had worked on or with the Investors' Committee to develop the Plan and those Noteholders who had not. Re-calculated on this basis the results remained firmly in favour of the proposed Plan -- 99 per cent of those connected with the development of the Plan voted positively, as did 80 per cent of those Noteholders who had not been involved in its formulation.

[34] The vote thus provided the Plan with the "double majority" approval -- a majority of creditors representing two- thirds in value of the claims -- required under s. 6 of the CCAA.

[35] Following the successful vote, the applicants sought court approval of the Plan under s. 6. Hearings were held on May 12 [page523] and 13. On May 16, the application judge issued a brief endorsement in which he concluded that he did not have sufficient facts to decide whether all the releases proposed in the Plan were authorized by the CCAA. While the application judge was prepared to approve the releases of negligence claims, he was not prepared at that point to sanction the release of fraud claims. Noting the urgency of the situation and the serious consequences that would result from the Plan's failure, the application judge nevertheless directed the parties back to the bargaining table to try to work out a claims process for addressing legitimate claims of fraud.

[36] The result of this renegotiation was a "fraud carve-out" -- an amendment to the Plan excluding certain fraud claims from the Plan's releases. The carve-out did not encompass all possible claims of fraud, however. It was limited in three key respects. First, it applied only to claims against ABCP Dealers. Secondly, it applied only to cases involving an express fraudulent misrepresentation made with the intention to induce purchase and in circumstances where the person making the representation knew it to be false. Thirdly, the carve-out limited available damages to the value of the notes, minus any funds distributed as part of the Plan. The appellants argue vigorously that such a limited release respecting fraud claims is unacceptable and should not have been sanctioned by the application judge.

[37] A second sanction hearing -- this time involving the amended Plan (with the fraud carve-out) -- was held on June 3, 2008. Two days later, Campbell J. released his reasons for decision, approving and sanctioning the Plan on the basis both that he had jurisdiction to sanction a Plan calling for third- party releases and that the Plan including the third-party releases in question here was fair and reasonable.

[38] The appellants attack both of these determinations. C. Law and Analysis

> [39] There are two principal questions for determination on this appeal:
> (1) As a matter of law, may a CCAA plan contain a release of claims against anyone other than the debtor company or its directors? (2) If the answer to that question is yes, did the application judge err in the exercise of his discretion to sanction the Plan as fair and reasonable given the nature of the releases called for under it? [page524]
> (1) Legal authority for the releases

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

> [41] The appellants submit that a court has no jurisdiction or legal authority under the CCAA to sanction a plan that imposes an obligation on creditors to give releases to third parties other than the directors of the debtor company. [See Note 1 below] The requirement that objecting creditors release claims against third parties is illegal, they contend, because: (a) on a proper interpretation, the CCAA does not permit such releases; (b) the court is not entitled to "fill in the gaps" in the CCAA or rely upon its inherent jurisdiction to create such authority because to do so would be contrary to the principle that Parliament did not intend to interfere with private property rights or rights of action in the absence of clear statutory language to that effect; (c) the releases constitute an unconstitutional confiscation of private property that is within the exclusive domain of the provinces under s. 92 of the Constitution Act, 1867; (d) the releases are invalid under Quebec rules of public order; and because (e) the prevailing jurisprudence supports these conclusions.

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

Interpretation, "gap filling" and inherent jurisdiction

[43] On a proper interpretation, in my view, the CCAA permits the inclusion of third-party releases in a plan of compromise or arrangement to be sanctioned by the court where those releases are reasonably connected to the proposed restructuring. I am led to this conclusion by a combination of (a) the open-ended, flexible character of the CCAA itself, (b) the broad nature of the term "compromise or arrangement" as used in the Act, and (c) the express statutory effect of the "double-majority" vote and court sanction which render the plan binding on all creditors, including [page525] those unwilling to accept certain portions of it. The first of these signals a flexible approach to the application of the Act in new and evolving situations, an active judicial role in its application and interpretation, and a liberal approach to that interpretation. The second provides the entrée to negotiations between the parties affected in the restructuring and furnishes them with the ability to apply the broad scope of their ingenuity in fashioning the proposal. The latter afford necessary protection to unwilling creditors who may be deprived of certain of their civil and property rights as a result of the process.

[44] The CCAA is skeletal in nature. It does not contain a comprehensive code that lays out all that is permitted or barred. Judges must therefore play a role in fleshing out the details of the statutory scheme. The scope of the Act and the powers of the court under it are not limitless. It is beyond controversy, however, that the CCAA is remedial legislation to be liberally construed in accordance with the modern purposive approach to statutory interpretation. It is designed to be a flexible instrument and it is that very flexibility which

gives the Act its efficacy: Canadian Red Cross Society (Re), 1998 CanLII 14907 (ON SC), [1998] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), 1995 CanLII 7370 (ON SC), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.), at p. 111 C.B.R., "[t]he history of CCAA law has been an evolution of judicial interpretation".

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

[46] These issues have recently been canvassed by the Honourable Georgina R. Jackson and Dr. Janis Sarra in their publication "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", [See Note 2 below] and there was considerable argument on these issues before the application judge and before us. While I generally agree with the authors' suggestion that the courts should adopt a hierarchical approach in their resort to these interpretive tools -- statutory interpretation, gap-filling, discretion and inherent jurisdiction [page526] -- it is not necessary, in my view, to go beyond the general principles of statutory interpretation to resolve the issues on this appeal. Because I am satisfied that it is implicit in the language of the CCAA itself that the court has authority to sanction plans incorporating third-party releases that are reasonably related to the proposed restructuring, there is no "gap-filling" to be done and no need to fall back on inherent jurisdiction. In this respect, I take a somewhat different approach than the application judge did.

[47] The Supreme Court of Canada has affirmed generally -- and in the insolvency context particularly -- that remedial statutes are to be interpreted liberally and in accordance with Professor Driedger's modern principle of statutory interpretation. Driedger advocated that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd. (Re) (1998), 1998 CanLII 837 (SCC), 36 O.R. (3d) 418, [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, quoting E.A. Driedger, Construction of Statutes, 2nd ed. (Toronto:
Butterworths, 1983); Bell ExpressVu Ltd. Partnership v. Rex, 2002 SCC 42 (CanLII), [2002] 2 S.C.R. 559, [2002] S.C.J. No. 43, at para. 26.

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

> The exercise of a statutory authority requires the statute to be construed. The plain meaning or textualist approach has given way to a search for the object and goals of the statute and the intentionalist approach. This latter approach makes use of the purposive approach and the mischief rule, including its codification under interpretation statutes that every enactment is deemed remedial, and is to be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects. This latter approach advocates reading the statute as a whole and being mindful of Driedger's "one principle", that the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. It is important that

> courts first interpret the statute before them and exercise their authority pursuant to the statute, before reaching for other tools in the judicial toolbox. Statutory interpretation using the principles articulated above leaves room for gap-filling in the common law provinces and a consideration of purpose in Québec as a manifestation of the judge's overall task of statutory interpretation. Finally, the jurisprudence in relation to statutory interpretation demonstrates the fluidity inherent in the judge's task in seeking the objects of the statute and the intention of the legislature.

[49] I adopt these principles. [page527]

[50] The remedial purpose of the CCAA -- as its title affirms -- is to facilitate compromises or arrangements between an insolvent debtor company and its creditors. In Chef Ready Foods Ltd. v. Hongkong Bank of Canada, 1990 CanLII 529 (BC CA), [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 318 C.B.R., Gibbs J.A. summarized very concisely the purpose, object and scheme of the Act:

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

[51] The CCAA was enacted in 1933 and was necessary -- as the then secretary of state noted in introducing the Bill on First Reading-- "because of the prevailing commercial and industrial depression" and the need to alleviate the effects of business bankruptcies in that context: see the statement of the Hon. C.H. Cahan, Secretary of State, House of Commons Debates (Hansard) (April 20, 1933) at 4091. One of the greatest effects of that Depression was what Gibbs J.A. described as "the social evil of devastating levels of unemployment". Since then, courts have recognized that the Act has a broader dimension than simply the direct relations between the debtor company and its creditors and that this broader public dimension must be weighed in the balance together with the interests of those most directly affected: see, for example, Elan Corp. v. Comiskey (1990), 1990 CanLII 6979 (ON CA), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.), per Doherty J.A. in dissent; Skydome Corp. v. Ontario, [1998] O.J. No. 6548, 16 C.B.R. (4th) 125 (Gen. Div.); Anvil Range Mining Corp. (Re) (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div.).

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

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

Application of the principles of interpretation

[53] An interpretation of the CCAA that recognizes its broader socio-economic purposes and objects is apt in this case. As the [page528] application judge pointed out, the restructuring underpins the financial viability of the Canadian ABCP market itself.

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

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

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

[56] The application judge did observe that "[t]he insolvency is of the ABCP market itself, the restructuring is that of the market for such paper . . ." (para. 50). He did so, however, to point out the uniqueness of the Plan before him and its industry-wide significance and not to suggest that he need have no regard to the provisions of the CCAA permitting a restructuring as between debtor [page529] and creditors. His focus was on the effect of the restructuring, a perfectly permissible perspective given the broad purpose and objects of the Act. This is apparent from his later references. For example, in balancing the arguments against approving releases that might include aspects of fraud, he responded that "what is at issue is a liquidity crisis that affects the ABCP market in Canada" (para. 125). In addition, in his reasoning on the fair- and-reasonable issue, he stated, at para. 142: "Apart from the Plan itself, there is a need to restore confidence in the financial system in Canada and this Plan is a legitimate use of the CCAA to accomplish that goal".

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

The statutory wording

> [58] Keeping in mind the interpretive principles outlined above, I turn now to a consideration of the provisions of the CCAA. Where in the words of the statute is the court clothed with authority to approve a plan incorporating a requirement for third-party releases? As summarized earlier, the answer to that question, in my view, is to be found in: (a) the skeletal nature of the CCAA; (b) Parliament's reliance upon the broad notions of "compromise" and "arrangement" to establish the framework within which the parties may work to put forward a restructuring plan; and in (c) the creation of the statutory mechanism binding all creditors in classes to the compromise or arrangement once it has surpassed the high "double majority" voting threshold and obtained court sanction as "fair and reasonable". Therein lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring.

[59] Sections 4 and 6 of the CCAA state:

> 4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs. [page530] . . . . .
>
> 6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding
> (a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

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

Compromise or arrangement

[60] While there may be little practical distinction between "compromise" and "arrangement" in many respects, the two are not necessarily the same. "Arrangement" is broader than "compromise" and would appear to include any scheme for reorganizing the affairs of the debtor: L.W. Houlden and C.H. Morawetz, Bankruptcy and Insolvency Law of Canada, looseleaf, 3rd ed., vol. 4 (Scarborough, Ont.: Carswell, 1992) at 10A- 12.2, N10. It has been said to be "a very wide and indefinite [word]": Reference re Timber Regulations, [1935] A.C. 184, [1935] 2 D.L.R. 1 (P.C.), at p. 197 A.C., affg [1933] S.C.R. 616, [1933] S.C.J. No. 53. See also Guardian Assurance Co. (Re), [1917] 1 Ch. 431 (C.A.), at pp. 448, 450 Ch.; T&N Ltd. and Others (No. 3) (Re), [2007] 1 All E.R. 851, [2006] E.W.H.C. 1447 (Ch.).

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

[62] A proposal under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA") is a contract: Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd., 1976 CanLII 142 (SCC), [1978] 1 S.C.R. 230, [1976] S.C.J. No. 114, at p. 239 S.C.R.; [page531] Society of Composers, Authors and Music Publishers of Canada v. Armitage (2000), 2000 CanLII 16921 (ON CA), 50 O.R. (3d) 688, [2000] O.J. No. 3993 (C.A.), at para. 11. In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes and, therefore, is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract. See Air Canada (Re), 2004 CanLII 34416 (ON SC), [2004] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 1993 CanLII 8492 (ON SC), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.), at p. 518 O.R.

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

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

[65] T&N carried employers' liability insurance. However, the employers' liability insurers (the "EL insurers") denied coverage. This issue was litigated and ultimately resolved through the establishment of a multi-million pound fund against which the employees and their dependants (the EL claimants) would assert their claims. In return, T&N's former employees and dependants (the EL claimants) agreed to forego any further claims against the EL insurers. This settlement was incorporated into the plan of [page532] compromise and arrangement between the T&N companies and the EL claimants that was voted on and put forward for court sanction.

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

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

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

Noteholders, stemming from the contributions the financial [page533] third parties are making to the ABCP restructuring. The situations are quite comparable.

The binding mechanism

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

The required nexus

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

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

> [71] In the course of his reasons, the application judge made the following findings, all of which are amply supported on the record:
> (a) The parties to be released are necessary and essential to the restructuring of the debtor; [page534] (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it; (c) the Plan cannot succeed without the releases; (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; and (e) the Plan will benefit not only the debtor companies but creditor Noteholders generally.

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

companies; they are closely connected to the value of the ABCP Notes and are required for the Plan to succeed. At paras. 76-77, he said:

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

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

The jurisprudence

[74] Third-party releases have become a frequent feature in Canadian restructurings since the decision of the Alberta Court of Queen's [page535] Bench in Canadian Airlines Corp. (Re), 2000 ABQB 442 (CanLII), [2000] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., 2000 ABCA 238 (CanLII), [2000] A.J. No. 1028, 266 A.R. 131 (C.A.), and [2001] S.C.C.A. No. 60, 293 A.R. 351. In Muscletech Research and Development Inc. (Re), 2006 CanLII 34344 (ON SC), [2006] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

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

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

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

[77] Justice Paperny began her analysis of the release issue with the observation, at para. 87, that "[p]rior to 1997, the CCAA did not provide for compromises of claims against anyone other than the petitioning company". It will be apparent from the analysis in these reasons that I do not accept that premise, notwithstanding the decision of the Quebec Court of Appeal in

Michaud v. Steinberg, [See Note 7 below] of which her comment may have been reflective. Paperny J.'s reference to 1997 was a reference to the amendments of that year adding s. 5.1 to the CCAA, which provides for limited releases in favour of directors. Given the limited scope of s. 5.1, Justice Paperny was thus faced with the argument -- dealt with later in these reasons -- that Parliament must not have intended to extend the authority to approve third-party releases beyond the scope of this section. She chose to address this contention by concluding that, although the amendments "[did] not authorize a release of claims against third parties other than directors, [they did] not prohibit such releases either" (para. 92). [page536]

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

[79] The appellants rely on a number of authorities, which they submit support the proposition that the CCAA may not be used to compromise claims as between anyone other than the debtor company and its creditors. Principal amongst these are Michaud v. Steinberg, supra; NBD Bank, Canada v. Dofasco Inc. (1999), 1999 CanLII 3826 (ON CA), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, 2001 BCSC 1721 (CanLII), [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 2005 CanLII 42247 (ON CA), 78 O.R. (3d) 241, [2005] O.J. No. 4883 (C.A.) ("Stelco I"). I do not think these cases assist the appellants, however. With the exception of Steinberg, they do not involve third-party claims that were reasonably connected to the restructuring. As I shall explain, it is my opinion that Steinberg does not express a correct view of the law, and I decline to follow it.

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

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

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

[82] The facts in Pacific Coastal are not analogous to the circumstances of this case, however. There is no suggestion that a resolution of Pacific Coastal's separate tort claim against Air Canada was in any way connected to the Canadian Airlines restructuring, even though Canadian -- at a contractual level -- may have had some involvement with the particular dispute. [page537] Here, however, the disputes that are the subject matter of the impugned releases are not simply "disputes between parties other than the debtor company". They are

closely connected to the disputes being resolved between the debtor companies and their creditors and to the restructuring itself.

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

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

> In my view, the appellant has not demonstrated that allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1990 CanLII 6979 (ON CA), 1 O.R. (3d) 289 at p. 297, . . . the CCAA is remedial legislation "intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both". It is a means of avoiding a liquidation that may yield little for the creditors, especially unsecured creditors like the respondent, and the debtor company shareholders. However, the appellant has not shown that allowing a creditor to continue an action against an officer for negligent misrepresentation would erode the effectiveness of the Act.
>
> In fact, to refuse on policy grounds to impose liability on an officer of the corporation for negligent misrepresentation would contradict the policy of Parliament as demonstrated in recent amendments to the CCAA and the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Those Acts now contemplate that an arrangement or proposal may include a term for compromise of certain types of claims against directors of the company except claims that "are based on allegations of misrepresentations made by directors". L.W. Houlden and C.H. Morawetz, the editors of The 2000 Annotated Bankruptcy and Insolvency Act (Toronto: Carswell, 1999) at p. 192 are of the view that the policy behind the provision is to encourage directors of an insolvent corporation to remain in office so that the affairs of the corporation can be reorganized. I can see no similar policy interest in barring an action against an officer of the company who, prior to the insolvency, has misrepresented the financial affairs of the corporation to its creditors. It may be necessary to permit the compromise of claims against the debtor corporation, otherwise it may [page538] not be possible to successfully reorganize the corporation. The same considerations do not apply to individual officers. Rather, it would seem to me that it would be contrary to good policy to immunize officers from the consequences of their negligent statements which might otherwise be made in anticipation of being forgiven under a subsequent corporate proposal or arrangement. (Footnote omitted)

[85] Once again, this statement must be assessed in context. Whether Justice Farley had the authority in the earlier Algoma CCAA proceedings to sanction a plan that included third-party releases was not under consideration at all. What the court was determining in NBD Bank was whether the release extended by its terms to protect a third party. In fact, on its face, it does

not appear to do so. Justice Rosenberg concluded only that not allowing Mr. Melville to rely upon the release did not subvert the purpose of the CCAA. As the application judge here observed, "there is little factual similarity in NBD to the facts now before the Court" (para. 71). Contrary to the facts of this case, in NBD Bank the creditors had not agreed to grant a release to officers; they had not voted on such a release and the court had not assessed the fairness and reasonableness of such a release as a term of a complex arrangement involving significant contributions by the beneficiaries of the release -- as is the situation here. Thus, NBD Bank is of little assistance in determining whether the court has authority to sanction a plan that calls for third-party releases.

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

> [Sections] 4, 5 and 6 [of the CCAA] talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors vis-à-vis the creditors themselves and not directly involving the company. (Citations omitted; emphasis added) See Stelco Inc. (Re), 2005 CanLII 41379 (ON SC), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

[87] This court upheld that decision. The legal relationship between each group of creditors and Stelco was the same, albeit there were inter-creditor differences, and creditors were to be classified in accordance with their legal rights. In addition, the [page539] need for timely classification and voting decisions in the CCAA process militated against enmeshing the classification process in the vagaries of inter-corporate disputes. In short, the issues before the court were quite different from those raised on this appeal.

[88] Indeed, the Stelco plan, as sanctioned, included third- party releases (albeit uncontested ones). This court subsequently dealt with the same inter-creditor agreement on an appeal where the Subordinated Debt Holders argued that the inter-creditor subordination provisions were beyond the reach of the CCAA and, therefore, that they were entitled to a separate civil action to determine their rights under the agreement: Stelco Inc. (Re), 2006 CanLII 16526 (ON CA), [2006] O.J. No. 1996, 21 C.B.R. (5th) 157 (C.A.) ("Stelco II"). The court rejected that argument and held that where the creditors' rights amongst themselves were sufficiently related to the debtor and its plan, they were properly brought within the scope of the CCAA plan. The court said (para. 11):

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

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

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

> Even if one can understand the extreme pressure weighing on the creditors and the respondent at the time of the sanctioning, a plan of arrangement is not the appropriate forum to settle disputes other than the claims that are the subject of the arrangement. In other words, one cannot, under the pretext of an absence of formal directives in the Act, transform an arrangement into a potpourri. . .
> . . .
>
> The Act offers the respondent a way to arrive at a compromise with is creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse. . . . . [page540]

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

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

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

[92] Justice Delisle, on the other hand, appears to have rejected the releases because of their broad nature -- they released directors from all claims, including those that were altogether

unrelated to their corporate duties with the debtor company -- rather than because of a lack of authority to sanction under the Act. Indeed, he seems to have recognized the wide range of circumstances that could be included within the term "compromise or arrangement". He is the only one who addressed that term. At para., 90 he said:

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

[93] The decision of the court did not reflect a view that the terms of a compromise or arrangement should "encompass all that should enable the person who has recourse to [the Act] to dispose of his debts ... and those contingent on the insolvency in which he finds himself", however. On occasion, such an outlook might embrace third parties other than the debtor and its creditors in order to make the arrangement work. Nor would it be surprising that, in such circumstances, the third parties might seek the protection of releases, or that the debtor might do so on their behalf. Thus, the perspective adopted by the majority in Steinberg, in my view, is too narrow, having regard to the language, purpose and objects of the CCAA and the intention of Parliament. They made no attempt to consider and explain why a compromise or arrangement could not include third-party releases. In addition, the decision [page541] appears to have been based, at least partly, on a rejection of the use of contract-law concepts in analyzing the Act -- an approach inconsistent with the jurisprudence referred to above.

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

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

The 1997 amendments

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

> 5.1(1) A compromise or arrangement made in respect of a debtor company may include in its terms provision for the compromise of claims against directors of the company that arose before the commencement of proceedings under this Act and that relate to the obligations of

> the company where the directors are by law liable in their capacity as directors for the payment of such obligations.

Exception

> (2) A provision for the compromise of claims against directors may not include claims that
> (a) relate to contractual rights of one or more creditors; or
> (b) are based on allegations of misrepresentations made by directors to creditors or of wrongful or oppressive conduct by directors.

Powers of court

> (3) The court may declare that a claim against directors shall not be compromised if it is satisfied that the compromise would not be fair and reasonable in the circumstances. [page542]

Resignation or removal of directors

> (4) Where all of the directors have resigned or have been removed by the shareholders without replacement, any person who manages or supervises the management of the business and affairs of the debtor company shall be deemed to be a director for the purposes of this section.

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

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

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

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

stability while the affairs of the company were being reorganized: see Houlden and Morawetz, vol. 1, supra, at 2-144, E11A; Dans l'affaire de la proposition de: Le Royal Penfield inc. et Groupe Thibault Van Houtte et Associés ltée), 2003 CanLII 33980 (QC CS), [2003] J.Q. no. 9223, [2003] R.J.Q. 2157 (C.S.), at paras. 44-46.

[100] Parliament thus had a particular focus and a particular purpose in enacting the 1997 amendments to the CCAA and the [page543] BIA. While there is some merit in the appellants' argument on this point, at the end of the day I do not accept that Parliament intended to signal by its enactment of s. 5.1 that it was depriving the court of authority to sanction plans of compromise or arrangement in all circumstances where they incorporate third-party releases in favour of anyone other than the debtor's directors. For the reasons articulated above, I am satisfied that the court does have the authority to do so. Whether it sanctions the plan is a matter for the fairness hearing.

The deprivation of proprietary rights

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

The division of powers and paramountcy

[102] Mr. Woods and Mr. Sternberg submit that extending the reach of the CCAA process to the compromise of claims as between solvent creditors of the debtor company and solvent third parties to the proceeding is constitutionally impermissible. They say that under the guise of the federal insolvency power pursuant to s. 91(21) of the Constitution Act, 1867, this approach would improperly affect the rights of civil claimants to assert their causes of action, a provincial matter falling within s. 92(13), and contravene the rules of public order pursuant to the Civil Code of Quebec. [page544]

[103] I do not accept these submissions. It has long been established that the CCAA is valid federal legislation under the federal insolvency power: Reference re: Constitutional Creditors Arrangement Act (Canada), 1934 CanLII 72 (SCC), [1934] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p. 661 S.C.R.), citing Viscount Cave L.C. in Royal Bank of Canada v. Larue, [1928] A.C. 187 (J.C.P.C.), "the exclusive legislative authority to deal with all matters within the domain of bankruptcy and insolvency is vested in Parliament". Chief Justice Duff elaborated:

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

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

Conclusion with respect to legal authority

[105] For all of the foregoing reasons, then, I conclude that the application judge had the jurisdiction and legal authority to sanction the Plan as put forward.
(2) The Plan is "fair and reasonable"

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

[107] Whether a plan of compromise or arrangement is fair and reasonable is a matter of mixed fact and law, and one on which the application judge exercises a large measure of discretion. The standard of review on this issue is therefore one of deference. In [page545] the absence of a demonstrable error, an appellate court will not interfere: see Ravelston Corp. Ltd. (Re), 2007 ONCA 268 (CanLII), [2007] O.J. No. 1389, 31 C.B.R. (5th) 233 (C.A.).

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

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

[110] The appellants argue that the fraud carve-out is inadequate because of its narrow scope. It (i) applies only to ABCP Dealers; (ii) limits the type of damages that may be claimed (no punitive damages, for example); (iii) defines "fraud" narrowly, excluding many rights that would be protected by common law, equity and the Quebec concept of public order; and (iv)

limits claims to representations made directly to Noteholders. The appellants submit it is contrary to public policy to sanction a plan containing such a limited restriction on the type of fraud claims that may be pursued against the third parties.

[111] The law does not condone fraud. It is the most serious kind of civil claim. There is, therefore, some force to the appellants' submission. On the other hand, as noted, there is no legal impediment to granting the release of an antecedent claim in fraud, provided the claim is in the contemplation of the parties to the release at the time it is given: Fotini's Restaurant Corp. v. White Spot Ltd., 1998 CanLII 3836 (BC SC), [1998] B.C.J. No. 598, 38 B.L.R. (2d) 251 (S.C.), at paras. 9 and 18. There may be disputes about the scope or extent of what is released, but parties are entitled to settle allegations of fraud in civil proceedings -- the claims here all being untested allegations of fraud -- and to include releases of such claims as part of that settlement.

[112] The application judge was alive to the merits of the appellants' submissions. He was satisfied in the end, however, [page546] that the need "to avoid the potential cascade of litigation that . . . would result if a broader 'carve out' were to be allowed" (para. 113) outweighed the negative aspects of approving releases with the narrower carve-out provision. Implementation of the Plan, in his view, would work to the overall greater benefit of the Noteholders as a whole. I can find no error in principle in the exercise of his discretion in arriving at this decision. It was his call to make.

> [113] At para. 71, above, I recited a number of factual findings the application judge made in concluding that approval of the Plan was within his jurisdiction under the CCAA and that it was fair and reasonable. For convenience, I reiterate them here -- with two additional findings -- because they provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:
> (a) The parties to be released are necessary and essential to the restructuring of the debtor; (b) the claims to be released are rationally related to the purpose of the Plan and necessary for it; (c) the Plan cannot succeed without the releases; (d) the parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan; (e) the Plan will benefit not only the debtor companies but creditor Noteholders generally; (f) the voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that, (g) the releases are fair and reasonable and not overly broad or offensive to public policy.

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

[115] The appellants all contend that the obligation to release the third parties from claims in fraud, tort, breach of fiduciary duty, etc. is confiscatory and amounts to a requirement that they -- as individual creditors -- make the equivalent of a greater financial contribution to the Plan. In his usual lively fashion, [page547] Mr. Sternberg asked us the same rhetorical question he posed to the application judge. As he put it, how could the court countenance the compromise of what in the future might turn out to be fraud perpetrated at the highest levels of Canadian and foreign banks? Several appellants complain that the proposed Plan is unfair to them because they will make very little additional recovery if the Plan goes forward, but will be required to forfeit a cause of action against third-party financial institutions that may yield

them significant recovery. Others protest that they are being treated unequally because they are ineligible for relief programs that Liquidity Providers such as Canaccord have made available to other smaller investors.

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

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

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

[119] The application judge noted, at para. 126, that the Plan represented "a reasonable balance between benefit to all Noteholders and enhanced recovery for those who can make out [page548] specific claims in fraud" within the fraud carve- out provisions of the releases. He also recognized, at para. 134, that:

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

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

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

Appeal dismissed.
SCHEDULE "A" --
CONDUITS Apollo
Trust Apsley Trust Aria
Trust Aurora Trust
Comet Trust Encore
Trust Gemini Trust

Ironstone Trust MMAI-I Trust Newshore Canadian Trust Opus Trust Planet Trust Rocket Trust Selkirk Funding Trust Silverstone Trust Slate Trust Structured Asset Trust Structured Investment Trust III Symphony Trust Whitehall Trust SCHEDULE "B" -- APPLICANTS ATB Financial Caisse de dépôt et placement du Québec Canaccord Capital Corporation [page549] Canada Mortgage and Housing Corporation Canada Post Corporation Credit Union Central Alberta Limited Credit Union Central of BC Credit Union Central of Canada Credit Union Central of Ontario Credit Union Central of Saskatchewan Desjardins Group Magna International Inc. National Bank of Canada/National Bank Financial Inc. NAV Canada Northwater Capital Management Inc. Public Sector Pension Investment Board The Governors of the University of Alberta SCHEDULE "C" -- COUNSEL (1) Benjamin Zarnett and Frederick L. Myers, for the Pan- Canadian Investors Committee (2) Aubrey E. Kauffman and Stuart Brotman, for

4446372 Canada Inc. and 6932819 Canada Inc. (3) Peter F.C. Howard, and Samaneh Hosseini, for Bank of America N.A.; Citibank N.A.; Citibank Canada, in its capacity as Credit Derivative Swap Counterparty and not in any other capacity; Deutsche Bank AG; HSBC Bank Canada; HSBC Bank USA, National Association; Merrill Lynch International; Merill Lynch Capital Services, Inc.; Swiss Re Financial Products Corporation; and UBS AG (4) Kenneth T. Rosenberg, Lily Harmer, and Max Starnino, for Jura Energy Corporation and Redcorp Ventures Ltd. (5) Craig J. Hill and Sam P. Rappos, for the Monitors (ABCP Appeals) (6) Jeffrey C. Carhart and Joseph Marin, for Ad Hoc Committee and Pricewaterhouse Coopers Inc., in its capacity as Financial Advisor (7) Mario J. Forte, for Caisse de Dépôt et Placement du Québec (8) John B. Laskin, for National Bank Financial Inc. and National Bank of Canada [page550] (9) Thomas McRae and Arthur O. Jacques, for Ad Hoc Retail Creditors Committee (Brian Hunter, et al.) (10)

Howard Shapray, Q.C. and Stephen Fitterman for Ivanhoe Mines Ltd. (11) Kevin P. McElcheran and Heather L. Meredith for Canadian Banks, BMO, CIBC RBC, Bank of Nova Scotia and T.D. Bank (12) Jeffrey S. Leon, for CIBC Mellon Trust Company, Computershare Trust Company of Canada and BNY Trust Company of Canada, as Indenture Trustees (13) Usman Sheikh, for Coventree Capital Inc. (14) Allan Sternberg and Sam R. Sasso, for Brookfield Asset Management and Partners Ltd. and Hy Bloom Inc. and Cardacian Mortgage Services Inc. (15) Neil C. Saxe, for Dominion Bond Rating Service (16) James A. Woods, Sébastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aéroports de Montréal, Aéroports de Montréal Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Métropolitaine de Transport (AMT), Giro Inc., Vêtements de sports RGR Inc., 131519 Canada Inc., Tecsys Inc., New Gold Inc. and Jazz Air LP

(17) Scott A. Turner, for Webtech Wireless Inc., Wynn Capital Corporation Inc., West Energy Ltd., Sabre Energy Ltd., Petrolifera Petroleum Ltd., Vaquero Resources Ltd., and Standard Energy Ltd. (18) R. Graham Phoenix, for Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., Quanto Financial Corporation and Metcalfe & Mansfield Capital Corp.

Notes

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

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

Note 3: Citing Gibbs J.A. in Chef Ready Foods, supra, at pp. 319-20 C.B.R.

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

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

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

Note 7: Steinberg was originally reported in French: Steinberg Inc. c. Michaud, 1993 CanLII 3991 (QC CA), [1993] J.Q. no. 1076, [1993] R.J.Q. 1684 (C.A.). All paragraph references to Steinberg in this judgment are from the unofficial English translation available at 1993 CarswellQue 2055.

Note 8: Reed Dickerson, The Interpretation and Application of Statutes (Boston: Little Brown and Company, 1975) at pp. 234-35, cited in Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (West Group, St. Paul, Minn., 2004) at p. 621.

TARGET CANADA CO., ET AL.

Applicants

-and-

DORAL HOLDINGS LIMITED ET AL.

Respondents

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

RESPONDING BOOK OF AUTHORITIES OF DORAL HOLDINGS LIMITED AND 430635 ONTARIO INC.

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