COURT FILE NUMBER:	2601-03446
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, AS AMENDED AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF RDFN FUM NATURAL PRODUCTS LTD. and RDFN FUM NATURAL PRODUCTS INC.
APPLICANT	RDFN FUM NATURAL PRODUCTS LTD. and RDFN FUM NATURAL PRODUCTS INC.
DOCUMENT:	**BOOK OF AUTHORITIES TO BENCH BRIEF OF THE APPLICANTS (SANCTION ORDER)**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MLT AIKINS LLP 2100, 222 - 3rd Ave SW Calgary, AB T2P 0B4 Telephone: 403.693.5420/403.693.4311 Attention: Ryan Zahara/Chris Nyberg Email: rzahara@mltaikins.com / cnyberg@mltaikins.com File: 0185373.00001

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APPLICATION BEFORE THE HONOURABLE JUSTICE C.D. SIMARD

TO BE HELD ON OCTOBER 7, 2026 AT 10:00 A.M. ON THE COMMERCIAL LIST

LIST OF AUTHORITIES

A. Legislation

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36

B. Case Law

1. *Laurentian University of Sudbury*, 2022 ONSC 5645
2. *Imperial Tobacco Canada Limited,* 2025 ONSC 1358
3. *Canadian Airlines Corp., Re*, 2000 ABQB 442
4. *Canwest Global Communication Corp, Re*, 2010 ONSC 4209
5. *Re AbitibiBowater Inc,* 2010 QCCS 4450
6. *Metcalfe & Mansfield Alternative Investments II Corp, Re*, 2008 ONCA 587
7. *Lydian International Limited (Re)*, 2020 ONSC 4006
8. *Target Canada Co, Re,* 2016 ONSC 3651
9. *Sino-Forest Corp, Re,* 2012 ONSC 7050
10. *Nordstrom Canada Retail, Inc,* 2024 ONSC 1622
11. *Green Relief Inc. Re*, 2020 ONSC 6837
12. *Tacora Resources Inc, Re*, 2024 ONSC 4436
13. *Harte Gold Corp (Re),* 2022 ONSC 653

C. Court Orders

1. *Target Canada Co et al*, CV-15-10832-00CL, Sanction and Vesting Order, granted on June 2, 2016

2. *Sino-Forest Corporation, Re,* CV-12-9667-00CL, Plan Sanction Order, granted December 10, 2012

3. *Nordstrom Canada Retail, Inc et al,* CV-23-00695619-00CL, Sanction and Vesting Order, granted on March 19, 2024

4. *Laurentian University of Sudbury, Re,* CV-21-00656040-00CL, Plan Sanction Order, granted on October 5, 2022

5. *Lydian International Limited et al*, CV-19-00633392-00CL, Order re: Plan Sanction and Implementation, granted on June 29, 2020

6. *Green Relief Inc, Re*, CV-20-00639217-00CL, Approval and Vesting Order, granted on November 9, 2020

7. *Tacora Resources Inc, Re*, CV-23-00707394-00CL, Approval and Reverse Vesting Order, granted on July 26, 2024

8. *Harte Gold Corp, Re,* CV-21-00673304-00CL, Approval and Reverse Vesting Order, granted on January 28, 2022

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to May 26, 2026

Last amended on December 12, 2024

À jour au 26 mai 2026

Dernière modification le 12 décembre 2024

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to May 26, 2026. The last amendments came into force on December 12, 2024. Any amendments that were not in force as of May 26, 2026 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 26 mai 2026. Les dernières modifications sont entrées en vigueur le 12 décembre 2024. Toutes modifications qui n'étaient pas en vigueur au 26 mai 2026 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

any class of them, the court may, on the application in a summary way of the company or 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.

R.S., c. C-25, s. 5.

garantis ou toute catégorie de ces derniers, le tribunal peut, à la requête sommaire de la compagnie, d'un de ces créanciers ou du syndic en matière de faillite ou liquidateur de la compagnie, ordonner que soit convoquée, de la manière qu'il prescrit, une assemblée de ces créanciers ou catégorie de créanciers, et, si le tribunal en décide ainsi, des actionnaires de la compagnie.

S.R., ch. C-25, art. 5.

Claims against directors — compromise

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.

Transaction — réclamations contre les administrateurs

5.1 (1) La transaction ou l'arrangement visant une compagnie débitrice peut comporter, au profit de ses créanciers, des dispositions relativement à une transaction sur les réclamations contre ses administrateurs qui sont antérieures aux procédures intentées sous le régime de la présente loi et visent des obligations de celle-ci dont ils peuvent être, ès qualités, responsables en droit.

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.

Restriction

(2) La transaction ne peut toutefois viser des réclamations portant sur des droits contractuels d'un ou de plusieurs créanciers ou fondées sur la fausse représentation ou la conduite injustifiée ou abusive des administrateurs.

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.

Pouvoir du tribunal

(3) Le tribunal peut déclarer qu'une réclamation contre les administrateurs ne peut faire l'objet d'une transaction s'il est convaincu qu'elle ne serait ni juste ni équitable dans les circonstances.

Resignation or removal of directors

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

1997, c. 12, s. 122.

Démission ou destitution des administrateurs

(4) Si tous les administrateurs démissionnent ou sont destitués par les actionnaires sans être remplacés, quiconque dirige ou supervise les activités commerciales et les affaires internes de la compagnie débitrice est réputé un administrateur pour l'application du présent article.

1997, ch. 12, art. 122.

Compromises to be sanctioned by court

6 (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or

Homologation par le tribunal

6 (1) Si une majorité en nombre représentant les deux tiers en valeur des créanciers ou d'une catégorie de créanciers, selon le cas, — mise à part, sauf ordonnance contraire du tribunal, toute catégorie de créanciers ayant des réclamations relatives à des capitaux propres — présents et votant soit en personne, soit par fondé de pouvoir à l'assemblée ou aux assemblées de créanciers respectivement tenues au titre des articles 4 et 5, acceptent

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 that 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.

Court may order amendment

(2) 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.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

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

une transaction ou un arrangement, proposé ou modifié à cette ou ces assemblées, la transaction ou l'arrangement peut être homologué par le tribunal et, le cas échéant, lie :

a) tous les créanciers ou la catégorie de créanciers, selon le cas, et tout fiduciaire pour cette catégorie de créanciers, qu'ils soient garantis ou chirographaires, selon le cas, ainsi que la compagnie;

b) dans le cas d'une compagnie qui a fait une cession autorisée ou à l'encontre de laquelle une ordonnance de faillite a été rendue en vertu de la *Loi sur la faillite et l'insolvabilité* ou qui est en voie de liquidation sous le régime de la *Loi sur les liquidations et les restructurations*, le syndic en matière de faillite ou liquidateur et les contributeurs de la compagnie.

Modification des statuts constitutifs

(2) Le tribunal qui homologue une transaction ou un arrangement peut ordonner la modification des statuts constitutifs de la compagnie conformément à ce qui est prévu dans la transaction ou l'arrangement, selon le cas, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

Certaines réclamations de la Couronne

(3) Le tribunal ne peut, sans le consentement de Sa Majesté, homologuer la transaction ou l'arrangement qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'homologation, de toutes les sommes qui étaient dues lors de la demande d'ordonnance visée aux articles 11 ou 11.02 et qui pourraient, de par leur nature, faire l'objet d'une demande aux termes d'une des dispositions suivantes :

a) le paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*;

b) toute disposition du *Régime de pensions du Canada* ou de la *Loi sur l'assurance-emploi* qui renvoie au paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu* et qui prévoit la perception d'une cotisation, au sens du *Régime de pensions du Canada*, d'une cotisation ouvrière ou d'une cotisation patronale, au sens de la *Loi sur l'assurance-emploi*, ou d'une cotisation prévue par la partie VII.1 de cette loi ainsi que des intérêts, pénalités ou autres charges afférents;

c) toute disposition législative provinciale dont l'objet est semblable à celui du paragraphe 224(1.2) de la *Loi de l'impôt sur le revenu*, ou qui renvoie à ce paragraphe, et qui prévoit la perception d'une somme, ainsi que des intérêts, pénalités ou autres charges afférents, laquelle somme :

CITATION: Laurentian University of Sudbury, 2022 ONSC 5645
COURT FILE NO.: CV-21-00656040
DATE: 2022-10-11

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **LAURENTIAN UNIVERSITY OF SUDBURY**

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *D.J. Miller, Mitch Grossell and Derek Harland*, for the Applicant

Ashley Taylor and Elizabeth Pillon, for the Court-appointed Monitor Ernst & Young Inc.

Bradley Wiffen, for His Majesty the King in Right of Ontario as represented by the Minister of Colleges and Universities

Scott Rollwagen, for the Board of Governors

Natasha MacParland, Lender Counsel for the Applicant

Charles Sinclair, for Laurentian University Faculty Association

Brendan Scott, for Laurentian University Staff Union

Stuart Brotman and Dylan Chochla, Toronto-Dominion Bank

Laura Culleton, for Bank of Montreal

Joseph Bellissimo, for Huntington University

Andrew Hatnay, for Thorneloe University

André Claude, for University of Sudbury

Alex MacFarlane and Charlotte Chen, for NOSM

Stephen Gaudreau, for the Art Gallery of Sudbury

Roderic McLauchlan, Barry Stork and Colby Linthwaite, for the Canadian Universities Reciprocal Insurance Exchange

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Mark G. Baker and Andre Luzhetskyy, for the Laurentian University Students' General Association

Heather Fisher, for the Auditor General of Ontario

Dawne Jubb, Interim General Counsel for Laurentian University

HEARD and DETERMINED: October 5, 2022

REASONS: October 11, 2022

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ENDORSEMENT

[1] At the conclusion of the hearing, I granted the motion with reasons to follow. These are the reasons.

[2] Laurentian University of Sudbury ("LU") brings this motion for the following orders:

(a) the Sanction Order that sanctions the Plan pursuant to the *Companies' Creditors Arrangement Act* ("CCAA");

(b) the Unsealing Order that, at the Effective Time on the Plan Implementation Date, unseals the Sealed Exhibits to the Affidavit of Dr. Robert Haché sworn January 30, 2021; and

(c) the Stay Extension Order that extends the Stay Period up to and including November 30, 2022.

[3] The evidentiary support for the requested relief is set out in the affidavit of Dr. Robert Haché, sworn on September 28, 2022 and in the 16th Report of Ernst & Young Inc., in its capacity as Monitor of LU (the "Monitor") (the "Report").

[4] The motion was not opposed.

BACKGROUND

[5] LU commenced this CCAA proceeding on February 1, 2021. In granting the Initial Order I made a number of findings of fact, including:

(a) LU was a "debtor company" to which the CCAA applies;

(b) LU was "plainly insolvent and faces a severe liquidity crisis";

(c) absent additional financing, LU would be unable to meet payroll at the end of February, 2021;

(d) the financial crisis was "real and immediate"; and

(e) with the approval of the interim financing, LU would have liquidity for the duration of the Stay Period.

[6] Subsequent to the granting of the Initial Order, LU commenced a comprehensive operational, financial and academic restructuring to ensure that it could emerge from the CCAA Proceeding as a going concern and as a financially sustainable university.

[7] LU engaged in negotiations with the assistance of Justice Sean Dunphy, the Court-Appointed Mediator with respect to the various restructuring initiatives which LU felt were necessary in order to achieve financial sustainability, including, among other things: (a) a full review and restructuring of its academic programs; (b) reducing its faculty complement based upon the academic restructuring; and (c) negotiating an end to, or terminating, LU's historic relationship with the former federated universities. LU achieved agreement with several of the key parties who participated in the Mediation, including Laurentian University Faculty Association ("LUFA"), Laurentian University Staff Union ("LUSA") and Huntington University.

[8] In addition to entering into restructuring agreements with critical stakeholders, LU states that it achieved the following key milestones during the CCAA proceeding:

(a) academic Restructuring;

(b) LUFA Term Sheet;

(c) LUSA Term Sheet;

(d) disclaimer of Federation Agreements with Former Federated Universities;

(e) cost savings;

(f) pension plan amendments;

(g) completion of operational and governance reports;

(h) completion of the real estate review;

(i) resolution of grievances; and

(j) resolution of claims.

The Meeting

[9] On July 28, 2022, the Plan was accepted for filing and the Meeting Order was issued authorizing LU to call, hold and conduct the Meeting. No party objected to the granting of the Meeting Order authorizing the Plan to be presented to creditors.

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[10] The meeting was held on September 14, 2022 and was attended in person or by proxy by 606 Affected Creditors and/or Unresolved Claimants holding an aggregate value of $178,893,641 in Proven Claims. A total of 597 Affected Creditors voted by proxy or in person at the Meeting, holding an aggregate value of $62,937,935.

[11] The Plan was approved by 87.4% in number representing 68.9% in value of Affected Claims of the Affected Creditors who voted in person or by proxy at the Meeting. The Monitor determined that the votes of Unresolved Claimants would not have impacted the outcome of the vote.

[12] The resolution to approve the Plan was carried by the Requisite Majority of Affected Creditors and the Plan was approved.

[13] The aim of the Plan is to: (a) complete LU's restructuring and provide the opportunity for LU to operate as a going concern bilingual and tri-cultural post-secondary university in the City of Sudbury; (b) provide for a compromise of, and consideration for Affected Claims that are Proven Claims; and (c) effect a release and discharge of all Affected Claims, Released Claims and the Huntington Released Claims.

[14] The salient terms of the Plan include:

(a) certain post-implementation steps that will be undertaken which are intended to better position LU from an operational and governance perspective;

(b) Unaffected Claims will remain unaffected by the Plan, subject to the treatment of the Unaffected Claims in the Plan;

(c) a Guaranteed Minimum Plan Consideration Amount of $45.5 million from the sale of the Designated Real Estate Assets will be received by LU within three years of the Plan Implementation Date;

(d) payment in full of all amounts owing to holders of CCAA Priority Claims, Secured Claims and Vacation Pay Compensation Pay Claims;

(e) a *pro rata* distribution of the Distribution Pool remaining after the payments referred to above and any reimbursement to LU for amounts pre-funded into the Distribution Pool;

(f) a full and final release of any Released Claims that may be made against the Released Parties, which is subject to a carve out for Non-Released Claims;

(g) an injunction against claims that may be asserted against any of the Released Parties, save and except as it relates to the Non-Released Claims; and

(h) a limited third-party release in favour of Huntington University regarding any claims that may be made against Huntington in respect of the discontinuance of

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> the RHBP or the discontinuance of any academic programs or courses by Huntington.

[15] The Plan is also subject to certain conditions to implementation, including (a) the resolution of all grievances that are subject to the Grievance Resolution process, and (b) the renewal of two senior management positions at LU (the President and the Provost) prior to the Plan Implementation Date.

Plan Releases

[16] The Plan provides the Plan Releases in respect of the Released Claims in favour of LU, the Chief Redevelopment Officer, the Monitor, and each of their respective representatives.

[17] Released Claims include all claims, obligations or liabilities in respect of the Released Parties existing or taking place at or prior to the Effective Date.

[18] The Plan does not affect (a) Crown claims as described in s. 6(3) of the CCAA, (b) employee-related payments as described in s. 6(5) of the CCAA, or (c) pension claims as described in s. 6(6) of the CCAA.

Implementation of the Plan

[19] It is LU's expectation that the plan will be implemented by November 30, 2022. LU is currently negotiating with the Ministry of Colleges and Universities ("MCU") regarding the terms of the Exit Financing Documentation. Subject to receipt of the requisite government approvals, LU intends to seek an order on November 1, 2022 authorizing it to enter into the Exit Financing Documentation.

[20] The issues for consideration on this motion are:

1. should the Court sanction the Plan?
2. should the Court grant the Unsealing Order? and
3. should the Court grant the Stay Extension Order?

Issue One: Should the Court Sanction the Plan?

[21] Pursuant to s. 6(1) of the CCAA, the court has the discretion to sanction a plan if it has achieved the requisite "double majority" vote at any meeting of creditors held pursuant to s. 4 of the CCAA. Once a court sanctions a plan, it becomes binding on the debtor company and all of its creditors.

[22] The Plan was approved by the requisite double majority of Affected Creditors who voted. The Plan was approved by 87.4% in number and 68.9% in value of the Affected Claims.

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[23] Having satisfied the voting criteria, the issue is whether the Court should exercise its discretion to approve and sanction the Plan. The test for court approval of a plan is well-established:

(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: *CanTrust Holdings Inc., et al. (Re)*, 2021 ONSC 4408 at para 13)

[24] When considering if the applicant has complied with all statutory requirements under the CCAA, the court will typically consider the following:

(a) if the applicant comes within the definition of a "debtor company" under section 2(1) of the CCAA:

(b) if the applicant has total claims in excess of $5 million;

(c) if the creditors were properly classified;

(d) if the notice of meeting was sent in accordance with the Meeting Order;

(e) if the meeting was properly constituted;

(f) if the voting was properly carried out; and

(g) if the plan was approved by the requisite majorities.

(see: *Canwest Global Communications Corp.*, 2010 ONSC 4209 at para. 15)

[25] Each of the foregoing factors are factual issues which have been established on the record.

[26] The Monitor has also stated in its Report that LU has strictly complied with all statutory requirements. I accept this statement.

[27] In addition, I am satisfied that the Plan complies with the statutory requirements set out in sections 6(3), 6(5) and 6(6) of the CCAA, which provides that the court may not sanction a plan unless it contains certain provisions concerning certain Crown claims, employee claims and pension claims.

[28] I conclude that LU has complied with all statutory requirements under the CCAA and this part of the test has been met.

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Issue Two – Were Any Unauthorized Steps Taken?

[29] The Monitor has filed 16 Reports. These Reports have detailed the activities of LU and I am satisfied that LU has acted in good faith and with due diligence throughout the course of this proceeding, complying with the requirements of the CCAA and all orders of the court.

[30] I am satisfied that there is no basis for any assertion that LU has proceeded in a manner that is not authorized by the CCAA. In my view, the second part of the test has been met.

Issue Three: The Plan is Fair and Reasonable

[31] Courts have emphasized that "perfection is not required" when assessing whether a plan is fair and reasonable (See: *AbitibiBowater Inc.* (Re), 2010 QCCS 4450 para. 33). Instead, a court should consider the relative degrees of prejudice that would flow from granting or refusing to grant the relief sought and whether the plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (See: *(Re) Canadian Airlines Corp.*, 2000 ABQB 442 at para. 3). Counsel to LU submits that the discretion of the court should be guided by the objectives of the CCAA – namely to "enable compromises to be made for the common benefit of the creditors and of the company, particular to keep a company in financial difficulties alive and out of the hands of liquidators" (See: *Northlands Properties Ltd.* v. *Excelsior Life Ins. Co. of Canada* 1989 CanLii 2672 (BCCA) at para. 17).

[32] In assessing whether a plan is fair and reasonable the court will consider:

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

(b) what creditors would receive 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 (inapplicable to LU); and

(f) the public interest.

(See: *Canwest Global, supra* at para. 21)

[33] With respect to classification, the Affected Creditors were classified in a single class. The classification of Affected Creditors was supported by the Monitor and approved in the Meeting Order without objection.

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[34] As previously noted, the double majority test was satisfied and this level of support allows me to conclude that the assenting creditors believe that their interests are treated fairly and equitably under the Plan.

[35] With respect to alternatives, as set out in the 14th Report of the Monitor, the Monitor believes that if the Plan is not implemented, the most likely outcome is some form of liquidation of LU's assets which would produce an inferior result for the Affected Creditors than that provided for under the Plan. Under the Plan, the Monitor estimates the unsecured creditors will recover approximately 14.1% to 24.2%. In liquidation, the Monitor estimates a recovery of approximately 8.5% to 16.7%. I note that if the Plan is not sanctioned, LU will not be able to successfully complete its restructuring and likely would be required to cease operations and liquidate. A liquidation would give rise to additional claims and increase the likelihood of an inferior result.

[36] With respect to oppression of creditors, LU submits that creditor treatment must be equitable, however, "equitable treatment is not necessarily equal treatment". In this case, I am satisfied that the Plan treats all Affected Creditors equally in terms of treatment under the Plan and distributions under the Plan. The only persons that receive different treatment are the Unaffected Creditors. I am satisfied, due to the factual or legal nature of their claims, they must be treated differently than the Affected Creditors.

[37] The issue of unfairness to shareholders is not applicable in this case as LU is a not for profit corporation without share capital.

[38] Finally, with respect to whether the Plan is in the public interest, if the Plan is sanctioned, LU will continue as a going concern, as a bilingual and tri-cultural post-secondary university in Sudbury. As counsel to LU submits, the continuation of LU will provide the opportunity for thousands of students that attend LU each year to continue to attend LU and complete their degrees. Further, implementation of the Plan will preserve the employment of hundreds of faculty and staff members at LU. I am satisfied that sanctioning of the Plan is in the public interest.

Plan Releases

[39] Turning now to the Plan Releases and the Huntington Third-Party Release, counsel to LU submits that it is well established that courts have the jurisdiction to sanction plans of compromise and arrangement under the CCAA containing third-party releases. (See: *Pacific Exploration & Production Corporation (Re)*, 2016 ONSC 5429 at para. 30; and *Lydian International Limited (Re)*, 2020 ONSC 4006).

[40] The following list of factors has been considered in respect of the approval of releases in CCAA proceedings, including third-party releases:

(a) whether the released claims are rationally connected to the purpose of the plan;

(b) whether the plan can succeed without the releases;

(c) whether the parties being released contributed to the plan;

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(d) whether the releases benefit the debtors as well as the creditors generally;

(e) whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) whether the releases are fair, reasonable and not overly-broad.

(See: *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54)

[41] As submitted by counsel to LU it is not necessary for each of these factors to be satisfied in order for the release to be granted.

[42] Having reviewed the record and the submissions as set out in LU's factum at para. 46, I am satisfied that the Plan Releases are necessary and appropriate in these circumstances. The Plan Releases are rationally connected to the purpose of the plan. The object of the Plan Releases is to provide LU with a fresh start so that it may continue to provide university education to thousands of students and employment to hundreds of people in the Greater Sudbury region and northern Ontario. Further, I am satisfied that the Plan cannot succeed without the Plan Releases. For LU to continue operating and fulfilling the purpose of the Plan, it must have finality in respect of its obligations and liabilities moving forward. In addition, the Released Parties are, in my view, necessary and essential to the restructuring and they contributed to the Plan. Each of LU, the Monitor and the CRO played a part in advancing the restructuring and achieving approximately $40 million in annual savings. The Directors and Officers of LU were active and engaged in overseeing and making key strategic decisions leading to the Plan.

[43] I am also satisfied that the creditors were, at all relevant times, aware of the nature and effect of the Plan Releases. Full disclosure of the Plan Releases was made to Affected Creditors at the time that LU applied for the Meeting Order. Further, the Monitor provided the meeting materials to over 1,100 Affected Creditors and these materials included the Information Circular, which described the Plan Releases in detail. I have also taken into account that at no point did any creditor or other stakeholders make any submissions on the scope of the Plan Releases or express any objection to the Plan Releases, nor were any submissions made in opposition to the Plan Releases on this motion.

[44] On this issue, I am satisfied that the Plan Releases are fair, reasonable and rationally connected to the overall purpose of the Plan, such that they should be approved.

[45] I am also satisfied that the Huntington Third-Party Release is appropriate in the circumstances. The Huntington Transition Agreement was a significant step in the restructuring of LU and LU derived certain benefits from the Huntington Transition Agreement. I am also satisfied that Huntington contributed in a tangible way to LU's restructuring and the Plan and the release of the Huntington Released claims is consistent with the terms reached in the Huntington Transition Agreement, previously approved.

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CONCLUSION

[46] In conclusion, I am satisfied that LU has complied with all requirements for the Court to sanction the Plan.

Issue 2: Unsealing Order

[47] LU has also requested that the Exhibits which were sealed on the Initial Order be unsealed. LUFA and LUSU requested that the Sealed Exhibits no longer be sealed at the appropriate time. LU has advised that all Affected Parties agreed that the appropriate time is at the Effective Time on the Plan Implementation Date, because the sensitivity associated with the correspondence that gave rise to the Sealing Order will no longer apply. Further, MCU has no objection to an unsealing of the Sealed Exhibits. In my view it is appropriate to grant the unsealing order.

Issue 3: Stay Extension Order

[48] Finally, LU seeks an extension of the Stay Period up to and including November 30, 2022.

[49] After the Plan has been sanctioned, the final step to conclude the restructuring is to satisfy the conditions precedent to implementation of the Plan. This will occur over the next few weeks. I am satisfied that LU continues to act in good faith and with due diligence as it moves towards Plan implementation. The required Cash Flow Forecast has been filed and LU will have sufficient liquidity to operate its business and meet its obligations to November 30, 2022. Further, the Monitor supports extending the Stay Period until November 30, 2022. In my view it is both reasonable and appropriate to extend the Stay Period to November 30, 2022.

DISPOSITION

[50] In the result, the motion is granted. Three orders - the Sanction Order, the Unsealing Order and the Stay Extension Order have been signed.

Chief Justice G.B. Morawetz

Date: October 11, 2022

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CITATION: Imperial Tobacco Canada Limited, 2025 ONSC 1358
COURT FILE NO.: CV-19-615862-00CL; CV-19-616077-00CL; CV-19-616779-00CL
DATE: 2025-03-06

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JTI-MACDONALD CORP.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ROTHMANS, BENSON & HEDGES INC.

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Natasha MacParland, Chanakya Sethi and Anisha Visvanatha*, for FTI Consulting Canada Inc., in its capacity as court-appointed Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

R. Shayne Kukulowicz and Monique Sassi, for Ernst & Young Inc., in its capacity as court-appointed Monitor of Rothmans, Benson & Hedges Inc.

Pamela Huff, Linc Rogers, Jake Harris and Katrina Banham, for Deloitte Restructuring Inc., in its capacity as Monitor of JTI-Macdonald Corp.

Deborah Glendinning, Marc Wasserman, Martino Calvaruso, Craig Lockwood and Marleigh Dick, for Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

Michael Feder, K.C., Paul Steep, Heather Meredith, Deborah Templer, Trevor Courtis, Jamey Gage, and Meena Alnajar, for Rothmans, Benson & Hedges Inc.

Robert Thornton, Leanne Williams, Scott McGrath, Mitch Grossell, Rushi Chakrabarti and Rebekah O'Hare, for JTI-Macdonald Corp.

Maria Konyukhova and David Byers, for British American Tobacco p.l.c., B.A.T. Industries, p.l.c. and British American Tobacco (Investments) Limited

Vern DaRe and Robert Cunningham, for the Canadian Cancer Society

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Edward Park, for Canada Revenue Agency

Avram Fishman, Mark E. Meland, Tina Silverstein, André Lespérance, Philippe Trudel, Bruce Johnson, Gordon Kugler, and Harvey Chaiton, for Conseil québécois sur le tabac et la santé, Jean-Yves Blais and Cécilia Létourneau (Quebec Class Action Plaintiffs)

Jacqueline Wall, for the Province of Ontario

Linda Plumpton, Jeremy Opolsky, Scott Bomhof, Adam Slavens, and Alec Angle, for JT Canada LLC Inc., and PricewaterhouseCoopers Inc., in its capacity as Receiver of JTI-Macdonald TM Corp.

Clifton Prophet and Nicholas Kluge, for Philip Morris International Inc.

David Ullmann, for La Nordique Compagnie D'Assurance du Canada

Raymond Wagner, K.C., Kate Boyle, and Maddy Carter, Representative Counsel for the Pan-Canadian Claimants

Stacy Petriuk and Laura Comfort, for the Province of Alberta

Jesse Mighton, Jeffrey Leon, Mike Eizenga, Preet Gill, *Shawn Kirkman, André I.G. Michael, Peter Lawless, K.C., Edward A. Gores, K.C., Michael Peerless and Jordan Wong,* for the Province of British Columbia, Province of Manitoba, Province of New Brunswick, Province of Nova Scotia, Province of Prince Edward Island, Province of Saskatchewan, Government of Northwest Territories, Government of Nunavut and Government of Yukon in their capacities as Plaintiffs in the HCCR Legislation Claims

Glenda Best, K.C. and Ken McClain, for the Province of Newfoundland and Labrador

Brett Harrison and Guneev Bhinder, for the Province of Quebec

Patrick Flaherty, Bryan McLeese, Claire Wortsman, Justin Safayeni and Patrick Carl, for R.J. Reynolds Tobacco Company and R.J. Reynolds Tobacco International Inc.

Ari Kaplan, Representative Counsel for Former Genstar U.S. Retiree Group Committee

Steven Weisz and Dilina Lallani, for Grand River Enterprises Six Nations Ltd.

James Bunting and Sam Cotton, for Heart and Stroke Foundation

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Douglas Lennox and David Klein, for Representative Plaintiff, Kenneth Knight, in the Certified British Columbia Class Action

William Sasso and David Robins, for The Ontario Flue-Cured Tobacco Growers' Marketing Board

Matthew Gottlieb and Andrew Winton, for The Honourable Warren K. Winkler, K.C., Court-Appointed Mediator

HEARD: January 29, 30 and 31, 2025

ADDITIONAL SUBMISSIONS: March 3, 2025

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ENDORSEMENT

A. INTRODUCTION

[1] On March 8, 2019, JTI-Macdonald Corp. ("JTIM") obtained an Initial Order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). Deloitte Restructuring Inc. ("Deloitte") was appointed as the Monitor of JTIM.

[2] On March 12, 2019, Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (collectively "Imperial") obtained an Initial Order pursuant to the CCAA. FTI Consulting Canada Inc. ("FTI") was appointed the Monitor of Imperial.

[3] On March 22, 2019, Rothmans, Benson & Hedge Inc. ("RBH") obtained an Initial Order pursuant to the CCAA. Ernst & Young Inc. ("E&Y") was appointed as the Monitor of RBH.

[4] A number of elements of these three CCAA filings overlap and the proceedings of JTIM, Imperial and RBH (the "Tobacco Companies") are collectively referred to as the CCAA Proceedings.

[5] On April 5, 2019, the Honourable Warren K. Winkler, K.C., was court appointed as mediator (the "Mediator") of the Tobacco Companies in the CCAA proceedings to oversee and coordinate a multi-party, comprehensive mediation (the "Mediation") among the Tobacco Companies and their key stakeholders and mediate a global settlement of the Tobacco Claims (as defined in the Imperial Plan, the RBH Plan and the JTIM Plan, collectively the "CCAA Plans").

[6] After a period of four and a half years, the Tobacco Companies had failed, both individually and collectively, to produce a plan of arrangement or compromise.

[7] On October 5, 2023, the court directed the Monitors to work with the Mediator to develop a plan of compromise or arrangement for each Tobacco Company.

[8] On October 31, 2024, Meeting Orders were granted in each of the Tobacco Companies' CCAA proceedings pursuant to which a plan of compromise or arrangement in respect of each of the Tobacco Companies dated October 17, 2024 (the "October 17 CCAA Plans") was accepted for filing and creditors meetings for Affected Creditors were scheduled for December 12, 2024 (the "Meetings"). (Defined terms used but undefined in this endorsement are as set out in the Third Amended and Restated CCAA Plan of Compromise and Arrangement in respect of each Tobacco Company dated February 27, 2025 (the "Third A&R CCAA Plans").)

[9] On December 5, 2024, the Monitors served CCAA Plans that amended and restated the October 17 CCAA Plans. The amendments were administrative in nature.

[10] The Meetings of Affected Creditors to vote on the CCAA Plans took place on December 12, 2024. The CCAA Plans were unanimously approved by Affected Creditors voting in person or by proxy at each of the three Meetings and the double majority required by the CCAA was achieved for each CCAA Plan as follows:

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(a) at the Imperial Meeting, the Imperial CCAA Plan was unanimously approved by 289,906 votes, representing $963,822,023,265 in total value of Voting Claims;

(b) at the RBH Meeting, the RBH CCAA Plan was unanimously approved by 289,904 votes, representing $963,296,023,265 in total value of Voting Claims; and

(c) at the JTIM Meeting, the JTIM CCAA Plan was unanimously approved by 289,904 votes, representing $963,296,023,265 in total value of Voting Claims.

[11] The Monitors now bring motions in each of the CCAA proceedings:

(d) for Sanction Orders approving and sanctioning the operative CCAA Plans, namely the Third A&R CCAA Plans dated February 27, 2025;

(e) authorizing and directing CCAA Plan Administrators, the Mediator and the Tobacco Companies to implement the CCAA Plans;

(f) approving the CCAA Plan Administration Reserve and the PCC Compensation Plan Reserve;

(g) an order releasing the Released Claims in respect of each Applicant, the Applicant Tobacco Company Group, the Monitors, the CCAA Plan Administrators, the Mediator and the other Released Parties, in accordance with the terms of the CCAA Plans;

(h) extending the Stay Period to the Effective Time;

(i) an order appointing Deloitte, FTI and E&Y as CCAA Plan Administrators; and

(j) ancillary relief.

[12] On March 3, 2025, the Monitors' motions for CCAA Plan Amendment Orders were granted, which reflected an agreement reached by the Tobacco Companies to allocate a $750 million working capital holdback to RBH. In exchange, RBH, JTIM and JTIM-TM agreed to withdraw their opposition to this motion. The court's endorsement, reported at 2025 ONSC 1375 dated March 3, 2025 is attached as Schedule "A".

[13] For the following reasons, the motions are granted, which, among other things, sanctions the CCAA Plans, as amended.

B. OVERVIEW OF CCAA PLANS

[14] The sanctioning of the CCAA Plans is a momentous achievement in Canadian restructuring history.

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[15] In order to appreciate the magnitude of this achievement, it is necessary to provide a detailed summary of the CCAA Plans. If there are any inconsistencies between this summary and the specific provisions of the CCAA Plans, the provisions of the CCAA Plans prevail.

[16] The CCAA Plans of Imperial, RBH and JTIM will effect a global settlement of all Tobacco Claims against such Tobacco Companies.

[17] The enormity of this settlement is best understood by considering the sheer number of parties involved and the complexity of the Tobacco Claims within the scope of the global settlement, including:

(a) The forty-two Applicant companies involved including: the Applicants – Imperial, RBH and JTIM; the Tobacco Companies' three international Parents based in the United Kingdom, United States and Japan respectively; and thirty-five Affiliates of the Tobacco Companies;

(b) In actions pursued in every Province, and in claims advanced by two Territories, in which all Provincial Crowns and Territorial governments were involved in seeking recovery of costs incurred in connection with the provision of past and future health care benefits to treat and care for Canadians suffering from Tobacco-related Diseases;

(c) Quebec Class Counsel obtained a $13.7 billion judgment in two Quebec class actions on behalf of smokers who suffered tobacco-related harms, as well as Quebec residents addicted to nicotine in the cigarettes made by the Tobacco Companies;

(d) The tort claims and potential tort claims of all individual smokers in Canada who have suffered tobacco-related harms, except those Quebec residents covered by the Quebec Class Actions judgment, will be settled through the Pan-Canadian Claimants' Compensation Plan ("PCC Compensation Plan") and the Cy-près Fund (described in more detail below). Pan-Canadian Claimants who are not eligible for direct compensation payments under the PCC Compensation Plan will receive indirect benefits from the research, programs and initiatives focused on improving outcomes in Tobacco-related Diseases that will be funded from the Cy-près Fund;

(e) In three uncertified class actions, the Ontario Flue-Cured Tobacco Growers' Marketing Board and certain individual tobacco growers pursued breach of contract claims on behalf of tobacco growers; and

(f) The *Knight* Class Action pursued a certified class action against Imperial alleging misleading marketing of light and mild cigarettes sold in British Columbia.

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[18] To obtain the global settlement, the Tobacco Companies will pay all but $750 million of their aggregate cash on hand upfront, and the majority of their future Net After-Tax Income until the Global Settlement Amount of $32.5 billion is paid in full. In return, the Tobacco Companies will receive a release of all Tobacco Claims.

[19] Since the Global Settlement Amount will be paid with a combination of upfront cash and annual payments during the Contribution Period, the CCAA Plans contain terms which are designed to manage the ongoing relationship among the Tobacco Companies and the Claimants to ensure the CCAA Plans are administered properly. The CCAA Plans accomplish this objective by enabling the Provinces, Territories, and any other Claimants who will not be paid their full share of the Global Settlement Amount out of the upfront cash ("Impacted Claimants"), to be provided with insight into the business and operations of the Tobacco Companies through detailed financial disclosure that will be provided over the twenty-or-so-year Contribution Period.

[20] Given the circumstances described above, (i) oversight of the Tobacco Companies by the CCAA Court is required during the administration of the CCAA Plans, (ii) financial and other information from the Tobacco Companies must be provided and explained to the Claimants to whom monies are still owed, and (iii) there must be a reporting function to the CCAA Court regarding the status of the implementation and administration of the CCAA Plans. The CCAA Plans create a role for the Monitors to act as neutral, independent intermediaries – the CCAA Plan Administrators – to perform or facilitate the performance of these functions.

[21] Because the Tobacco Companies will be required to interface with the Provinces and Territories during the administration of the CCAA Plans, it is essential that the Tobacco Companies be able to do so without having to speak separately to individual representatives from each Province and Territory. The CCAA Plans provide the Tobacco Companies with comfort that, during the Contribution Period (which is anticipated to be lengthy), they will not have to deal separately with thirteen individual Provincial and Territorial governments and, instead, will have one representative entity to whom they will direct their attention. In order to communicate with one voice with the Tobacco Companies, the Provinces and Territories shall establish the Provincial and Territorial Liaison Committee ("PTLC") to coordinate and facilitate their communications with the Tobacco Companies, the CCAA Plan Administrators and others regarding the CCAA Plans during the Contribution Period. The Tobacco Companies through the CCAA Plan Administrators will communicate with the Provinces and Territories jointly as a group through the Chair of the PTLC.

[22] The CCAA Plans settle the claims of the Provinces and Territories to recover the expenditures to provide past and future health care benefits to treat and care for Canadians suffering from Tobacco-related Diseases through the payment to the Provinces and Territories of upfront cash, plus annual payments from the Tobacco Companies' future Net After-Tax Income during the Contribution Period.

[23] The CCAA Plans also settle the claims of Canadians to recover damages for certain tobacco-related harms caused by their use of or exposure (whether direct or indirect) to Tobacco

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Products or their emissions. There are three components to the settlement of the claims by Individuals in all Canadian jurisdictions:

(a) Payment of $4.119 billion to satisfy the judgment granted by the Quebec Superior Court, and upheld by the Quebec Court of Appeal, awarding damages to Quebec residents diagnosed with Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV) who meet the other eligibility criteria of the certified class definition. Eligible Quebec residents will receive direct payments of compensation;

(b) Payment of $2.521 billion to fund the PCC Compensation Plan which will provide direct payments of compensation to residents of all of the Provinces and Territories who were diagnosed with Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV) and meet the other eligibility criteria to qualify for compensation under the PCC Compensation Plan; and

(c) Payment of $1.0 billion to create the Cy-près Fund that will be administered by a public charitable foundation ("Cy-près Foundation") and provide indirect benefits to Individuals residing in all Provinces and Territories who are suffering from tobacco-related harms and do not fulfill the criteria to qualify to receive compensation under the Quebec Administration Plan or the PCC Compensation Plan. The establishment of the Cy-près Foundation is a creative use of a cy-près remedy outside of the context of a class action that is used to fill in the gap where direct compensation is not available to Individuals by providing a remedy in the form of indirect benefits that will flow to:

    (i) Smokers suffering from Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV) who are outside the claims period or who smoked less than the requisite tobacco dose to qualify for direct compensation under the PCC Compensation Plan;

    (ii) Smokers who have tobacco-related harms other than Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV); and

    (iii) Persons who smoke or have smoked Tobacco Products who have not yet or may never develop a tobacco-related harm.

[24] The Quebec Administration Plan and the PCC Compensation Plan are innovative in their use of an agent for class counsel to provide assistance to Individual claimants to complete and submit claims forms.

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C. BACKGROUND LEADING TO DEVELOPMENT OF CCAA PLANS

[25] JTIM, Imperial and RBH were granted protection from their creditors under the CCAA on March 8, 12 and 22, 2019 respectively. The Tobacco Companies collectively sought to use their CCAA Proceedings to achieve a global settlement of all claims and potential claims against them and their respective parent and affiliated companies in Canada in respect of the development, design, manufacture, production, marketing, advertising, distribution, purchase, sale or disposition of Tobacco Products, the use of or exposure (whether direct or indirect) to Tobacco Products or their emissions, the development of any disease related to the use of Tobacco Products, or any representation or omission in respect of Tobacco Products (together with certain other Claims related to Tobacco Products, collectively, the "Tobacco Claims").

[26] The Tobacco Claims include the Claims of the following Claimants:

(a) **Provinces and Territories –** All Provinces commenced actions against the Tobacco Companies and members of their Tobacco Company Groups pursuant to health care costs recovery ("HCCR") legislation which provide each Provincial Crown with a direct and distinct action against a manufacturer of Tobacco Products to recover the cost of health care benefits caused or contributed to by a tobacco-related wrong. The Northwest Territories and Nunavut proclaimed HCCR Legislation which is not yet in force. Yukon has not enacted HCCR Legislation. The CCAA Plans compromise the claims of Yukon and the other Territories in respect of the present value of the Territories' total expenditures for past and future health care benefits provided for Insured Persons resulting from Tobacco-related Diseases or the risk of Tobacco-related Diseases;

(b) **Quebec Class Action Plaintiffs –** In Quebec, the Quebec Class Action Plaintiffs obtained a $13.7 billion judgment against Imperial, RBH and JTIM in two class actions. The certified class definition in the *Létourneau* Class Action includes Quebec residents who, as of 1998, were addicted to nicotine from September 30, 1994 onward and continued to be daily smokers of the Tobacco Companies' cigarettes as of February 21, 2005 (or their earlier death). The certified class definition in the *Blais* Class Action includes Quebec residents who, prior to November 20, 1998, had smoked a minimum of 87,600 cigarettes and, prior to March 12, 2012, were diagnosed with Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV);

(c) **Pan-Canadian Claimants –** Represented by the Court-appointed PCC Representative Counsel, the Pan-Canadian Claimants are all Individuals, excluding the *Blais* Class Members and *Létourneau* Class Members, who have asserted or may be entitled to assert a PCC Claim against the Tobacco Companies. A PCC Claim is any Claim of any Pan-Canadian Claimant to recover damages in respect of the development, design, manufacture, production, marketing, advertising, distribution, purchase or sale of Tobacco

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Products, including any representations or omissions in respect thereof, the historical or ongoing use of or exposure (whether directly or indirectly) to Tobacco Products or their emissions and the development of any disease or condition as a result thereof, in each case arising from any conduct, act or omission, existing or taking place at or prior to the Effective Time (whether or not continuing thereafter) including, all Claims that have been, could have been or could be advanced in seventeen actions listed in the CCAA Plans that were commenced in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia and Newfoundland and Labrador, by Individuals on their own account or under provincial class proceedings legislation. The settlement of the PCC Claims will be achieved through the payment of direct compensation through the PCC Compensation Plan to eligible PCCs, together with the provision of indirect benefits that will flow to PCCs who are not eligible to receive a direct compensation payment through the research, programs and initiatives focused on improving outcomes in Tobacco-related Diseases that will be funded by the Cy-près Foundation;

(d) ***Knight* Class Action Plaintiffs –** In British Columbia, the *Knight* Class Action Plaintiffs pursued a certified class action against only Imperial on behalf of persons who purchased Imperial's light or mild cigarettes in British Columbia for personal, family or household use between May 9, 1997 and July 31, 2007; and

(e) **Tobacco Producers –** The Ontario Flue-Cured Tobacco Growers' Marketing Board and certain individual tobacco growers pursued three uncertified class actions commenced against each of the Tobacco Companies who sold their tobacco through the Ontario Flue-Cured Tobacco Growers' Marketing Board pursuant to the annual Heads of Agreement made with Imperial, RBH and JTIM from January 1, 1986 to December 31, 1996.

[27] The Mediator and the Monitors intend to serve and file Fourth Amended and Restated CCAA Plans for Imperial, RBH and JTIM which make additional revisions of an administrative nature to (i) clarify the process for the establishment of the Cy-près Foundation and the final approval of the Cy-près Foundation after the Sanction Hearing, and (ii) address the non-solicitation of Pan-Canadian Claimants and Quebec Class Action Plaintiffs. None of these amendments are materially adverse to the financial or economic interests of the Affected Creditors or the Unaffected Creditors.

D. PURPOSE AND EFFECT OF CCAA PLANS

[28] If sanctioned, the CCAA Plans will:

(a) Fully and finally settle, irrevocably compromise and release all Tobacco Claims;

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(b) Bring finality to and resolve all Pending Litigation in Canada against the Tobacco Companies, members of their Tobacco Company Groups and the Canadian Tobacco Manufacturers' Council;

(c) Effect the distribution of the Global Settlement Amount of $32.5 billion to the Claimants;

(d) Effect the restructuring of the businesses of Imperial and RBH by transferring their respective Alternative Products Business to a Newco; and

(e) Permit Imperial, RBH and JTIM to exit their CCAA Proceedings and continue to carry on business in Canada.

E. STRUCTURE OF THE CCAA PLANS TO SETTLE ALL TOBACCO CLAIMS IN CANADA

[29] The global settlement of all Tobacco Claims in Canada involves the concurrent resolution of the CCAA Proceedings of Imperial, RBH and JTIM in accordance with the terms of the CCAA Plans. The complexity of the structure of the CCAA Plans to settle the Tobacco Claims and the implementation and administration of the terms of the CCAA Plans over an estimated twenty-year Contribution Period necessitate continuing oversight of the Tobacco Companies throughout the Contribution Period. The CCAA Plans provide compensation to Affected Creditors based on future earnings of the Tobacco Companies over a Contribution Period that is currently estimated to span twenty years.

(i) Jurisdiction of CCAA Court

[30] In the CCAA Plan Administrator Appointment Orders, the CCAA Court will be requested to approve the appointment of the Monitors - FTI, EY and Deloitte - to serve as the CCAA Plan Administrators respectively for the CCAA Plans of Imperial, RBH and JTIM. Once appointed, as required and applicable, they may act in both their capacities as Monitors and CCAA Plan Administrators depending upon the duties that they are fulfilling.

[31] The CCAA Court shall have jurisdiction to address and resolve issues that may arise during the administration of the CCAA Plans including such matters as:

(a) Determining whether a Tobacco Company is no longer Financially Viable due to circumstances beyond the control of the Tobacco Company or its Tobacco Company Group;

(b) Jointly with the Quebec Superior Court, determining matters relating to the ongoing supervision of the Quebec Class Action Administration Plan;

(c) Determining matters relating to the ongoing supervision of the Pan-Canadian Claimants' Compensation Plan;

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(d) Supervising the Cy-près Foundation, including approving the establishment of the Cy-près Foundation as a charitable public foundation; approving the appointment of ten directors, including the Chair, to the Foundation Board; and approving proposals from interested individuals and organizations seeking financing and support for research, programs and initiatives which fall within the scope of the mission of the Cy-près Foundation;

(e) Receiving reports from the CCAA Plan Administrators, the Claims Administrator for the PCC Compensation Plan and the Quebec Administration Plan, and the Chair of the Cy-près Foundation;

(f) Determining whether the acceleration clause may be invoked in the event that (i) a Tobacco Company breaches the covenant restricting a Tobacco Company from transferring all of its assets and business to any other entity, except in certain prescribed circumstances, or (ii) a Tobacco Company fails to deposit into the Global Settlement Trust Account or the Supplemental Trust Account, as applicable, any amount at all on account of its respective share of any of the Upfront Contributions, any Annual Contributions or any Reserved Amounts;

(g) Approving any waivers of an Event of Default or Breach, other than a failure to make a Contribution which obligation may not be waived;

(h) In accordance with the Dispute Resolution Procedure, determining any Disputes that may arise between the Tobacco Companies, any or all members of the Tobacco Company Groups, Aggrieved Parties and/or the CCAA Plan Administrators arising out of or relating to the CCAA Plan, including the determination of all proceedings relating to the occurrence of an Event of Default and, in exceptional circumstances, a Dispute pertaining to a Breach in lieu of the Arbitrator doing so;

(i) Determining whether to grant a judgment enforcing an Arbitrator's award that resolved a Dispute arising during the administration of the CCAA Plans; and

(j) Determining whether a Putative Miscellaneous Claimant should be granted leave to commence a proceeding relating to a Miscellaneous Claim and then determining such Putative Miscellaneous Claimant's claim on the merits.

[32] The CCAA Plan Administrators will be central to the administration of the CCAA Plans in their role as the conduit for the orderly flow of information and reports between, as applicable, the CCAA Court, Quebec Superior Court, Tobacco Companies, Claimants, Cy-près Foundation, Claims Administrator and Administrative Coordinator.

[33] The CCAA Plan Administrators' oversight of the administration of the PCC Compensation Plan and the Quebec Administration Plan shall include:

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(a) Being consulted regarding and, if warranted, applying to the CCAA Court to seek a revision to the terms of the PCC Compensation Plan and the Quebec Administration Plan;

(b) Upon receipt of a requisition and sufficiently detailed supporting information and data from the Claims Administrator, authorizing the advancement of an instalment of funds held in the PCC Trust Account and QCAP Trust Account to the Claims Administrator's trust account to enable it to make Individual Payments to Eligible PCCs and Compensation Payments to Eligible *Blais* Class Members;

(c) Reporting to the CCAA Court regarding the progress of the administration of the PCC Compensation Plan, and jointly to the CCAA Court and the Quebec Superior Court regarding the progress of the administration of the Quebec Administration Plan; and

(d) Submitting the Claims Administrator's budget for the claims administration of the PCC Compensation Plan to the CCAA Court for approval, and the Claims Administrator's budget for the claims administration of the Quebec Administration Plan for joint approval by the CCAA Court and Quebec Superior Court.

(ii) Overview of Economic Framework of CCAA Plans

[34] In the Tobacco Companies' CCAA Proceedings, the terms of the three CCAA Plans are interrelated and interdependent and have been structured in such a manner as to achieve the global settlement of all Tobacco Claims against Imperial, RBH and JTIM, which essentially comprise the legally compliant tobacco industry in Canada. All three CCAA Plans must be sanctioned by the CCAA Court and commence implementation at the same Effective Time in order to effect the global settlement.

[35] The CCAA Plans contemplate that Annual Contributions will be funded by the Net After-Tax Income generated from the Canadian operations of Imperial, RBH and JTIM. The Tobacco Companies will be maintained as viable going concerns in Canada, which receive ongoing intercompany operational support, in order to maximize their future ability to pay.

[36] The economic framework of the CCAA Plans is structured as follows: the Global Settlement Amount of $32.5 billion will be paid over a period estimated to be in the range of twenty years by (i) an upfront cash payment from each Tobacco Company calculated based upon its cash and cash equivalents generated from all sources by each Tobacco Company as at the month end prior to the Plan Implementation Date, less the aggregate sum of $750 million allocated to RBH to fund working capital, plus the Cash Security Deposits held as suretyship with the Registry of the Quebec Court of Appeal ("Upfront Contributions"); plus (ii) annual payments made by each Tobacco Company from its future earnings calculated using a Metric based upon its Net After-Tax Income ("Annual Contributions"); plus (iii) prescribed percentages of any Tax Refund Cash Payments, Annual Amounts and Carry Amounts (collectively, "Reserved Amounts") which will

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provide the Claimants with percentages of any tax attributes resulting from each Tobacco Company's deduction for income tax purposes of an Upfront Contribution, Annual Contribution or Reserved Amount that is available for carryforward or carryback to another taxation year.

(iii) Global Settlement Amount

[37] The Global Settlement Amount under the CCAA Plans is $32.5 billion which will be paid from the Tobacco Companies' cash on hand at CCAA Plan implementation as well as the future Net After-Tax Income that will be generated by the Tobacco Companies' operating businesses in Canada post CCAA Plan implementation. Since the Tobacco Companies do not have sufficient assets to pay the Global Settlement Amount in full on the Plan Implementation Date, the $32.5 billion will be paid by:

1. An Upfront Contribution from each Tobacco Company payable in full on or before the Plan Implementation Date, plus

2. Annual Contributions from each Tobacco Company calculated as percentages of Net After-Tax Income paid on or before the July 30th following each calendar year during the Contribution Period, plus

3. Periodic cash payments of prescribed percentages of any Reserved Amounts deposited into the Supplemental Trust Account by each Tobacco Company.

[38] The Annual Contributions will be based upon a prescribed percentage of each Tobacco Company's Net After-Tax Income calculated in accordance with the Metric. Since the quantum of the Tobacco Companies' future profits after the Plan Implementation Date is not presently determinable, the Contribution Period is not fixed. After the Plan Implementation Date, the Tobacco Companies are required to continue to pay the Annual Contributions and the percentages of the Reserved Amounts to be released from the Supplemental Trust Account to the Global Settlement Trust Account for distribution to the Claimants, until such time as the aggregate amount of the Contributions (inclusive of the Upfront Contributions, Annual Contributions and the Reserved Amounts released to the Global Settlement Trust Account) equals $32.5 billion. Upon payment of the Global Settlement Amount in full, the Tobacco Companies' obligations in respect of their CCAA Plans shall terminate.

(iv) Upfront Contributions

[39] The Upfront Contributions will be equal to the aggregate of:

1. Each Tobacco Company's cash and cash equivalents generated from all sources, excluding Alternative Products for the period commencing at each Tobacco Company's respective Filing Date to the month end prior to the Plan Implementation Date, plus

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2. The Cash Security Deposits deposited by Imperial and RBH in the Registry of the Quebec Court of Appeal as security for the payment of the *Blais* Judgment and the *Létourneau* Judgment, less

3. $750 million which shall be allocated to RBH to provide working capital.

[40] Since the commencement of the CCAA Proceedings in March, 2019, the Tobacco Companies have continued to carry on business and have been accumulating cash which will be included in the Upfront Contributions.

[41] Excluded from the CCAA Plans are Alternative Products which include e-cigarettes (vaping products), and nicotine pouches. In the CCAA Plans, an Alternative Product is formally defined to be: (i) any device that produces emissions in the form of an aerosol and is intended to be brought to the mouth for inhalation of the aerosol without burning of (a) a substance; or (b) a mixture of substances; (ii) any substance or mixture of substances, whether or not it contains tobacco or nicotine, that is intended for use with or without those devices to produce emissions in the form of an aerosol without burning; (iii) any non-combustible tobacco (other than smokeless tobacco) or nicotine delivery product; or (iv) any component, part or accessory of or used in connection with any such device or product referred to above.

[42] Imperial and RBH have Alternative Products Businesses in Canada, whereas JTIM does not. Any Alternative Product Claim against a Tobacco Company or any member of its Tobacco Company Group is an Unaffected Claim which is not released pursuant to the CCAA Plans. Cash generated from the Alternative Products Businesses of Imperial and RBH is excluded from the calculations of the Annual Contributions.

[43] Since the formula for calculating the Upfront Contributions includes each Tobacco Company's cash on hand as at the month end prior to the Plan Implementation Date, which will occur on an as yet undetermined date, the following calculation of the $12.456 billion amount of the Upfront Contributions is an estimate as at December 31, 2024 based upon five-year financial forecasts prepared by the Tobacco Companies in the Spring of 2024:

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All amounts in CAD, billions

Projected Upfront Contributions as at December 31, 2024:

JTIM:	1.581
IMPERIAL:	4.849
RBH:	5.792
IMPERIAL's Cash Security Deposit:	0.758
RBH's Cash Security Deposit:	0.226
Total:	13.206
Less: Working Capital	(0.750)
Projected Available Upfront Contributions:	**12.456**

(v) Annual Contributions

[44] Each Tobacco Company will make Annual Contributions based upon a prescribed percentage of its Net After-Tax Income that is to be calculated in accordance with the Metric, which is the method by which, on an annual basis, the applicable earnings of the operating business of each Tobacco Company will be determined, excluding the Alternative Products Businesses of Imperial and RBH.

[45] The Metric will **include**:

(a) Interest income; and

(b) The proceeds of any disposition of any assets, including capital assets and intangible assets.

[46] The Metric will **exclude**:

(a) One-time accounting adjustments that are non-operational in nature;

(b) One-time restructuring and global settlement related adjustments that are non-operational in nature (however, the Metric will not exclude cash expenses associated with CCAA Plan implementation including the Costs for the services of the CCAA Plan Administrators, the Claims Administrator in respect of the administration of the PCC Compensation Plan, the Administrative Coordinator and the PCC Representative Counsel);

(c) Interest expense to related parties; and

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(d) Any penalties and fines imposed by taxing and/or regulatory authorities.

[47] Each Tobacco Company will calculate the Annual Contributions which it must pay under its CCAA Plan by applying the percentages set out in Table 1 below to its Net After-Tax Income that it will independently determine using its own accounting practices.

Table 1

Years after Plan Implementation Date	Percentage of Net After-Tax Income ("NATI")
Years 1 - 5	85% of NATI
Years 6 - 10	80% of NATI
Years 11 - 15	75% of NATI
Year 16 and following until $32.5 billion has been paid in full	70% of NATI

[48] The Annual Contributions for Year 1 shall be adjusted to eliminate the portion of Year 1 that occurs prior to the Plan Implementation Date. The Annual Contributions for the final calendar year of the Contribution Period shall be pro-rated to ensure that the Global Settlement Amount of $32.5 billion is not exceeded.

[49] A Tobacco Company shall only be permitted to reduce the percentage of its Annual Contributions by the next 5% increment provided that it has made all of the payments of Annual Contributions due and owing for all prior years.

F. ALLOCATION OF GLOBAL SETTLEMENT AMOUNT

(i) Allocation of $32.5 Billion Global Settlement Amount

[50] The following Claimants participated in the mediation, unanimously voted to approve the CCAA Plans at the Meetings on December 12, 2024 and will be entitled to receive shares of the Global Settlement Amount:

1. Provinces and Territories;
2. Quebec Class Action Plaintiffs;
3. Pan-Canadian Claimants;
4. *Knight* Class Action Plaintiffs; and

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5. Tobacco Producers.

[51] The Global Settlement Amount will be allocated among the Claimants, the Cy-près Fund, the Miscellaneous Claims Fund and two cash reserves that will be established on the Plan Implementation Date as security for the payment of the Costs (both Costs outstanding as of the Plan Implementation Date and Costs incurred after the Plan Implementation Date) of the services provided by the Monitors, CCAA Plan Administrators, Court-Appointed Mediator, Claims Administrator, Administrative Coordinator and PCC Representative Counsel, as set out in Table 2 below:

Table 2

Amount Allocated from Global Settlement Amount	Amount in CAD, billions
Provinces and Territories Settlement Amount	24.725
QCAP Settlement Amount ($4.250 minus $0.131 allocated to Cy-près Foundation)	4.119
PCC Compensation Plan Amount	2.521
Cy-près Fund (inclusive of $0.131 QCAP Cy-près Contribution)	1.000
Tobacco Producers Settlement Amount	0.015
Knight Class Action Plaintiffs Settlement Amount	0.015
Miscellaneous Claims Amount (may be increased to $0.060 if the Tobacco Companies make an election pursuant to Section 18.2.1)	0.025
CCAA Plan Administration Reserve	0.075
PCC Compensation Plan Reserve	0.005
Global Settlement Amount	**32.500**

(ii) Allocation of Upfront Contributions

[52] Set out in Table 3 below is the projected allocation of the Upfront Contributions which are estimated to be $12.456 billion as of December 31, 2024:

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Table 3

Amount Allocated from Upfront Contributions	Amount in CAD, billions
Provinces and Territories	6.202
Quebec Class Action Plaintiffs	3.869
Pan-Canadian Claimants	1.750
Cy-près Foundation	0.500
Tobacco Producers	0.015
Knight Class Action Plaintiffs	0.015
Miscellaneous Claims Fund	0.025
CCAA Plan Administration Reserve	0.075
PCC Compensation Plan Reserve	0.005
Total Estimated Upfront Contributions	**12.456**

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(iii) Allocation Among Provinces and Territories

[53] The Provinces and Territories have agreed that the Provinces and Territories Settlement Amount will be apportioned among the Provinces and Territories in accordance with the percentages set out in Table 4 below:

Table 4

Province/Territory	Percentage Share of Provinces and Territories Settlement Amount
British Columbia	14.4710%
Alberta	12.6272%
Saskatchewan	2.8787%
Manitoba	4.5252%
Ontario	28.7761%

Province/Territory	Percentage Share of Provinces and Territories Settlement Amount
Québec	26.8248%
New Brunswick	2.4117%
Nova Scotia	3.1740%
Prince Edward Island	0.6605%
Newfoundland and Labrador	2.1471%
Yukon	0.3973%
Northwest Territories	0.7269%
Nunavut	0.3795%
Total:	100.0000%

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G. PARENT AND TOBACCO COMPANY GROUP SUPPORT THROUGH INTERCOMPANY SERVICES

[54] Imperial, RBH and JTIM each carries on business in Canada within a highly integrated, global Tobacco Company Group having an international Parent, based respectively in the U.K., the U.S. and Japan, and many Affiliates and direct or indirect Subsidiaries. Each Tobacco Company is dependent on Intercompany Transactions to buy and sell goods, services, licenses and intellectual property and allocate, collect and pay costs, expenses and other amounts from and to the members of its Tobacco Company Group.

[55] The agreement by the Tobacco Companies' respective Parents and relevant Affiliates to provide shared services and other operational support to the Tobacco Companies during the Contribution Period via the Intercompany Transactions is one part of the consideration for the full and final settlement and release of all Tobacco Claims against the Tobacco Company Groups of Imperial, RBH and JTIM.

[56] During the Contribution Period, each Tobacco Company's Parent and relevant Affiliates shall continue to provide the Tobacco Company and its Subsidiaries with Intercompany Services that are (a) consistent with existing arrangements or past practice, or as otherwise approved by the CCAA Plan Administrators, (b) in compliance with Applicable Law and subject to the Tobacco Company Group's transfer pricing policies across global markets, and (c) subject to normal course market adjustments. Any adjustments to Intercompany Services within the Tobacco Company Group shall not affect the Tobacco Company in a manner that is materially less favourable as

compared to the terms on which similar Intercompany Services are provided to any other members of the Tobacco Company Group.

(i) Payment Assurances for the Benefit of Provinces, Territories and Impacted Claimants

[57] The Tobacco Producers and *Knight* Class Action Plaintiffs will be paid their full shares of the Global Settlement Amount from the Upfront Contributions. The QCAPs, PCCs and Cy-près Foundation will be paid, in substantial part, from the Upfront Contributions with the balance of their full shares projected to be received after the end of Years 1, 2 and 5 respectively of the Contribution Period. The payment period for the Provinces and Territories will extend over the balance of the Contribution Period which, depending on the Tobacco Companies' future financial performance, could extend beyond twenty years.

[58] The CCAA Plans do not include any agreements whereby guarantors would provide guarantees for the Tobacco Companies' performance of their obligations to pay the Global Settlement Amount in full. The payment assurances provided for in the CCAA Plans are comprised of: (i) Contribution Security to be granted by all three Tobacco Companies; (ii) the JTIM Subordination Agreement; and (iii) certain restrictions on the Tobacco Companies' ability to transfer cash outside of Canada during the Contribution Period.

(ii) Contribution Security

[59] As a condition to the implementation of the CCAA Plans, at least ten Business Days prior to the Plan Implementation Date, each Tobacco Company is required to execute a Contribution Security Agreement granting security to a Collateral Agent (to be engaged prior to the Effective Time) for the exclusive benefit of the Claimants over all its present and after acquired assets, undertakings and properties to secure the Tobacco Company's obligation to pay the Annual Contributions and Reserved Amounts. Set out in Table 5 below are the forms of Contribution Security to be granted by each Tobacco Company based upon the nature of their assets and properties:

Table 5

Form of Contribution Security	Imperial	RBH	JTIM
Contribution Security Agreement	√	√	√
Deed of Immoveable Hypothec		√	√
Deed of Moveable Hypothec	√	√	√
Demand Debenture granting mortgage on real property		√	

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Form of Contribution Security	Imperial	RBH	JTIM
Subordination Agreement			√

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[60] The Contribution Security shall be subordinate to (i) any statutory deemed trusts; and (ii) any security granted by a Tobacco Company to any lender in connection with an operating facility, subject to certain limits.

[61] The Contribution Security shall only be enforceable upon the occurrence of an Event of Default which has not been cured. No exercise of remedies pursuant to the Contribution Security Agreement may occur without the approval of the CCAA Court which shall have exclusive jurisdiction to determine all matters relating to the enforcement of such agreement.

(iii) JTIM Subordination Agreement

[62] JTIM TM, which is a wholly owned subsidiary of JTIM, owns and licenses to JTIM trademarks used in JTIM's business under a trademark license agreement dated October 8, 1999, as amended from time to time. JTIM TM is also JTIM's largest secured creditor pursuant to ten secured convertible debentures.

[63] As a condition to the implementation of the CCAA Plans, at least ten Business Days prior to the Plan Implementation Date, JTIM TM is required to enter into the JTIM Subordination Agreement that subordinates JTIM TM's existing security over JTIM's assets, undertakings and properties to the Collateral Agent and defers the exercise of any rights and recourses by JTIM TM against JTIM and its property, until such time as the Global Settlement Amount has been paid in full. JTIM shall have the right to use the trademarks licensed under the trademark license agreement until the Global Settlement Amount has been paid in full.

[64] During the Contribution Period, before the Global Settlement Amount has been paid in full, JTIM shall be permitted to:

(a) Pay principal and interest (including default interest and fees) on its debentures owing to JTIM TM, and any arrears of royalty and license fees that accrued prior to the Effective Time, solely from JTIM's share of the Net After-Tax Income and any amounts released from the Supplemental Trust Account to JTIM that remain with JTIM, subject to the requirement that JTIM shall retain its cash, cash equivalents and investments in Canada until such time as the Annual Contributions and Reserved Amounts have been paid in respect of each fiscal year; and

(b) Pay from amounts generated from its ongoing operations, the royalties and license fees in respect of trademark license arrangements that are in place on the Plan Implementation Date (except during a Standstill Period that is described in Sections 8 and 9 of the JTIM Subordination Agreement).

(iv) Retention/Transfer of Cash outside of Canada

[65] Prior to filing for protection from their creditors under the CCAA in March, 2019, each Tobacco Company used their Intercompany Transactions as a mechanism to transfer cash generated from their Canadian operations out of Canada to other companies within their Tobacco Company Groups. To provide assurance to the Provinces, Territories and Impacted Claimants, in each year during the Contribution Period, each Tobacco Company will fulfill its obligations to pay its Annual Contribution and any Reserved Amount in full before transferring any cash to other companies within its Tobacco Company Group.

H. GLOBAL RELEASE AND SETTLEMENT OF CLAIMS

[66] Pursuant to the CCAA Plans Imperial, RBH and JTIM and all members of their Tobacco Company Groups will be released from all Tobacco Claims. Since the Tobacco Companies will be obligated to pay out 85%, declining in five-year increments to 70%, of their Net After-Tax Income over the protracted Contribution Period, they need comfort that, in exchange for such payments, the Release will include the domestic Tobacco Companies, their Parents and all of their affiliates to fully and finally settle the Tobacco Claims which have been brought, or may be brought, against them.

[67] The composite list of Claimants who will be bound by the Release includes: all Provinces and Territories; the Quebec Class Action Plaintiffs; the Pan-Canadian Claimants; the Tobacco Producers; and the *Knight* Class Action Plaintiffs. The development of the Pan-Canadian Claimants' Compensation Plan, the Cy-près Foundation and the Miscellaneous Claims Fund was the means for the Tobacco Companies to provide consideration for the release of Claims of the PCCs and any Miscellaneous Claimants, among others. In addition to the global Release, the Claimants will execute contractual releases in favour of each Tobacco Company to provide even greater certainty of the release of all Tobacco Claims and, in particular, any Section 5.1(2) and Section 19(2) Claims of the Claimants.

(i) Scope of Released Claims

[68] At the Effective Time, each of the Released Parties shall be fully, finally, irrevocably and unconditionally released and forever discharged of and from any and all Released Claims that any of the Releasors has ever had, now has, or may hereafter have against the Released Parties or any of them (either individually or with any other Person), whether or not based on conduct continuing after the Effective Time and whether or not presently known to any of the Releasors.

[69] The Released Parties include: the Tobacco Companies; members of their respective Tobacco Company Groups that were named as defendants in actions commenced in Canada; every other current or former Affiliate of any of the Tobacco Companies and their Tobacco Company Groups and each of their respective indemnitees; and the Canadian Tobacco Manufacturers' Council (a trade association of the Canadian tobacco industry that addresses smoking and health issues).

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[70] The Releasors include: the Provinces and Territories; Quebec Class Action Plaintiffs; Pan-Canadian Claimants; *Knight* Class Action Plaintiffs; Tobacco Producers; and every other Person having an Affected Claim or a Released Claim,

[71] The expansive and global scope of the Release is achieved through the release of all Tobacco Claims against the Released Parties. A Tobacco Claim is any Claim of any Person against a Tobacco Company, any member of its Tobacco Company Group, or any Director of any such companies, that has been, could have been or could be advanced, by a Person, or on behalf of a certified or proposed class, or by a Government (including the Provinces, Territories and Canada), to recover damages or any other remedy or costs in respect of the development, design, manufacture, production, marketing, advertising, distribution, purchase, sale or disposition of Tobacco Products, the use of or exposure (whether direct or indirect) to Tobacco Products or their emissions, the development of any disease related to the use of Tobacco Products, or any representation or omission in respect of Tobacco Products, including any misrepresentations, breach of duty or fraud in respect thereof by any member of the Tobacco Company Group or its Representatives in Canada or, in the case of the Tobacco Company, anywhere else in the world, in each case arising from any conduct, act or omission existing or taking place at or prior to the Effective Time (whether or not continuing thereafter) and including any Section 5.1(2) Claim or Section 19(2) Claim.

[72] The Tobacco Claims include any:

(a) **Provincial HCCR Claim** which is any Claim that has been, could have been or could be advanced in any of the actions commenced by the Provinces under the HCCR Legislation;

(b) **Territorial HCCR Claim** which is any Claim that has been, could have been or could be advanced in relation to the recovery of the present value of the Territories' total expenditures for past and future health care benefits provided for Insured Persons resulting from Tobacco-related Disease or the risk of Tobacco-related Disease;

(c) **QCAP Claim** which is any Claim that has been, could have been or could be advanced in the *Blais* Class Action and the *Létourneau* Class Action;

(d) **PCC Claim** which is any Claim of any Pan-Canadian Claimant that has been made or may in the future be made against any of the Released Parties, by a Person, or on behalf of a certified or proposed class, to recover damages or any other remedy in respect of the development, design, manufacture, production, marketing, advertising, distribution, purchase or sale of Tobacco Products, including any representations or omissions in respect thereof, the historical or ongoing use of or exposure (whether directly or indirectly) to Tobacco Products or their emissions and the development of any disease or condition as a result thereof, in each case arising from any conduct, act or omission, existing or taking place at or prior to the Effective Time (whether or not continuing

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thereafter) including all Claims that have been, could have been or could be advanced in seventeen actions listed in the CCAA Plans that were commenced in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia and Newfoundland and Labrador, by Individuals on their own account or under provincial class proceedings legislation. The PCC Claims will be settled by the provision of direct compensation under the PCC Compensation Plan as well as indirect benefits by virtue of the Cy-près Foundation;

(e) ***Knight* Claim** which is any Claim that has been, could have been or could be advanced in the certified *Knight* Class Action against Imperial alleging deceptive marketing of light and mild cigarettes; and

(f) **Tobacco Producers Claim** which is any Claim that has been, could have been or could be advanced in the three uncertified class actions commenced against each of the Tobacco Companies by the Ontario Flue-Cured Tobacco Growers' Marketing Board, and certain individual Tobacco Producers, who sold their tobacco through the Ontario Flue-Cured Tobacco Growers' Marketing Board pursuant to the annual Heads of Agreement made with Imperial, RBH and JTIM from January 1, 1986 to December 31, 1996.

[73] The Provinces' actions against the Tobacco Companies and members of their Tobacco Company Groups were brought pursuant to the HCCR Legislation enacted in each Province which, *inter alia*, provides that each Provincial Crown has a direct and distinct action against a manufacturer of Tobacco Products to recover the cost of health care benefits caused or contributed to by a tobacco related wrong. The Northwest Territories and Nunavut proclaimed HCCR Legislation which is not yet in force. Yukon has not enacted HCCR Legislation.

[74] The CCAA Plans provide assurance to the Tobacco Companies that the Provinces and Territories will not enact future legislation that will circumvent the global release. The issue to be addressed is that, notwithstanding the release of the Provinces' and Territories' tobacco-related health care costs claims, future governments in the Provinces and Territories might enact legislation similar to the HCCR Legislation to advance future Tobacco Claims. To address this concern, the CCAA Plans provide that the Released Parties and the Provinces and Territories recognize that a legislature's sovereign power to enact, amend and repeal legislation cannot be fettered. However, in the event that any legislation (including any regulations promulgated thereunder) similar or analogous to the HCCR Legislation may be enacted or amended by a Province or Territory at any time after the Effective Time, the Released Parties and the Provinces and Territories are *ad idem* that the enactment of such future legislation shall not render unenforceable or otherwise make ineffective any of the terms of the Claimant Contractual Releases or the CCAA Plans.

[75] In addition to Tobacco Claims, the Released Claims include any Claims:

(a) In respect of the assets, obligations, business or affairs of the Released Parties in Canada or, in the case of Imperial, RBH and JTIM, anywhere else in the

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world, relating to Tobacco Products, which are based on or arising from any conduct, act or omission, existing or taking place at or prior to the Effective Time (whether or not continuing thereafter);

(b) In respect of the CCAA Proceedings (and the Chapter 15 Proceedings of Imperial and JTIM (if commenced)) up to the Effective Time, provided that the Released Party is not determined by (i) a final order of the CCAA Court to have committed fraud in the CCAA Proceedings, or (ii) a final order of the US Bankruptcy Court to have committed fraud in the Chapter 15 Proceedings of Imperial or JTIM; and

(c) Existing at or prior to the Effective Time that have been, could have been or could be advanced in the CCAA Proceedings.

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[76] The CCAA Plans also provide comprehensive releases by all Persons, including the Released Parties, Releasors, Affected Creditors and Unaffected Creditors, of any claims that could be advanced against: (i) FTI, EY and Deloitte in their capacities as the Monitors and the CCAA Plan Administrators; (ii) FTI in its capacity as Foreign Representative in Imperial's Chapter 15 Proceeding; (iii) the Mediator; (iv) the Administrative Coordinator; and (v) the Chief Restructuring Officer ("CRO") for JTIM.

(ii) Injunctions

[77] The CCAA Plans give effect to comprehensive permanent injunctions that will forever bar the commencement of any proceeding in respect of all Affected Claims and all Released Claims against any of the Released Parties, the Monitors, the CCAA Plan Administrators, the Mediator, the Administrative Coordinator and the CRO and their respective Representatives.

(iii) Claimant Contractual Release

[78] In addition to the comprehensive terms of the Release set out in the CCAA Plans, the Claimants will execute contractual releases in favour of each Tobacco Company ("Claimant Contractual Releases"), for the purpose of providing even greater certainty with respect to the release of the Tobacco Claims and, in particular, any Section 5.1(2) and Section 19(2) Claims of the Claimants.

[79] The Released Claims are expressly defined to include any Section 5.1(2) Claim and any Section 19(2) Claim. At the Meetings of Eligible Voting Creditors held in each CCAA Proceeding on December 12, 2024, the Claimants voted unanimously to approve the CCAA Plans of Imperial, RBH and JTIM.

[80] In order to provide certainty with respect to the release of any Section 5.1(2) and Section 19(2) Claims, the Claimants will execute Claimant Contractual Releases in favour of the Released Parties, the Monitors, the CCAA Plan Administrators, the Mediator and the Administrative Coordinator, and their respective Representatives, that shall take effect as at the Effective Time.

The Claimant Contractual Releases include express releases of any Section 5.1(2) Claim and any Section 19(2) Claim.

[81] Each Tobacco Company shall also execute the Claimant Contractual Releases in order to give effect to their releases of the Monitors, the CCAA Plan Administrators, the Mediator and the Administrative Coordinator, and their respective Representatives.

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(iv) Unaffected Claims

[82] The principal purpose of the CCAA Plans is the settlement of the Tobacco Claims. Accordingly, liabilities of the Tobacco Companies other than the Tobacco Claims are largely unaffected. The Unaffected Claims that will not be compromised and released pursuant to the CCAA Plans include:

(a) Any Alternative Product Claim;

(b) Any Cash Management Bank Claim;

(c) Any Employee Priority Claim;

(d) Any Governmental Priority Claim;

(e) Any Claims in respect of CCAA Plan Administration Reserve Costs and the PCC Compensation Plan Reserve Costs;

(f) Any Secured Claim that is not a Tobacco Claim**,** including the Secured Claim by JTIM TM against JTIM but provided that the JTIM TM Secured Claim shall be subordinated as described in Article 5, Section 5.14 in JTIM's CCAA Plan;

(g) Any Claim by any Director under any directors' or officers' indemnity policy or agreement with a Tobacco Company to the extent not otherwise covered by the CCAA Charges;

(h) Any Intercompany Services Claim;

(i) Any Intercompany Claim, subject to the terms of Article 5, Section 5.15 in the CCAA Plans of Imperial and RBH, and Section 5.16 in JTIM's CCAA Plan;

(j) Any Claim by a supplier against a Tobacco Company for the supply of goods or services other than a Tobacco Claim;

(k) Any Claim against a Tobacco Company relating to environmental remediation pursuant to Applicable Law;

(l) Any Claim by any Person under any contract with a Tobacco Company that has not been disclaimed and which Claim is not a Tobacco Claim;

(m) Any Claim by Canada or any Province or Territory against any Released Party relating in any manner to:

i. Except as otherwise contemplated in Imperial's CCAA Plan, any applicable Taxes of any kind whatsoever applicable to any Released Party, and

ii. Such Released Party's compliance with any Applicable Law and statutes and the regulations made thereunder, except for liability for actions or omissions occurring prior to the Effective Time in respect of a Tobacco Claim; and

(n) Any Claim in respect of Imperial's obligation to pay the balance owed under the Comprehensive Agreement dated July 31, 2008 between Imperial, Canada and the Provinces which settled the claims by Canada and the Provinces against Imperial regarding the trade of contraband products in Canada and related tax collection matters.

(v) Consideration Provided by Tobacco Companies and Tobacco Company Groups for Release

[83] The consideration for the Release to be provided to the Tobacco Companies and, as applicable, certain members of their Tobacco Company Groups, includes:

(a) The Tobacco Companies' payment of the Upfront Contributions and promise to pay the Annual Contributions and Reserved Amounts to the Global Settlement Trust Account and Supplemental Trust Account until the aggregate $32.5 billion Global Settlement Amount is paid in full;

(b) The agreement of each Tobacco Company's Parent and relevant Affiliates to provide shared services and other operational support to the Tobacco Companies;

(c) The other promises and commitments made by the Released Parties, or any of them as applicable, in the Definitive Documents;

(d) The QCAP Settlement Amount ($4.250 billion minus $131.0 million allocated to the Cy-près Foundation) is the consideration for the full and final settlement and satisfaction of the *Blais* Judgment;

(e) The QCAP Cy-près Contribution in the amount of $131.0 million is the consideration for the full and final settlement and satisfaction of the *Létourneau* Judgment;

(f) The $2.521 billion funding of the PCC Compensation Plan is the consideration for the full and final settlement and release of all PCC Claims;

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(g) The $1.0 billion Cy-près Fund will provide consideration for the full and final settlement and release of all claims and potential claims of PCCs who are not receiving direct compensation payments from the PCC Compensation Plan, and *Létourneau* Class Members who are not receiving direct compensation payments from the Quebec Administration Plan, but will be indirectly benefited by falling within the scope of the Cy-près Foundation;

(h) Consideration for the settlement of the *Knight* Class Action shall be a contribution to the Cy-près Fund and the payment of the *Knight* Class Counsel Fee;

(i) The $15.0 million consideration for the settlement of the Tobacco Producers' Actions shall be paid to the Ontario Flue-Cured Tobacco Growers' Marketing Board for the benefit of the Tobacco Producers; and

(j) The Miscellaneous Claims Fund which is described in the following section.

(vi) Miscellaneous Claims Fund

[84] The Miscellaneous Claims Fund was created in order to provide even greater certainty that the CCAA Plans will provide a comprehensive and effective release of all Tobacco Claims. In order to identify any Person, other than a Claimant or an Individual Claimant, who might have a potential Tobacco Claim that has not been ascertained or asserted, the CCAA Plans include a mechanism for such Putative Miscellaneous Claimant to assert, with leave of the CCAA Court, a Miscellaneous Claim against the Miscellaneous Claims Fund. No Claimant or Individual Claimant may assert a Miscellaneous Claim. The existence of any Miscellaneous Claims is not admitted by the Tobacco Companies and is expressly denied.

[85] The Miscellaneous Claims Fund shall be in the amount of $25.0 million to be paid from the Upfront Contributions. The Tobacco Companies may unanimously elect to increase the Miscellaneous Claims Amount from $25.0 million to $60.0 million provided that: (a) the $35.0 million top-up shall be paid by the Tobacco Companies on top of the $32.5 billion Global Settlement Amount; (b) the Tobacco Companies are in unanimous agreement regarding how they shall apportion payment of the $35.0 million among themselves and the source of the top-up funds; and (c) the sourcing of the additional sum of $35.0 million shall not affect the amount nor the timing of the payments of the Upfront Contributions and the Global Settlement Amount.

[86] A Putative Miscellaneous Claimant is required to seek leave from the CCAA Court to commence a proceeding relating to a Miscellaneous Claim.

[87] All Putative Miscellaneous Claimants shall only have recourse to the Miscellaneous Claims Fund, and any judgments or awards made, or other amounts ordered to be paid in regard to Miscellaneous Claims shall be paid solely from the Miscellaneous Claims Fund.

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I. SETTLEMENT OF CLAIMS BY INDIVIDUALS RESIDENT IN CANADA WHO SUFFERED TOBACCO-RELATED HARMS

[88] There are three components to the consideration provided by the CCAA Plans which together constitute a complete package of benefits to settle the claims of Tobacco-Victims who suffer or suffered harm from a Tobacco-related Disease as a result of the use of or exposure to a Tobacco Product sold by Imperial, RBH and JTIM in Canada:

1. **Quebec Class Action Administration Plan -** Pursuant to the *Blais* Judgment, Tobacco-Victims who reside in Quebec, were diagnosed with Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV) and fulfill the other required eligibility criteria set out in the certified class definition (regarding amount of cigarettes smoked, period of time during which smoking took place, and date of diagnosis), will be able to submit claims for payment of direct compensation through the Quebec Class Action Administration Plan ("Quebec Administration Plan");

2. **Pan-Canadian Claimants' Compensation Plan -** The PCC Compensation Plan is the counterpart to the Quebec Administration Plan that will provide direct compensation payments to Tobacco-Victims residing in the Provinces and Territories, except those Quebec residents covered by the *Blais* Judgment. To achieve parity as much as possible across Canada, the eligibility criteria under the PCC Compensation Plan tracks the eligibility criteria for the Quebec Administration Plan, in that the Tobacco-Victims must have been diagnosed with Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV) and must have smoked the same amount of cigarettes (Twelve Pack-Years) during the same period of time (January 1, 1950 to November 20, 1998). The date of diagnosis and the date upon which the Tobacco-Victim must have been alive differ between the two plans due to the differences in the timing of the commencement of the Quebec Class Actions and the commencement of the CCAA Proceedings. The amounts of compensation payable to eligible Tobacco-Victims under the PCC Compensation Plan are discounted 40% from the amounts payable to Tobacco-Victims under the Quebec Administration Plan to take into account the applicable law on causation in Quebec versus the common law jurisdictions, the status of the Quebec Class Action Judgments and litigation risk for the PCCs; and

3. **Cy-près Fund administered by Cy-près Foundation -** Any Tobacco-Victim residing in any Province or Territory who does not meet the eligibility criteria to receive a direct compensation payment under either the Quebec Administration Plan or the PCC Compensation Plan will receive indirect benefits through the research, programs and initiatives focused on improving outcomes in Tobacco-related Diseases that will be funded by grants from the Cy-près Fund.

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[89] The package of benefits provided by the Quebec Administration Plan, PCC Compensation Plan and Cy-près Fund will redress the tobacco-related harms suffered by all Tobacco-Victims in Canada. The Quebec Administration Plan and PCC Compensation Plan will enable eligible Tobacco-Victims to access benefits using claims processes that are innovative and unique in that:

(a) In assessing whether a claim meets the eligibility criteria under either plan, presumptive causation is inferred for Tobacco-Victims who prove a diagnosis of Lung Cancer, Throat Cancer or Emphysema/COPD (GOLD Grade III or IV);

(b) Both plans will have an agent (Raymond Chabot for the Quebec Administration Plan and Epiq for the PCC Compensation Plan) which will assist Tobacco-Victims to complete and submit their claim forms to the Claims Administrator, so that they will not need to retain a lawyer for this purpose; and

(c) Tobacco-Victims will not be required to find a physician to complete a form regarding their diagnosis, unless proof of diagnosis cannot be obtained through the provision of a medical test report which proves the diagnosis and date of diagnosis.

[90] The important features of each of the Quebec Administration Plan, PCC Compensation Plan and Cy-près Foundation are described in more detail in the sections that follow.

J. SETTLEMENT OF QUEBEC CLASS ACTION JUDGMENTS AND QUEBEC CLASS ACTION ADMINISTRATION PLAN

(i) Settlement and Satisfaction of Blais Judgment and Létourneau Judgment

[91] In 1998, the *Blais* Class Action and the *Létourneau* Class Action were commenced against Imperial, RBH and JTIM in the Quebec Superior Court. Both proceedings were certified as class actions on February 21, 2005.

[92] On May 27, 2015 (as rectified on June 9, 2015), the Honourable Justice Brian Riordan of the Quebec Superior Court granted judgment against Imperial, RBH and JTIM in both class actions.

[93] On October 27, 2015, the Quebec Court of Appeal ordered Imperial to deposit the sum of $758 million and RBH to deposit the sum of $226 million with the Registry of the Quebec Court of Appeal in quarterly instalments as suretyship in respect of payment of the *Blais* Judgment and the *Létourneau* Judgment. These monies totalling $984 million comprise the Cash Security Deposits which are included in the Upfront Contributions.

[94] On March 1, 2019, the Quebec Court of Appeal upheld the trial judgment in every respect other than to vary the dates from which interest and the additional indemnity are to be calculated. The judgment awarded to the QCAPs in the *Blais* Class Action and the *Létourneau* Class Action totals $13,699,504,730 inclusive of interest calculated to March 8, 2019.

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[95] On March 8, 12 and 22, 2019 respectively, JTIM, Imperial and RBH filed for protection from their creditors under the CCAA because they did not have sufficient funds to satisfy the *Blais* Judgment and *Létourneau* Judgment. The CCAA Court recognized that the Quebec Court of Appeal judgment was the singular event that gave rise to the CCAA Proceedings.

[96] The QCAP Settlement Amount ($4.250 billion including $131.0 million allocated to the Cy-près Foundation) is the consideration for the full and final settlement and satisfaction of the *Blais* Judgment and the *Létourneau* Judgment.

[97] The purpose of the Quebec Administration Plan is to effect the distribution of the compensation ordered in the *Blais* Judgment, as compromised in accordance with the CCAA Plans, to be paid to eligible persons resident in Quebec who are suffering from at least one of three Tobacco-related Diseases caused by smoking cigarettes sold in Canada by Imperial, RBH and JTIM.

(ii) Blais Eligibility Criteria

[98] The Quebec Administration Plan will provide direct compensation in the form of monetary payments to QCAPs who meet all of the following *Blais* Eligibility Criteria to qualify as *Blais* Class Members pursuant to the *Blais* Judgment:

> (a) On the date that a Tobacco-Victim Claimant or Succession Claimant submits their Proof of Claim:
>
> (i) If the Tobacco-Victim Claimant is alive, they must reside in Quebec, or
>
> (ii) If the Tobacco-Victim Claimant is deceased, they must have resided in Quebec on the date of their death;
>
> (b) The Tobacco-Victim Claimant was alive on November 20, 1998;
>
> (c) Between January 1, 1950 and November 20, 1998, the Tobacco-Victim Claimant smoked a minimum of Twelve Pack-Years of cigarettes sold by the Tobacco Companies:
>
> Twelve Pack-Years of cigarettes is the equivalent of 87,600 cigarettes which is calculated as any combination of the number of cigarettes smoked in a day multiplied by the number of days of consumption. For example, Twelve Pack-Years equals:
>
> 10 cigarettes smoked per day for 24 years (10 x 365 x 24) = 87,600 cigarettes, or
>
> 20 cigarettes smoked per day for 12 years (20 x 365 x 12) = 87,600 cigarettes, or

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30 cigarettes smoked per day for 8 years (30 x 365 x 8) = 87,600 cigarettes;

(d) Before March 12, 2012, the Tobacco-Victim Claimant was diagnosed with:

i. Lung Cancer, or

ii. Throat Cancer, or

iii. Emphysema/COPD (GOLD Grade III or IV) (collectively, the "*Blais* Compensable Diseases"); and

(e) On the date of the diagnosis with a *Blais* Compensable Disease the Tobacco-Victim Claimant resided in Quebec.

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[99] Pursuant to the *Blais* Judgment, the Heirs of Tobacco-Victims who died *prior to or on* November 20, 1998 are not eligible to receive a Compensation Payment from the Quebec Administration Plan. The Heirs of Tobacco-Victims who died *after* November 20, 1998 may qualify to receive a Compensation Payment through a Succession Claim made under the Quebec Administration Plan.

[100] The Quebec Administration Plan and PCC Compensation Plan both set out harmonization principles that direct the Claims Administrator to ensure that a resident of Quebec is not paid a Compensation Payment under the Quebec Administration Plan pursuant to the *Blais* Judgment as well as an Individual Payment from the PCC Compensation Plan. An individual resident in Quebec is only permitted to make one claim for compensation either as a *Blais* Class Member under the Quebec Administration Plan or as a PCC-Claimant under the PCC Compensation Plan. A Quebec resident is not permitted to make a claim to both claims processes.

(iii) Amount of Compensation Payments to Eligible Blais Class Members

[101] Table 6 below summarizes the compensation available to Eligible *Blais* Class Members under the Quebec Administration Plan:

Table 6

Quebec Class Action Administration Plan		
Column 1 **Compensable Disease**	**Compensation Payment** (or such lesser amount as may be determined by the Claims Administrator to be available for the subclass of claimants; quantum will vary based upon the actual take-up rate and other factors and shall not exceed the maximum amounts specified in this table)	
	Column 2	**Column 3**

	Compensation Payment for Eligible *Blais* Class Members who started to smoke before January 1, 1976	Compensation Payment for Eligible *Blais* Class Members who started to smoke on or after January 1, 1976 (80% of Column 2)
Lung Cancer	$100,000	$80,000
Throat Cancer	$100,000	$80,000
Emphysema/COPD (GOLD Grade III or IV)	$30,000	$24,000

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(iv) Proof of Eligibility for Compensation Payments

[102] The Quebec Administration Plan was designed with the specific intention that Tobacco-Victim Claimants and Succession Claimants will be able to complete and submit the claims forms without retaining the services of either their own third-party lawyer or any non-lawyer who may offer form completion, form submission or other related services.

K. PAN-CANADIAN CLAIMANTS' COMPENSATION PLAN

(i) Rationale for Inclusion of PCC Compensation Plan in CCAA Plans

[103] When JTIM filed for protection from its creditors under the CCAA on March 8, 2019, litigation had already been commenced in Canada against the Tobacco Companies and the Tobacco Company Groups by or on behalf of individuals in Canada in the following three broad claimant groups: the QCAPs in Quebec; *Knight* Class Action Plaintiffs in British Columbia; and claimants who fall within the uncertified proposed class definitions in seven actions commenced under class proceedings legislation in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Nova Scotia.

[104] As at March 8, 2019, the scope of the claims pleaded in the actions pending against the Tobacco Companies and the Tobacco Company Groups did not cover all claims or potential claims which could be advanced against these entities by individuals resident in Canada. There were individuals resident in all Provinces and Territories who may have had claims or potential claims which were not included in the three broad claimant groups described above and were unascertained and unquantifiable. Significantly, this group of individuals was unrepresented by counsel and may have been unaware of the existence of the CCAA proceedings and that their rights may be affected and their claims may be compromised in the CCAA Plans.

[105] The PCC Compensation Plan and the Cy-près Foundation together are the consideration provided for in the CCAA Plans to settle and fully and finally release all claims and potential claims against Imperial, RBH and JTIM and their respective Tobacco Company Groups in Canada by the Pan-Canadian Claimants who are defined to be all Individuals resident in the Provinces and

Territories, excluding the QCAPs, who have either advanced or may be entitled to advance a Tobacco Claim. The PCC Compensation Plan and the Cy-près Foundation are critically important to the global settlement of the Tobacco Claims because, together, they identify those persons who will be bound by the settlement of the PCC Claims in accordance with the terms of the CCAA Plans.

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[106] The development of the PCC Eligibility Criteria was informed by the following:

1. The Breach Period (January 1, 1950 and November 20, 1998) and Critical Tobacco Dose (PCCs smoked a minimum of twelve pack-years of cigarettes) are the same as those approved by the Quebec Courts in the *Blais* Judgment;

2. The PCC Claims Period (March 8, 2015 and March 8, 2019 inclusive of those dates) was informed by an analysis of the limitations law applicable in each Province and Territory, as well as relevant historical background and the desire to achieve parity among the PCCs residing in all the Provinces and Territories by choosing a uniform four-year limitation period for all jurisdictions;

3. The PCC Compensable Diseases are the same as those approved by the Quebec Courts in the *Blais* Class Action with the diagnoses of Emphysema and COPD (GOLD Grade III or IV) being treated as sufficiently equivalent; and

4. Expert epidemiological evidence from Dr. Prabhat Jha was used to (i) define which Tobacco-related Diseases will qualify for compensation under the PCC Compensation Plan, and (ii) quantify the estimated number of PCCs who may qualify to receive compensation under the PCC Compensation Plan.

(ii) PCC Eligibility Criteria

[107] To be eligible to receive compensation under the PCC Compensation Plan, each PCC-Claimant must meet all of the following PCC Eligibility Criteria:

(a) On the date that a PCC-Claimant submits their Claim Package:

   i. If the PCC-Claimant is alive, they must reside in a Province or Territory in Canada, or

   ii. If the PCC-Claimant is deceased, they must have resided in a Province or Territory in Canada on the date of their death;

(b) The PCC-Claimant was alive on March 8, 2019;

(c) Between January 1, 1950 and November 20, 1998, the PCC-Claimant smoked a minimum of Twelve Pack-Years of cigarettes sold by the Tobacco Companies:

Twelve Pack-Years of cigarettes is the equivalent of 87,600 cigarettes which is calculated as any combination of the number of cigarettes smoked in a day multiplied by the number of days of consumption. For example, Twelve Pack-Years equals:

10 cigarettes smoked per day for 24 years (10 x 365 x 24) = 87,600 cigarettes, or

20 cigarettes smoked per day for 12 years (20 x 365 x 12) = 87,600 cigarettes, or

30 cigarettes smoked per day for 8 years (30 x 365 x 8) = 87,600 cigarettes.

(d) Between March 8, 2015 and March 8, 2019 (inclusive of those dates), the PCC-Claimant was diagnosed with:

i. Lung Cancer, or

ii. Throat Cancer, or

iii. Emphysema/COPD (GOLD Grade III or IV) (collectively, the "PCC Compensable Diseases"); and

(e) On the date of the diagnosis with a PCC Compensable Disease the PCC-Claimant resided in a Province or Territory in Canada.

(iii) Amount of Compensation Payments to Eligible Pan-Canadian Claimants

[108] Table 7 below summarizes the compensation available to Eligible Pan-Canadian Claimants under the PCC Compensation Plan:

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Table 7

PCC Compensation Plan		
Column 1 **PCC Compensable Disease**	**Individual Payment** (or such lesser amount as may be determined by the Claims Administrator to be available for the subclass of claimants; quantum will vary based upon the actual take-up rate and other factors and shall not exceed the maximum amounts specified in this table)	
	Column 2 **Compensation for PCCs who started to smoke before January 1, 1976** **(60% of damages awarded to Quebec Class Action Plaintiffs)**	**Column 3** **Compensation for PCCs who started smoking on or after January 1, 1976** **(80% of Column 2)**
Lung Cancer	$60,000	$48,000
Throat Cancer	$60,000	$48,000
Emphysema/COPD (GOLD Grade III or IV)	$18,000	$14,400

[109] An Individual who meets all the PCC Eligibility Criteria shall be paid for the single PCC Compensable Disease with which they have been diagnosed that will provide them with the highest amount of compensation from the PCC Compensation Plan. No "double recovery" or overlapping recovery will be permitted if a PCC-Claimant has been diagnosed with more than one PCC Compensable Disease.

L. SUPERVISION, OVERSIGHT AND ADMINISTRATION OF THE QUEBEC ADMINISTRATION PLAN AND THE PCC COMPENSATION PLAN

[110] The CCAA Court shall have an ongoing supervisory role in respect of the administration of the CCAA Plans which include the Quebec Administration Plan and the PCC Compensation Plan.

[111] Matters relating to the ongoing supervision of the Quebec Administration Plan, including any changes to the terms thereof, shall be heard and determined jointly by the CCAA Court and the Quebec Superior Court. In performing this function, the CCAA Court and the Quebec Superior Court may communicate with one another in accordance with a protocol to be worked out and

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established by them. Matters relating to the ongoing supervision of the PCC Compensation Plan, including any changes to the terms thereof, shall be heard and determined solely by the CCAA Court.

[112] At the Sanction Hearing, the Court was asked to approve:

(a) The terms of the Quebec Administration Plan and the PCC Compensation Plan;

(b) The appointment of Epiq Class Actions Services Canada, Inc. as the Claims Administrator to administer both the Quebec Administration Plan and the PCC Compensation Plan; and

(c) The appointment of Daniel Shapiro, K.C. to serve as the Administrative Coordinator who will coordinate and serve as a liaison and conduit to facilitate the flow of information between the Claims Administrator and the CCAA Plan Administrators in regard to both the Quebec Administration Plan and the PCC Compensation Plan.

M. CY-PRÈS FOUNDATION

(i) Rationale for Inclusion of Cy-près Foundation in CCAA Plans

[113] The Tobacco Companies will fund $1.0 billion to establish the Cy-près Fund that will be administered by a public charitable foundation. The Cy-près Fund is intended to serve the interests of the PCCs and *Létourneau* Class Members by providing them with indirect benefits as an approximation of remedial compensation for those PCCs not eligible to receive direct compensation from the PCC Compensation Plan and *Létourneau* Class Members who are not eligible to receive compensation under the Quebec Administration Plan.

[114] The Cy-près Fund is an essential component of the global settlement of the Tobacco Claims in Canada. In respect of PCCs who are not eligible to receive direct compensation under the PCC Compensation Plan there is a high probability that their claims would not succeed against the Tobacco Companies for several reasons including: (i) their claims are likely statute-barred or subject to the defence of laches; and (ii) they were diagnosed with Tobacco-related Diseases which fall below the threshold to identify diseases which were presumptively caused by smoking the Tobacco Companies' cigarettes, such that they would be required to prove entitlement to direct compensation by establishing medical causation and legal causation in an individual trial. Such PCCs do not have a legal entitlement in the form of a judgment, membership in a class in a certified class action, or an individual claim that has a high probability of success, or any other practicable means to recover direct compensation for Tobacco-related Diseases caused by smoking the Tobacco Companies' cigarettes.

[115] The establishment of the Cy-près Fund is consistent with the class action legislation and case law developed in Canada to make provision for indirect prospective benefits to a class of persons for whom direct compensation is impracticable, and who would not otherwise receive monetary relief.

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[116] The Cy-près Fund will provide consideration for the full and final settlement and release of all claims and potential claims of PCCs who are not receiving direct compensation payments from the PCC Compensation Plan, and *Létourneau* Class Members who are not receiving direct compensation payments from the Quebec Administration Plan but will be indirectly benefited by falling within the scope of the Foundation. This broad group of claimants includes the following persons and any affected family members or estates:

1. Smokers suffering from lung or throat cancer or Emphysema/COPD (Gold Grade III or IV) who are outside the claims period or who smoked less than the requisite twelve pack years or, in the case of Emphysema/COPD, were not classified as Gold Grade III or IV or the equivalent;

2. Smokers who have tobacco-related harms other than Lung Cancer or Throat Cancer and Emphysema/COPD (Gold Grade III or IV) or the equivalent; and

3. Persons who smoke or have smoked Tobacco Products who have not yet or may never develop a tobacco-related harm.

[117] The Cy-près Fund will provide indirect benefits to the PCCs that are rationally connected to Tobacco-related Diseases and the varying circumstances of the diverse group of PCCs and *Létourneau* Class Members covered by the Cy-près Fund.

(ii) Purpose of Cy-près Foundation

[118] The Cy-près Foundation's purpose is to fund research, programs and initiatives focused on improving outcomes in Tobacco-related Diseases. The Cy-près Foundation will indirectly benefit users of Tobacco Products and their affected family members or estates who are not directly compensated through the Quebec Administration Plan or PCC Compensation Plan.

[119] The Cy-près Foundation will fund research, programs and initiatives regarding tobacco-related cancers, Emphysema/COPD and other illnesses and conditions which are reasonably and rationally connected to tobacco-related harms. The research, programs and initiatives that are funded by the Cy-près Foundation will achieve earlier diagnosis, better treatment and improved outcomes for Persons suffering from these diseases.

(iii) Establishment and Administration of Cy-près Foundation

[120] The establishment of the Cy-près Foundation will take place in two phases: the first occurring at the Sanction Hearing, and the second occurring at the hearing for the final approval by the CCAA Court of the Cy-près Foundation, so as to permit the finalization of the administrative aspects of the Cy-près Foundation.

[121] The Foundation Board shall establish a secretariat and direct its activities to facilitate the effective and efficient governance, administration and operation of the Cy-près Foundation which will include the solicitation, receipt, review and evaluation of the merits of proposals submitted by

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individuals and organizations seeking distributions from the Cy-près Fund. The Foundation Board shall establish the criteria, reflective of the mission of the Cy-près Foundation, for applicants to qualify to receive distributions from the Cy-près Fund. The Foundation Board shall publish requests for proposals soliciting the submission of proposals from interested individuals and organizations seeking financing and support for research, programs and initiatives which fall within the scope of the mission of the Cy-près Foundation. Following a peer review process, proposals accepted by the Foundation Board will be submitted to the CCAA Plan Administrators for their review. If accepted by the CCAA Plan Administrators, they will submit them to the CCAA Court for approval.

(iv) Oversight of Cy-près Foundation

[122] The CCAA Court is responsible for the ultimate supervision of the Cy-près Foundation. The CCAA Plan Administrators will be the overseers of the Cy-près Foundation and will function as the intermediaries relative to the supervisory role of the CCAA Court. In this capacity, the CCAA Plan Administrators will gather the data and information concerning the Cy-près Foundation that will be of significance to the CCAA Court when it approves various functions of the Cy-près Foundation as it will be required to do from time to time. The CCAA Plan Administrators will report to the CCAA Court regarding the activities of the Cy-près Foundation annually, or more frequently as they deem necessary.

(v) Term of Operation of Cy-près Foundation

[123] The Cy-près Foundation shall not be dissolved, nor shall its work be terminated until such time as specified by the CCAA Court.

N. DISPOSITION OF PENDING PROCEEDINGS

[124] The principal purpose of the CCAA Plans is that they will bring finality to thirty years of litigation in Canada against the Tobacco Companies and members of their Tobacco Company Groups. To achieve this objective, as soon as possible after the Plan Implementation Date:

1. the Parties shall take all steps necessary to dismiss with prejudice and without costs all Pending Litigation against the Tobacco Companies, certain members of their respective Tobacco Company Groups, and the Canadian Tobacco Manufacturers' Council; and

2. the Tobacco Companies and the QCAPs shall take all steps and actions necessary to dismiss with prejudice and without costs any leave applications or appeals from the judgments in the Quebec Class Actions or any related motions pending in the Quebec Superior Court, the Court of Appeal of Quebec and/or the Supreme Court of Canada. After the QCAP Claims Process has ended and the Eligible *Blais* Class Members have been paid their Compensation Payments, the Tobacco Companies and the QCAPs shall consent to motions seeking the Closing Judgment to be brought in the Quebec Superior Court by

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the Quebec Class Counsel in the *Blais* Class Action and the *Létourneau* Class Action.

O. POSITION OF THE PARTIES

[125] The parties made submissions over three days – January 29 – 31, 2025. It was apparent that the Tobacco Companies had differing views of the Plan.

[126] There was a consensus among the Tobacco Companies with respect to the total compensation to be paid - $32.5 billion – over an extended period of time.

[127] The Tobacco Companies had failed to reach an agreement as to how the $750 million working capital holdback was to be allocated amongst themselves.

[128] The dispute has now been resolved. Subsequent to the hearing, the Tobacco Companies reached an agreement that the $750 million working capital holdback was to be allocated 100% to RBH.

[129] This agreement is reflected in the Plan Amendment Order which was granted on March 3, 2025.

[130] As a result of the Plan Amendment Order, the CCAA Plans now have the support of all three Tobacco Companies and their respective Monitors. The consideration being paid to Claimants remains unchanged and the payment schedule remains unaltered.

[131] The following parties are supportive of the CCAA Plan, as amended, being sanctioned:

(a) JTIM;

(b) JTIM TM;

(c) Imperial;

(d) RBH;

(e) Deloitte, Monitor of JTIM;

(f) FTI, Monitor of Imperial;

(g) E&Y, Monitor of RBH;

(h) QCAPs;

(i) PCCs;

(j) *Knight*;

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(k) Tobacco Producers;

(l) British Columbia;

(m) Alberta;

(n) Saskatchewan;

(o) Manitoba;

(p) Ontario;

(q) Quebec;

(r) New Brunswick;

(s) Nova Scotia;

(t) Prince Edward Island;

(u) Newfoundland and Labrador;

(v) Yukon Territory;

(w) North-West Territories; and

(x) Nunavut Territory.

(i) Heart and Stroke Foundation of Canada and Canadian Cancer Society

[132] Two organizations expressed opposition to the CCAA Plans in their current form. The organizations are the Heart and Stroke Foundation of Canada ("HSF") and the Canadian Cancer Society ("CCS").

[133] HSF and CCS raised concerns with respect to the following:

(a) The structure of the Cy-près Foundation; and

(b) The scope of the Release.

[134] It is of fundamental importance to note that neither HSF nor CCS is an Affected Creditor or Unaffected Creditor of the Tobacco Companies. HSF and CCS are "social stakeholders" in these proceedings.

[135] HSF submits that an essential flaw in the CCAA Plans rests in the mandate of the $1 billion Cy-près Foundation.

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[136] HSF complains that, in its current form, the Cy-près Foundation has a narrow mandate to only fund research programs and initiatives focused on improving outcomes in tobacco-related diseases. As such, the CCAA Plans and the Cy-près Foundation do not address the legitimate interests of millions of individuals who will suffer harm from the future use of tobacco products (the "FTH Stakeholders").

[137] HSF further submits that the FTH Stakeholders interests, and those of the Canadian public more broadly, require the inclusion of tobacco prevention and reduction measures, including smoking cessation and public awareness.

[138] HSF points out that the Foundation is currently precluded from funding initiatives and programs related to tobacco use prevention and reduction.

[139] HSF submits that the CCAA Plans should not be sanctioned unless and until the CCAA Plans are amended to include prevention and reduction measures within the mandate of the Cy-près Foundation.

[140] It was acknowledged by HSF that the FTH Stakeholders do not have claims in these CCAA proceedings because, they did not use tobacco products and/or suffer harm before the CCAA proceedings began. However, HSF submits that the potential future claims for the harm places FTH Stakeholders in a position where they will be deeply impacted by the CCAA Plans.

[141] HSF also voiced complaints with the scope of the releases. HSF submits that while the releases are anchored to wrongs committed by the Tobacco Companies that occurred before the effective time, they capture future claims "that could be advanced", whether "directly or indirectly", on a "continuing" basis.

[142] HSF also submits that the October 31, 2024 amendment to the Representation Counsel Order was prejudicial to FTH Stakeholders as it incorporated a forward-looking nature of released claims.

[143] From the standpoint of HSF, the sole issue is whether the CCAA Plans are fair and reasonable.

[144] In its current form, HSF submits that the Plans do not meet the third part of the test to sanction a plan, for three interrelated reasons:

(i) The CCAA Plans do not address or protect the legitimate interests of FTH Stakeholders;

(ii) The CCAA Plans are not in the public interest; and

(iii) There are other alternatives that would remedy these deficiencies.

[145] HSF stresses that the court's decision should be informed by the objectives of the CCAA which are to facilitate the reorganization of a debtor company "for the benefit of the Company, its

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creditors, employees and in many instances, a much broader constituency of affected persons: see *CanWest Global Communications Corp., Re*, 2010 ONSC 4209, 70 C.B.R. (5th) 1, at para. 20 (*Canwest Global)*.

[146] The solution put forward by HSF is as follows: "Stated simply, there is a clear and preferable commercial alternative to the CCAA Plans: Modified CCAA Plans that include prevention and reduction measures within the mandate of the Cy-près Foundation."

[147] CCS is not opposed to the allocation of funds under the CCAA Plans. However, CCS submits that the CCAA Plans should not be sanctioned in their current form and that they should be modified to:

> (i) Ensure there is not a release to protect tobacco companies from liability for future wrongful conduct;
>
> (ii) Restrict promotion;
>
> (iii) Require public disclosure of internal Tobacco Companies' documents provided in provincial lawsuits;
>
> (iv) Expand the mandate of the Cy-près Foundation; and
>
> (v) Make a series of administrative changes related to the Cy-près Foundation to improve the Foundation's operations and impact.

[148] CCS points out that Tobacco Companies want to increase tobacco sales or at least forestall the decline of tobacco sales. CCS wants to minimize tobacco sales. The ultimate objective is to have a tobacco-free society.

[149] With respect to the releases, CCS is concerned that the effect of Article 11 of the CCAA Plans is to provide a release from liability for tobacco companies for some future wrongful conduct after the effective time.

[150] CCS also wants changes to the CCAA Plans to restrict promotional expenditures.

[151] CCS also wants production of documents received by Ontario and New Brunswick as part of pretrial discovery in their provincial lawsuits.

[152] CCS recognizes the documents provided to Ontario and New Brunswick are subject to confidentiality, but they submit that under the CCAA, the court could order production by court order pursuant to s.11 of the CCAA as the court may "make any order that it considers appropriate in the circumstances."

[153] Alternatively, CCS submits that another approach would be to give the parties six months to work out an acceptable proposal.

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[154] CCS has also proposed a redraft of the mandate of the Cy-près Foundation so as to expand the mandate of the Cy-près Foundation to include programs and initiatives to reduce tobacco use which would increase the benefit and impact of the foundation.

(ii) Tobacco Companies, Monitors and Claimants

[155] The Tobacco Companies, Monitors and Claimants all oppose any modifications to the mandate of the Cy-près Foundation or changes to the Releases.

(iii) Discussion

[156] I do not, for a moment, doubt the laudable objectives of HSF and CCS. The facts are clear. The use of tobacco products and smoking in particular are harmful to your health and, in many cases, can cause death or have serious health implications. HSF and CCS advocate for the elimination of tobacco products.

[157] However, in considering the arguments put forth by HSF and CCS, it is necessary to consider the impact these arguments would have on the CCAA Plans as a whole and their impact on the broad range of stakeholders.

[158] In *Target Canada Co. (Re)*, 2016 ONSC 316 at para 81, I noted that the CCAA process is one of building blocks. The same comment applies to these proceedings. The Mediator and the Monitors have achieved an unprecedented consensus among the QCAPs, the PCCs, *Knight*, Tobacco Producers, and the Provincial and Territorial governments. All these parties have legal rights as creditors of the Tobacco Companies.

[159] In addition, the Tobacco Companies are also supportive of the CCAA Plans.

[160] Having regard to such widespread support for the CCAA Plans, it is my view that the recommendations offered by HSF and CCS – as social stakeholders – must be approached with great caution. The court's role in determining what is fair and reasonable for purposes of sanctioning a plan of arrangement does not extend to amending or rewriting the CCAA Plans to incorporate the concerns of social stakeholders, notwithstanding how laudable those concerns may be.

[161] This Court has observed in the comparable context of a class-action settlement as follows:

> The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement. [emphasis added]

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(See: *Baxter v. Canada (Attorney General),* 2006 CanLII 41673 (ONSC) at para. 9.)

[162] HSF and CCS are social stakeholders in this proceeding. They have put forth their positions forcefully. However, the solutions and suggestions provided by HSF and CCS are, in my view, unworkable. In essence, HSF and CCS wish this court to amend the CCAA Plans. This is not a viable option.

[163] The CCAA Proceedings have been ongoing for nearly six years. For four and a half years, there was limited progress. Commencing in the fall of 2023, when the Monitors and the Mediator took control over the preparation and drafting of the CCAA Plans, there was a turning point. Today, the CCAA Plans are before the court on a motion to sanction.

[164] The decision for the court to make is a binary one. It is to either sanction the CCAA Plans or to reject the CCAA Plans. It is not the role or the function of the court to redraft or amend the CCAA Plans. The views expressed by HSF and CCS are important to consider, However, in my view, these views have been taken into account by the drafters of the CCAA Plans.

[165] The quantum of funds for the Cy-près Foundation is unprecedented. It is funded to the extent of $1 billion. Its objectives have been clearly set out and described above. In my view, the Cy-près Foundation will benefit not only Claimants who are not entitled to monetary compensation but will also benefit society in general. The mandate of the Cy-près Foundation may not meet all of the objectives of CCS and HSF. However, the mandate has been established through many hours of negotiation between the Tobacco Companies, the Monitors, Claimants and the Mediator.

[166] The funding of the Foundation requires a significant contribution from the Tobacco Companies. It also requires significant concessions from Claimants. The Claimants have collectively agreed to an allocation of $1 billion to the Foundation.

[167] The Monitors and by extension, the Mediator, recommend that the court sanction the CCAA Plans, as is. This includes approving the mandate of the Cy-près Foundation in its current form.

[168] The mandate of the Cy-près Foundation may not be perfect from the standpoint of HSF and CCS, but that does not entitle HSF and CCS to substitute their proposed solutions and proposed language from that which is set out in the Cy-près Foundation. Furthermore, it does not warrant a rejection of the CCAA Plans. The position of HSF that the CCAA Plans should be rejected if their suggestions are not incorporated is, quite simply, something this court should not and cannot accept.

[169] The concerns of HSF and CCS have been considered by the Monitors and the Mediator. A $1 billion Cy-près Foundation is being created. The establishment of the Cy-près Foundation satisfies me that the CCAA Plans have taken into account the interests of social stakeholders and the public at large.

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[170] The mandate of the Cy-près Foundation is both reasonable and appropriate in the circumstances and it is approved.

[171] The Claimants, who will be receiving meaningful compensation as a result of the sanctioning of the CCAA Plans, have waited long enough. Litigation was commenced in 1998. Judgment was obtained in 2015 and confirmed on appellate review in 2019. The CCAA Proceedings were commenced in 2019 and are before this court today to be sanctioned. Thousands of Claimants have sadly passed away during this period. The QCAPs and the PCCs have waited long enough to receive compensation. The wait, for many, has been intolerable. That wait ends today.

[172] With respect to the scope of the release, HSF and CCS complain that the effect of the release is that it covers future wrongful conduct.

[173] A full and complete response to this submission was set out by Ms. Wall in her responding argument on behalf of the Province of Ontario. I can do no better than to reproduce the salient points made by Ms. Wall, taken from the January 31, 2025 unofficial transcript provided by the real-time reporter, commencing at page 115 where Ms. Wall references the position of HSF:

> "The future tobacco harm stakeholders are millions of…"
>
> "… individuals who will purchase or consume tobacco products or be exposed to their use following the commencement of these proceedings but who have not suffered any harm prior to the [claims] bar date."

[174] Ms. Wall responds as follows at p. 118:

> Now the Heart and Stroke Foundation have made up the term "FTH stakeholders". This is not a concept that was used at all in the mediation, and I'll explain why. It's based on fundamental misunderstandings of, first, the concept of the Pan-Canadian claimants, so I'm going to talk about what the Pan-Canadian claimants are; and secondly, the scope of the release, and I think this is quite important to deal with, the scope of the release.
>
> > "The first step in the development of the PCC compensation plan was to identify the potential causes of action that could be advanced by the PCCs against the tobacco companies and the tobacco company groups. Understanding the causes of action are necessary to determine the scope of the PCCs' claims and potential claims that will need to be released in the global settlement."
> >
> > "The thesis underlying the PCC claims is that the tobacco companies have committed breaches of the common-law, equitable, and/or statutory duties or obligations that they owed to individuals in each province and [territory] who have been exposed to tobacco product manufactured by them and offered for sale in each tobacco jurisdiction".

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> "The PCCs potentially could base their claims on one or more causes of action, including, without limitation, first conspiracy".
>
> …
>
> "The cause of action will be commencing in about 1953. The tobacco companies conspired and acted in concert to prevent individuals in each province and territory from acquiring knowledge of the harmful and addictive properties of cigarettes in circumstances where they knew or ought to have known that their claims would cause tobacco-related diseases in such persons".

And I'll go back to the public-knowledge date in a moment:

> "…the tobacco companies knew or ought to have known that their cigarettes, when smoked as intended, were addictive and could cause or contribute to disease, and as manufacturers of cigarettes sold to individuals in each province and territory, they owed a duty of care to warn the public of smoke cigarettes of the risks of addiction and disease from smoking as was known or should have been known to them based on research on smoking and health from 1950 onward.
>
> The tobacco companies failed to provide any warning and effective warnings of the risk of tobacco-related disease which were known to them. They suppressed information known to them and misinformed and misled individuals about the risks of addiction and diseases from smoking."

And finally:

> "Another basis of the – these are causes of action, allegations that could ground claims by PCCs would be misrepresentation. Since 1950, the tobacco companies misrepresented the risks of smoking by denying any link between smoking and addiction, which was contrary to what was known or should have been known to them based on research that was known to them on smoking and health."

So I'll leave it there. So only a person who has a cause of action has a claim that can be released. [*emphasis added*]

I mention to you the public-knowledge date, and this becomes relevant in a few minutes when we revisit Mr. Bunting's hypothetical FTH stakeholder named Sarah.

The public-knowledge date, that term came out of the Quebec class action judgement. The Court made a finding regarding what it called the public-knowledge date, which is the date by which individuals knew or should have known

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of the risks of smoking the applicants' cigarettes that could cause the smoking, tobacco-related diseases.

The [Quebec] Court found that the [public-knowledge] date to be March 1st of 1996, so the breach period during which the tobacco companies committed their wrongful conduct which grounds the causes of action, begins in 1950 and ends, very important, ends at the public-knowledge date.

The public-knowledge date in the PCC compensation plan was adjusted from that March 1st of 96 date to November 20, 1998, to create some parity with the PCC-certified - sorry, the QCAP-certified class definition, which used November 1998, which was the date of the certification of the class action – I'm sorry, the issuance of the Statement of Claim.

…

So what does all this information I've set out for you do? And this is all – what I'm taking you through is all in the plan, the document.

So if a person smoked before the public-knowledge date, then they may have a cause of action because they smoked before the public knew or should have known of the risks that smoking the cigarettes of the applicants could cause tobacco-related diseases. Such is a person may have a claim that can be released.

But if a person starts smoking after the public-knowledge date, then they don't have a cause of action. They use the applicants' tobacco products when they knew or should have known of the risk of smoking the cigarettes that caused the tobacco-related diseases. Such a person does not have a claim that can be released.

Now, if you recall Mr. Bunting's hypothetical "Sarah", she was an FTH stakeholder, as he termed her, who first tried smoking in high school in 2025. She then became a heavier smoker addicted to nicotine in university and thereafter developed a tobacco-related disease and went to a lawyer to consult about her claim.

Sarah does not have any cause of action against the tobacco companies because she started smoking, in that hypothetical, 27 years after the public-knowledge date in 1996. She used tobacco products that, due to Canadian regulations and legislation, et cetera, have clear warnings in 2025 on their packages, and now, on the actual cigarettes, warning of the risks of smoking and the risk of tobacco-related disease.

So, since Sarah doesn't have a cause of action, she doesn't have any claim to release.

So what the Heart and Stroke Foundation has missed with this concept they've been putting forward is not every person who smokes and suffers from a tobacco-related

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> disease has a cause of action and entitles them to redress. And this is product liability principles, and a person who doesn't have a cause of action does not have a claim that is released in the plans.

[175] In my view, the foregoing submissions of Ms. Wall address the concerns of the HSF, as well as the concerns of CCS with respect to the scope of the Release.

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P. THE LAW

[176] The issues on this motion are:

(a) Should the Court sanction the CCAA Plans?

(b) Should the Court grant the releases sought?

(c) Should the Court grant the CCAA Plan Administrator Appointment Orders?

[177] In seeking approval of a plan of compromise or arrangement under the CCAA, the debtor company must establish that:

(a) There has been strict compliance with all statutory requirements;

(b) Nothing has been done or purported to be done that is not authorized by the CCAA and prior orders of the Court in the CCAA proceedings; and

(c) The plan must be fair and reasonable.

See *Canadian Airlines Corp. (Re)*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9, at para. 178, leave to appeal refused, 2000 ABCA 238, variation refused, 2001 ABCA 9, leave to appeal refused, [2001] S.C.R. xii (note) [*Canadian Airlines*]; *Laurentian University of Sudbury*, 2022 ONSC 5645, at para. 23; and *Lydian International Limited (Re)*, 2020 ONSC 4006, at para. 22) [*Lydian International*].

(i) Strict Compliance with Statutory Requirements

[178] I find that the statutory requirements for the sanction of the CCAA Plans under s. 6 of the CCAA have been satisfied.

[179] The Tobacco Companies, Monitors and Court-Appointed Mediator have complied with the procedural requirements of the CCAA, the Second Amended and Restated Initial Orders, the Claims Procedure Orders, the Meeting Orders, the Sanction Protocol Orders and all other Orders granted by the Court in the CCAA Proceedings. In particular:

(a) At the time that each Initial order was granted, the Court found that the CCAA applied to each of the Tobacco Companies and that each of the Tobacco Companies had liabilities that exceeded the $5 million threshold under the CCAA: see *Imperial Tobacco Canada Limited*, *et al.*, *Re*, 2019 ONSC 1684, 68

C.B.R. (6th) 322, at para. 7; *JTI-Macdonald Corp., Re*, 2019 ONSC 1625, at para. 11; and the Endorsement of Justice Pattillo dated March 21, 2019, at p. 3;

(b) Notices of the Meetings were distributed in accordance with the Meeting Orders: see Imperial Meeting Order (October 31, 2024), at paras. 16-19; JTIM Meeting Order (October 31, 2024), at paras. 16-19; and RBH Meeting Order (October 31, 2024), at paras. 16-19;

(c) The classification of creditors for voting purposes for each of the Tobacco Companies was approved by this Court: Imperial Meeting Order, at para. 20; JTIM Meeting Order, at para. 20; and RBH Meeting Order, at para. 20);

(d) The Meetings were properly constituted, and voting on the CCAA Plans at the Meetings was properly carried out in accordance with the Meeting Orders: see FTI 25th Report, at paras 20-21; EYI 22nd Report, at paras. 21-25; Deloitte 21st Report, at paras. 17-20);

(e) The CCAA Plans comply with the statutory requirements set out in subsections 6(3), 6(5) and 6(6) of the CCAA and the Meeting Orders: see *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 6(1); FTI 25th Report, at para. 33; EYI 23rd Report, at para. 16; and Deloitte 22nd Report, at para. 56(a)).

[180] In addition, the CCAA Plans comply with the statutory requirements set out in subsections 6(3), 6(5) and 6(6) of the CCAA, which provide that the Court may not sanction a plan of arrangement unless it contains certain specified provisions concerning Crown claims, employee claims and pension claims. Such claims are Unaffected Claims under the CCAA Plans.

[181] Further, in compliance with subsection 6(8) of the CCAA, the CCAA Plans do not contemplate the payment of any amounts to equity holders of the Tobacco Companies.

(ii) No Unauthorized Matters

[182] Second, no unauthorized matters have occurred in these CCAA Proceedings.

[183] In considering whether any unauthorized steps have been taken by the debtor companies, courts can rely on the Monitors' reports and the materials filed by the parties and their stakeholders: *Canadian Airlines, supra*, at para. 64; and *Canwest Global, supra*, at para. 17.

[184] Throughout the course of these CCAA Proceedings, the Tobacco Companies, the Monitors and the Court-Appointed Mediator have acted in good faith and with due diligence and have complied with the requirements of the CCAA and the Orders of this Court: see EYI 23rd Report, at para. 24; FTI 25th Report, at para. 38; *Canadian Airlines, supra*, at para. 64; *Canwest Global*, *supra*, at para. 17). The Tobacco Companies have regularly filed affidavits to keep this Court apprised of all material matters over the course of the CCAA Proceedings. This Court was satisfied that at each stay extension in respect of each of the CCAA Proceedings the Tobacco Companies had acted and were acting in good faith and with due diligence. Further, the Monitors have

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provided regular reports, none of which have identified any non-compliance with the CCAA or this Court's Orders.

(iii) The CCAA Plans are Fair and Reasonable

[185] In reviewing the fairness and reasonableness of the CCAA Plans, the Court does not and should not require perfection: see *Sammi Atlas Inc., Re*, 3 C.B.R. (4th) 171, at para. 4. As the Court stated in *Canadian Airlines*, at paras. 178-179:

> In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required.… Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole.…
>
> Fairness and reasonableness are not abstract notions, but must be measured against the available commercial alternatives. The triggering of the statute, namely insolvency, recognizes a fundamental flaw within the company. In these imperfect circumstances there can never be a perfect plan, but rather only one that is supportable.

[186] The Court's discretion is "an exercise in assessing current reality by comparing available commercial alternatives to what is offered in the proposed plan": see *Canadian Airlines*, *supra*, at para. 3; *Canwest Global*, *supra*, at para. 19). The Court 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, employees and, in many instances, a much broader constituency of affected persons: see *Canwest Global*, *supra*, at para. 20.

[187] Factors that establish that a plan is fair and reasonable include: (i) the claims are properly classified; (ii) the plan was approved by the double majority of creditors as required by the CCAA; (iii) there is no viable alternative to the plan; and (iv) the public interest: see *Canwest Global*, *supra*, at para. 21; *Canadian Airlines*, *supra*, at para. 96; *Nelson Financial Group Ltd. (Re)*, 2011 ONSC 2750, 79 C.B.R. (5th) 307, at para. 37; and *Sino-Forest Corporation (Re)*, 2012 ONSC 7050, at para. 61).

[188] Each Monitor has concluded that the CCAA Plans are fair and reasonable, as set out below.

[189] The classification of Affected Creditors in a single class for voting purposes was appropriate in the circumstances and was approved pursuant to the Meeting Orders. None of the Affected Creditors have disputed their classification into a single class.

[190] Creditor Approval is the most important factor and "creates an inference that the plan is fair and reasonable": see *Canadian Airlines*, *supra*, at para. 97. The unanimous approval of the CCAA Plans by Affected Creditors voting in person, or by proxy at the meetings, reflects their belief in exercising their business judgment, that the CCAA Plans are fair, reasonable and economically feasible. The Court should not second-guess or displace the business judgment of

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the Affected Creditors who, with the Tobacco Companies, participated in the development of the CCAA Plans in their best interests: see *Olympia & York*, *supra*, at paras. 36-37; and *Canadian Airlines*, *supra*, at para. 97.

[191] That there is no "alternative transaction that would provide greater recovery than the recoveries contemplated in the Plans" weighs in favour of a finding that the CCAA Plans are fair and reasonable: see *Canwest Global*, *supra*, at para. 25. As noted above, the Monitors and the Court-Appointed Mediator have considered possible alternatives to the CCAA Plans and have concluded that there is no viable alternative to the CCAA Plans which have the consent of the Affected Creditors.

[192] The Tobacco Companies face aggregate liability of approximately $1 trillion arising from the Tobacco Claims. As this Court has previously recognized, the "astronomical" dollar value of potential claims "is clearly beyond the ability for any or all of the [Tobacco Companies] to satisfy": 2023 ONSC 5449, at para. 15. If the CCAA Plans are not sanctioned by this Court and implemented, the likely outcome is the liquidation or bankruptcy of the Tobacco Companies: see FTI 25th Report, at para. 40.

[193] In my view, each factor supports a finding that the CCAA Plans are fair and reasonable in the unique circumstances of these CCAA Proceedings and within the context of the CCAA: *Canadian Airlines*, *supra* at para. 94.

(iv) Nothing in the CCAA Plans is Contrary to the Public Interest

[194] Nothing in the CCAA Plans is Contrary to the Public Interest. In fact, the CCAA Plans:

(a) Provide meaningful recovery to Affected Creditors, including the individual QCAP and PCCR Claimants, as well as the Provinces and Territories;

(b) Require the creation and funding of the Cy-près Foundation, a $1 billion public charitable foundation designed to provide indirect benefits to a diverse group of PCCs, *Létourneau* Class Members and the general public; and

(c) Allow the Tobacco Companies to continue as going concerns, which will benefit their employees, suppliers and other stakeholders.

Q. THE THIRD PARTY RELEASES SHOULD BE GRANTED

[195] This Court has jurisdiction to approve the Third-Party Releases

[196] It is well-established that the Court has jurisdiction, in appropriate circumstances, to sanction plans containing releases in favour of third parties: see *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587, 92 O.R. (3d) 513, at para. 61, leave to appeal refused, 2008 CanLII 46997 (S.C.C.) [*Metcalfe*]. In addition to approving releases of directors and officers, courts have also sanctioned plans releasing other third parties that contributed to a plan, including the debtor's affiliates, employee representatives and others: see *Sino-Forest Corporation (Re)*,

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2012 ONSC 7050, at paras. 70-74, leave to appeal refused, 2013 ONCA 456, leave to appeal refused, 2014 CanLII 11054 (S.C.C.) (releasing the debtor's subsidiaries); *Target Canada Co., Re*, 2016 ONSC 3651, at paras. 40-47 [*Target*] (releasing the debtor's parent company, who was also the plan sponsor); *Laurentian*, *supra*, at paras. 39-45 (releasing a university with which the debtor had a relationship); *Lydian International*, *supra*, at paras. 50-64 (releasing senior lenders).

[197] In determining whether to approve a third-party release, the Court will consider the following factors, none of which alone is determinative:

(a) Whether the parties to be released from claims are necessary and essential to the restructuring of the debtor;

(b) Whether the claims to be released are rationally connected to the purpose of the plan and necessary for it;

(c) Whether the plan could succeed without the releases;

(d) Whether the parties being released are contributing to the plan;

(e) Whether the release benefits the debtors as well as the creditors generally;

(f) Whether the creditors who voted on the plan had knowledge of the nature and effect of the releases; and

(g) Whether the releases are fair and reasonable and not overly broad or offensive to public policy: see *Metcalfe*, *supra*, at para. 113; *Laurentian*, *supra*, at para. 40, citing *Lydian International*, *supra*, at para. 54.

[198] The third-party releases in the CCAA Plans were negotiated as part of the overall framework of the compromises in the CCAA Plans and are necessary to achieve the global settlement of the Tobacco Claims and for the CCAA Plans to be implemented. Each of the released third parties either have contributed or will contribute in a tangible and realistic way to the CCAA Plans and, in some cases, are providing consideration absent which the CCAA Plans could not succeed.

[199] The CCAA Proceedings could not proceed without the officers and directors of the Tobacco Companies, the Monitors and the Court-Appointed Mediator, among others, who have each played an integral role in these complex coordinated CCAA Proceedings and have provided meaningful guidance throughout.

[200] Similarly, the implementation of the CCAA Plans would not be possible without the Parent Companies and relevant affiliates in the Tobacco Company Groups. These entities have variously agreed to provide shared services and other operational support to the Tobacco Companies and the Administrative Coordinators, who will administer the PCC Compensation Plan and the Quebec Administration Plan. The Tobacco Companies have further agreed to enter into the Definitive

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Documents in exchange for the releases. These releases are necessary to ensure the orderly, efficient and fair administration and implementation of the CCAA Plans.

[201] The Affected Creditors received the CCAA Plans and related materials before the Meeting, which detailed the nature and effect of the releases. Under the CCAA Plans, the Claimants will each execute Claimant Contractual Releases, confirming their consent to the releases under the CCAA Plans. The Affected Creditors voted overwhelmingly in favour of the CCAA Plans containing those releases. In my view, the third-party releases are not overly broad and contain the necessary and appropriate carve-outs: see EYI 23rd Report, at paras. 31-33; FTI 25th Report, at paras. 29-34.

[202] I have no doubt the issue of the releases consumed many hours for all those participating in the mediation. The Monitors, and by extension, the Mediator, support the granting of the releases in their current form. They take into account the required factors. It is not for the court to redraft or amend the releases. Again the choice for the court is a binary one. It must either accept the language or reject it.

[203] The Monitors consider the third-party releases proposed in the CCAA Plans to be fair, reasonable and rationally connected to the overall purpose of the CCAA Plans.

[204] I accept this recommendation. The third party releases are approved.

R. THE CCAA PLAN ADMINISTRATOR APPOINTMENT ORDERS SHOULD BE GRANTED

(i) The Court has the Jurisdiction to Grant the CCAA Plan Administrator Appointment Orders

[205] Section 11 of the CCAA "confers jurisdiction on the court in the broadest of terms" and enables the court to "make any order that it considers appropriate in the circumstances": *Acerus Pharmaceuticals Corporation (Re)*, 2023 ONSC 3314, at para. 9. As the Supreme Court has explained, the "vast" power conferred by section 11 "is constrained only by restrictions set out in the CCAA itself and the requirement that the order made be appropriate in the circumstances": *Canada v. Canada North Group Inc.*, 2021 SCC 30, [2021] 2 S.C.R. 571, at para. 21. The appropriateness of a section 11 order is also assessed in relation to its grounding in the well-established remedial objectives of the CCAA, including facilitating the reorganization of a debtor company, providing for timely, efficient and impartial resolution of a debtor's insolvency, and ensuring the fair and equitable treatment of the claims against a debtor.

(ii) The CCAA Plan Administrator Appointment Orders are Appropriate in the Circumstances

[206] The implementation of the CCAA Plans is expected to be lengthy and complex. Each CCAA Plan is dependent on the implementation of the other two CCAA Plans to ensure the global settlement of all Tobacco Claims against each Tobacco Company. The CCAA Plan Administrator

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Appointment Orders are therefore designed to facilitate the implementation of the coordinated CCAA Plans, including the continued involvement of the Court-Appointed Mediator.

[207] As neutral third parties, the CCAA Plan Administrators, along with the Court-Appointed Mediator, will give comfort and stability to the Court and the Affected Creditors by overseeing the implementation of the CCAA Plans and reporting as necessary.

[208] I am satisfied that the CCAA Plan Administrator Appointment Orders should be granted to facilitate the restructuring of the Tobacco Companies and advance the goals of the CCAA in these complex and coordinated CCAA proceedings.

DISPOSITION

[209] The motion to sanction the CCAA Plan for each of JTIM, Imperial and RBH, together with the ancillary relief set out at para. [11], is granted.

[210] It remains for the CCAA Plans to be implemented on the Plan Implementation Date. The Stay Period expires today. It is therefore necessary to extend the Stay Period.

[211] I am satisfied that the parties are working in good faith and with due diligence such that an extension of the Stay Period is both necessary and reasonable in the circumstances. The Tobacco Companies have sufficient resources to carry on operations from now to the Plan Implementation Date.

[212] The Stay Period is extended to the Plan Implementation Date.

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EXPRESSION OF GRATITUDE

[213] All parties, and the court, are indebted to The Honourable Warren K. Winkler, K.C., and the representatives of the Monitors for their incredible contributions and efforts in forming a consensus among stakeholders that has resulted in the sanctioning of these CCAA Plans.

Chief Justice Geoffrey B. Morawetz

Date: March 6, 2025

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SCHEDULE "A"

CITATION: Imperial Tobacco Limited, 2025 ONSC 1375
COURT FILE NOS.: CV-19-615862-00CL, CV-19-616077-00CL and CV-19-616779-00CL
DATE: 2025-03-03

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SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JTI-MACDONALD CORP.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IMPERIAL TOBACCO CANADA LIMITED AND IMPERIAL TOBACCO COMPANY LIMITED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ROTHMANS, BENSON & HEDGES INC.

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Craig Lockwood, Deborah Glendinning, Marc Wasserman and Martino Calvaruso*, for Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

Natasha MacParland and Chanakya Sethi, for FTI Consulting Canada Inc. in its capacity as court-appointed Monitor of Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited

Robert Thornton, for JTI-Macdonald Corp.

Linc Rogers, for Deloitte Restructuring Inc. in its capacity as Monitor of JTI-Macdonald Corp.

Jamey Gage and Trevor Courtis, for Rothmans, Benson & Hedges Inc.

R. Shayne Kukulowicz and Monique Sassi, for Ernst & Young Inc., in its capacity as court-appointed Monitor of Rothmans, Benson & Hedges Inc.

Jacqueline Wall, for the Province of Ontario

Sam Cotton, for the Heart and Stroke Foundation

Jesse Mighton, Jeffrey Leon, Mike Eizenga and Preet Gill, for the Province of British Columbia, Province of Manitoba, Province of New Brunswick, Province of Nova Scotia, Province of Prince Edward Island, Province of Saskatchewan, Government of Northwest Territories, Government of Nunavut and Government of Yukon in their capacities as Plaintiffs in the HCCR Legislation Claims

André I.G. Michael, for the Consortium of Provinces and Territories

Brett Harrison and Guneev Bhinder, for the Province of Quebec

HEARD: March 3, 2025

2025 ONSC 1358 (CanLII)

ENDORSEMENT

[1] This endorsement concerns the ongoing *Companies' Creditors Arrangement Act* ("CCAA") proceedings involving JTI-Macdonald Corp. ("JTI"), Imperial Tobacco Canada Limited and Imperial Tobacco Company Limited (collectively, "Imperial" and Rothmans Benson & Hedges Inc. ("RBH"). JTI, Imperial and RBH are collectively referred to as the "Tobacco Companies". This endorsement relates to all three Tobacco Companies.

[2] Each of Deloitte Restructuring Inc. ("Deloitte"), in its capacity as Court-appointed Monitor of JTI, FTI Consulting Canada Inc. ("FTI"), in its capacity as Court-appointed Monitor of Imperial and Ernst & Young Inc. ("EY") in its capacity as Court-appointed Monitor of RBH brought a motion for an order (CCAA Plan Amendment Order No. 1) approving the proposed amendments as reflected in the Third Amended and Restated Plan of Compromise and Arrangement in each of the CCAA proceedings.

[3] CCAA Plans were unanimously approved by voting creditors at three separate, sequential meetings of Affected Creditors of JTI, Imperial and RBH (the "Meetings") on December 12, 2024. The Monitors then brought motions for orders sanctioning the CCAA Plans and ancillary relief, which were heard from January 29 to 31, 2025 (the "Sanction Hearing").

[4] The Court's decision on the Sanction Hearing is under reserve.

[5] At the Sanction Hearing, the Tobacco Companies advised that the issue of allocation under the CCAA Plans remains unresolved as between them.

[6] The Tobacco Companies have now reached an agreement in principle to resolve the allocation issue.

[7] Pursuant to the CCAA Plans, the Tobacco Companies are to make upfront contributions on or before the Plan Implementation date equal to the aggregate of each Tobacco Companies' cash and cash equivalents generated from all sources by each Tobacco Company prior to the Plan Implementation Date, plus cash security deposits, less the sum of $750 million.

[8] The allocation of the $750 million holdback to be retained by the Tobacco Companies to fund working capital (the "Working Capital Holdback") remained unresolved at the time of the Sanction Hearing. The Tobacco Companies have now agreed in principle that on the Plan Implementation Date, RBH will retain the entire Working Capital Holdback. In exchange for RBH, JTI and JTI Macdonald TM Corp. ("JTI-TM") have agreed to withdraw all of their objections to the sanctioning of the CCAA Plans.

[9] Pursuant to section 20.4(a) of the CCAA Plans, the Monitors now move for CCAA Plan Amendment Orders to approve certain amendments to the CCAA Plans to implement this agreement in principle (the "Amendments").

[10] As a result of the agreement in principle, the Tobacco Companies take the position that section 5.2 of the CCAA Plans is to be intentionally deleted.

[11] In addition, the Tobacco Companies require that section 5.4 of the CCAA Plans be amended to: (i) provide that the Working Capital Holdback is to be retained by RBH as the "RBH Retained Amount", (ii) permit RBH to deal with the RBH Retained Amount in its sole discretion, including to transfer or distribute such monies outside of Canada in such manner as RBH may determine; and (iii) clarify that any such transfers or distributions of the RBH Retained Amount will be deemed to be permitted transfers for the sole purpose of Article 11 of the CCAA Plans.

[12] Certain administrative changes to effect the Amendments may also be required.

[13] None of the amendments affect any Affected Creditor or Unaffected Creditor. The amendments only impact the allocation of the Working Capital Holdback among the Tobacco Companies.

[14] No Claimants oppose the motions.

[15] The only opposition to the requested relief is from the Heart and Stroke Foundation (Heart & Stroke").

[16] Heart & Stroke makes its submissions as a social stakeholder. It submits that the CCAA Plan Amendment Orders should not be granted because the proposed amendments to the CCAA Plans do not cure the unfairness and unreasonableness of the CCAA Plans arising from the narrow scope of the *Cy-près* Foundation.

[17] In making its submissions, Heart & Stroke relies on the Responding Factum that was referenced at the Sanction Hearing, oral arguments made at the Sanction Hearing and its written submissions for this motion. Heart & Stroke does not raise any new issues on this motion.

[18] The Province of Ontario submitted that Heart & Stroke's objection to the proposed amendment to the Plan constituted an abuse of process.

[19] Abuse of process is a flexible doctrine which grants the court inherent power to prevent the misuse of its procedure in a way that would bring the administration of justice into disrepute.

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It may be used to bar the relitigation of issues previously decided and to promote judicial economy and the integrity of the court's process: *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63, [2003] 3 S.C.R. 77, at paras. 37, 51.

[20] Heart & Stroke previously brought a motion for leave to appoint representative counsel for "Future Tobacco Harms Stakeholders" in this proceeding. In a decision dated June 23, 2023, McEwen J. dismissed that motion, in part on the basis that any claims of the Future Tobacco Harms Stakeholders were no different in nature from the unascertained and unasserted claims of the Pan-Canadian Claimants: 2023 ONSC 2347, at para. 86.

[21] As a result of McEwen J.'s decision, Future Tobacco Harms Stakeholders do not constitute a distinct class of creditors in this CCAA process. Heart & Stroke is neither an Affected Creditor nor an Unaffected Creditor. The court need not consider whether the proposed amendments to the plan are materially prejudicial to their interests.

[22] Heart & Stroke opposes the amendments to the plan on the basis that they do not adequately address the needs of Future Tobacco Harms Stakeholders. If the court were to adopt this argument, the effect would be to treat Future Tobacco Harms Stakeholders as a class of creditors whose approval is required to sanction the plan. In this way, Heart & Stroke's submissions are an improper attempt to undermine McEwen J.'s decision.

[23] Heart and Stroke is a social stakeholder in this proceeding, but its status does not give it standing to raise objections on issues that do not affect it. In *Parsons v. Canadian Red Cross Society* (2001), 140 O.A.C. 348, the Court of Appeal held that, where a party has no legal rights that are impacted by a particular decision, that party has no standing to appeal that decision. By analogy, where a party's rights are not impacted by an amendment to a proposed plan of arrangement, that party has no standing to object to the amendment.

[24] The proposed amendments to the plan fix the allocation of the Working Capital Holdback. None of the amendments sought on this motion affect Heart & Stroke as a social stakeholder. The proposed amendments have no impact on the scope of the *Cy-près* Foundation. The issues raised by Heart & Stroke on this motion were raised in the Sanction Hearing. The court's decision on the motion to sanction the plan is under reserve. Heart & Stroke's objections will be addressed in the court's decision on that motion.

[25] Heart & Stroke advanced arguments that had no bearing on the question of whether the motion to amend the plan should be granted, and which challenged the court's previous decision regarding the status of Future Tobacco Harms Stakeholders. For these reasons, Ontario's abuse of process concern was not without merit.

[26] In my view, Heart & Stroke's submissions were ill-advised and are rejected.

[27] The sole issue on these motions is whether the court should grant the CCAA Plan Amendment Orders.

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[28] Section 20.4(a) of the CCAA Plan requires the Monitors to notify Affected Creditors and the Tobacco Companies and obtain court approval of any amendment, restatement, modification or supplement to be made following the Meeting Orders that is not solely: (i) administrative; or (ii) error correcting.

[29] The Monitors submit that the proposed amendments are substantive and not merely curative and therefore that the court approve them. They submit that the amendments do not affect and are not materially adverse to the financial or economic interests of Affected Creditors or Unaffected Creditors. The amendments only impact the allocation of the Working Capital Holdback among the Tobacco Companies. The Affected Creditors and Tobacco Companies received notice of these motions on February 27, 2025. All three Tobacco Companies, along with JTI-TM, support the amendments.

[30] Sections 6 and 7 of the CCAA provide the court with authority to sanction a plan or to alter or modify its terms. When amendments are proposed after the creditors meeting, section 7 of the CCAA gives the court the discretion to sanction an amended plan without convening an additional creditors meeting if the court is satisfied that the creditors or shareholders are not adversely affected by the proposed amendments.

[31] I accept the submissions of the Monitor. I am satisfied that no Affected Creditor or Unaffected Creditor will be affected by the amendments. I am also satisfied that each of the Monitors has adhered to section 20.4(a) of the CCAA Plans by providing notice to the common service list and moving for the court's approval of the amendments.

[32] Each of the Monitors has filed a report recommending that the court approve the amendments and grant the CCAA Plan Amendment Order No. 1.

[33] I am satisfied that the evidence establishes that the requested relief is appropriate in the circumstances. The motions of the Monitors are granted and the orders have been signed.

[34] For greater certainty, the existing Stay of Proceedings remains in effect until such time as the decision on the Sanction Hearing has been released.

"Chief Justice Geoffrey B. Morawetz"

Date: March 3, 2025

2025 ONSC 1358 (CanLII)

Re Canadian Airlines Corporation, 2000 ABQB 442

Date: 20000627

Action No. 0001-05071

2000 ABQB 442 (CanLII)

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

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

AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT* (ALBERTA) S.A. 1981, c. B-15, AS AMENDED, SECTION 185

AND IN THE MATTER OF CANADIAN AIRLINES CORPORATION AND CANADIAN AIRLINES INTERNATIONAL LTD.

REASONS FOR DECISION

of the

HONOURABLE MADAM JUSTICE M. S. PAPERNY

2000 ABQB 442 (CanLII)

I. INTRODUCTION

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

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

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

II. BACKGROUND

Canadian Airlines and its Subsidiaries

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

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

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

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

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

Events Leading up to the CCAA Proceedings

[9] Canadian’s financial difficulties significantly predate these proceedings.

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

[11] In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by

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pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled $771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the *Canada Transportation Act* (relaxing certain rules under the *Competition Act* to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from $7.90 to $1.55.

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

[13] The continued lack of sufficient funds from operations made it evident by late fall of 1996 that Canadian needed to take action to avoid a cash shortfall in the spring of 1997. In November 1996, Canadian announced an operational restructuring plan (the "1996 Restructuring") aimed at returning Canadian to profitability and subsequently implemented a payment deferral plan which involved a temporary moratorium on payments to certain lenders and aircraft operating lessors to provide a cash bridge until the benefits of the operational restructuring were fully implemented. Canadian was able successfully to obtain the support of its lenders and operating lessors such that the moratorium and payment deferral plan was able to proceed on a consensual basis without the requirement for any court proceedings.

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

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

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

[17] The benefits of the 1996 Restructuring continued in 1998 but were not sufficient to offset a number of new factors which had a significant negative impact on financial

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

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

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

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

Initial Discussions with Air Canada

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

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

[23] Following the termination of merger discussions between Canadian and Air Canada, senior management of Canadian, at the direction of the Board and with the support of AMR, renewed its efforts to secure financial partners with the objective of obtaining either an equity

investment and support for an eventual merger with Air Canada or immediate financial support for a merger with Air Canada.

Offer by Onex

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

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

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

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

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

Offer by 853350

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

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October 26, 1999 by the Government of Canada regarding its intentions to alter the regime governing the airline industry.

[30] As noted above, AMR and its subsidiaries and affiliates had certain agreements with Canadian arising from AMR's investment (through its wholly owned subsidiary, Aurora Airline Investments, Inc.) in CAIL during the 1994 Restructuring. In particular, the Services Agreement by which AMR and its subsidiaries and affiliates provided certain reservations, scheduling and other airline related services to Canadian provided for a termination fee of approximately $500 million (as at December 31, 1999) while the terms governing the preferred shares issued to Aurora provided for exchange rights which were only retractable by Canadian upon payment of a redemption fee in excess of $500 million (as at December 31, 1999). Unless such provisions were amended or waived, it was practically impossible for Canadian to complete a merger with Air Canada since the cost of proceeding without AMR's consent was simply too high.

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

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

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

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

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

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

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

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

[38] Despite the $45 million provided by Air Canada, Canadian's liquidity position remained poor. With January being a traditionally slow month in the airline industry, further bridge financing was required in order to ensure that Canadian would be able to operate while a debt restructuring transaction was being negotiated with creditors. Air Canada negotiated an arrangement with the Royal Bank of Canada ("Royal Bank") to purchase a participation interest in the operating credit facility made available to Canadian. As a result of this agreement, Royal Bank agreed to extend Canadian's operating credit facility from $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement the assignment of accounts receivable security originally securing Royal's $70 million facility with a further Security Agreement securing certain unencumbered assets of Canadian in consideration for this increased credit availability. Without the support of Air Canada or another financially sound entity, this increase in credit would not have been possible.

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

[40] Prior to the acquisition of majority control of CAC by 853350, Canadian's management, Board of Directors and financial advisors had considered every possible alternative for restoring Canadian to a sound financial footing. Based upon Canadian's extensive efforts over the past year in particular, but also the efforts since 1992 described

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above, Canadian came to the conclusion that it must complete a debt restructuring to permit the completion of a full merger between Canadian and Air Canada.

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

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

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

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

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

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

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

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

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

The Restructuring Plan

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[50] The Plan has three principal aims described by Canadian:

(a) provide near term liquidity so that Canadian can sustain operations;
(b) allow for the return of aircraft not required by Canadian; and
(c) permanently adjust Canadian's debt structure and lease facilities to reflect the current market for asset values and carrying costs in return for Air Canada providing a guarantee of the restructured obligations.

[51] The proposed treatment of stakeholders is as follows:

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

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

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

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

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

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

> The Offeror intends to conduct the Debt Restructuring in such a manner as to seek to ensure that the unionized employees of Canadian, the suppliers of new credit (including trade credit) and the members of the flying public are left unaffected.
> The Offeror is of the view that the pursuit of these three principles is essential in order to ensure that the long term value of Canadian is preserved.

Canadian's employees, customers and suppliers of goods and services are unaffected by the CCAA Order and Plan.
Also unaffected are parties to those contracts or agreements with Canadian which are not being terminated by Canadian pursuant to the terms of the March 24, 2000 Order.

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

The Affected Unsecured Creditors fall into the following categories:

a. Claims of holders of or related to the Unsecured Notes (the "Unsecured Noteholders");
b. Claims in respect of certain outstanding or threatened litigation involving Canadian;
c. Claims arising from the termination, breach or repudiation of certain contracts, leases or agreements to which Canadian is a party other than aircraft financing or lease arrangements;
d. Claims in respect of deficiencies arising from the termination or re-negotiation of aircraft financing or lease arrangements;
e. Claims of tax authorities against Canadian; and
f. Claims in respect of the under-secured or unsecured portion of amounts due to the Senior Secured Noteholders.

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

[53] The Monitor has concluded that if the Plan is not approved and implemented, Canadian will not be able to continue as a going concern and in that event, the only foreseeable

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

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

[55] There are two vociferous opponents of the Plan, Resurgence Asset Management LLC ("Resurgence") who acts on behalf of its and/or its affiliate client accounts and four shareholders of CAC. Resurgence is incorporated pursuant to the laws of New York, U.S.A. and has its head office in White Plains, New York. It conducts an investment business specializing in high yield distressed debt. Through a series of purchases of the Unsecured Notes commencing in April 1999, Resurgence clients hold $58,200,000 of the face value of or 58.2% of the notes issued. Resurgence purchased 7.9 million units in April 1999. From November 3, 1999 to December 9, 1999 it purchased an additional 20,850,000 units. From January 4, 2000 to February 3, 2000 Resurgence purchased an additional 29,450,000 units.

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

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

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

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III. ANALYSIS

[59] Section 6 of the CCAA provides that:

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

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

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

[61] A leading articulation of this three-part test appears in ***Re Northland Properties Ltd.*** (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at 182-3, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) and has been regularly followed, see for example ***Re Sammi Atlas Inc.*** (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div.) at 172 and ***Re T. Eaton Co.***, [1999] O.J. No. 5322 (Ont. Sup. Ct.) at paragraph 7. Each of these criteria are reviewed in turn below.

1. Statutory Requirements

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

> (a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;

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

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

(a) CAC and CAIL are insolvent and thus each is a "debtor company" within the meaning of section 2 of the CCAA. This was established in the affidavit evidence of Douglas Carty, Senior Vice President and Chief Financial Officer of Canadian, and so declared in the March 24, 2000 Order in these proceedings and confirmed in the testimony given by Mr. Carty at this hearing.

(b) CAC and CAIL have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of $5,000,000.

(c) In accordance with the April 7, 2000 Order of this court, a Notice of Meeting and a disclosure statement (which included copies of the Plan and the March 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

(d) As confirmed by the May 12, 2000 ruling of this court (leave to appeal denied May 29, 2000), the creditors have been properly classified.

(e) Further, as detailed in the Monitor's Fifth Report to the Court and confirmed by the June 14, 2000 decision of this court in respect of a challenge by Resurgence Asset Management LLC (“Resurgence”), the meetings of creditors were properly constituted, the voting was properly carried out and the Plan was approved by the requisite double majorities in each class. The composition of the majority of the unsecured creditor class is addressed below under the heading “Fair and Reasonable”.

2. Matters Unauthorized

[64] This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in ***Olympia & York Developments Ltd.* v. *Royal Trust Co.*** (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in ***Cadillac Fairview (Re)*** (1995), 53 A.C.W.S. (3d) 305 (Ont. Gen. Div.), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

[65] In this proceeding, the dissenting groups have raised two matters which in their view are unauthorized by the CCAA: firstly, the Minority Shareholders of CAC suggested the proposed share capital reorganization of CAIL is illegal under the ABCA and Ontario

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Securities Commission Policy 9.1, and as such cannot be authorized under the CCAA and secondly, certain unsecured creditors suggested that the form of release contained in the Plan goes beyond the scope of release permitted under the CCAA.

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a. Legality of proposed share capital reorganization

[66] Subsection 185(2) of the ABCA provides:

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

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

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

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

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

Section 167 of the ABCA

[69] Reorganizations under section 185 of the ABCA are subject to two preconditions:
a. The corporation must be "subject to an order for re-organization"; and
b. The proposed amendments must otherwise be permitted under section 167 of the ABCA.

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

[71] The relevant portions of section 167 provide as follows:

> 167(1) Subject to sections 170 and 171, the articles of a corporation may by special resolution be amended to
> (e) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued,
> (f) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series into the same or a different number of shares of other classes or series,
> (g.1) cancel a class or series of shares where there are no issued or outstanding shares of that class or series,

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

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

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

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

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

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

[76] The rationale for allowing such a reorganization appears plain; the corporation is insolvent, which means that on liquidation the shareholders would get nothing. In those circumstances, as described further below under the heading "Fair and Reasonable", there is nothing unfair or unreasonable in the court effecting changes in such situations without shareholder approval. Indeed, it would be unfair to the creditors and other stakeholders to permit the shareholders (whose interest has the lowest priority) to have any ability to block a reorganization.

[77] The Petitioners were unable to provide any case law addressing the use of section 185 as proposed under the Plan. They relied upon the decisions of ***Royal Oak Mines Inc.***, [1999] O.J. No. 4848 and ***Re T Eaton Co.,*** *supra* in which Farley J.of the Ontario Superior Court of Justice emphasized that shareholders are at the bottom of the hierarchy of interests in liquidation or liquidation related scenarios.

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

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

Section 183 of the ABCA

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

[81] I disagree with this creative characterization. The proposed transaction is a reorganization as contemplated by section 185 of the ABCA. As recognized in ***Savage v.***

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Amoco Acquisition Company Ltd, [1988] A.J. No. 68 (Q.B.), aff'd, 68 C.B.R. (3d) 154 (Alta. C.A.), the fact that the same end might be achieved under another section does not exclude the section to be relied on. A statute may well offer several alternatives to achieve a similar end.

Ontario Securities Commission Policy 9.1

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

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

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

b. Release

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

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

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

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

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

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

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

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

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

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

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

3. Fair and Reasonable

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

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

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

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

a. The composition of the unsecured vote;
b. What creditors would receive on liquidation or bankruptcy as compared to the Plan;
c. Alternatives available to the Plan and bankruptcy;
d. Oppression;
e. Unfairness to Shareholders of CAC; and
f. The public interest.

a. Composition of the unsecured vote

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

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

[98] However, given the manner of voting under the CCAA, the court must be cognizant of the treatment of minorities within a class: see for example ***Quintette Coal Ltd.,*** (1992) 13 C.B.R. (3rd) 14 (B.C.S.C) and ***Re Alabama, New Orleans, Texas and Pacific Junction Railway Co.*** (1890) 60 L.J. Ch. 221 (C.A.). The court can address this by ensuring creditors' claims are properly classified. As well, it is sometimes appropriate to tabulate the vote of a particular class so the results can be assessed from a fairness perspective. In this case, the classification was challenged by Resurgence and I dismissed that application. The vote was also tabulated in this case and the results demonstrate that the votes of Air Canada and the Senior Secured Noteholders, who voted their deficiency in the unsecured class, were decisive.

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

1. For the resolution to approve the Plan: 73 votes (65% in number) representing $494,762,304 in claims (76% in value);
2. Against the resolution: 39 votes (35% in number) representing $156,360,363 in claims (24% in value); and
3. Abstentions: 15 representing $968,036 in value.

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

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

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

> In my view, the obvious benefits of settling rights and keeping the enterprise together as a going concern far outweigh the deprivation of the appellants' wholly illusory rights. In this connection, the learned chambers judge said at p.29:
>
> > I turn to the question of the right to hold the property after an order absolute and whether or not this is a denial of something of that significance that it should affect these proceedings. There is in the material before me some evidence of values. There are the principles to which I have referred, as well as to the rights of majorities and the rights of minorities.
> > Certainly, those minority rights are there, but it would seem to me that in view of the overall plan, in view of the speculative nature of holding property in the light of appraisals which have been given as to value, that this right is something which should be subsumed to the benefit of the majority.

[103] Resurgence submitted that Air Canada manipulated the indebtedness of CAIL to assure itself of an affirmative vote. I disagree. I previously ruled on the validity of the deficiency when approving the LOIs and found the deficiency to be valid. I found there was consideration for the assignment of the deficiency claims of the various aircraft financiers to Air Canada, namely the provision of an Air Canada guarantee which would otherwise not have been available until plan sanction. The Monitor reviewed the calculations of the deficiencies and determined they were calculated in a reasonable manner. As such, the court approved those transactions. If the deficiency had instead remained with the aircraft financiers, it is reasonable to assume those claims would have been voted in favour of the plan. Further, it would have been entirely appropriate under the circumstances for the aircraft financiers to have retained the deficiency and agreed to vote in favour of the Plan, with the same result to Resurgence. That the financiers did not choose this method was explained by the testimony of Mr. Carty and Robert Peterson, Chief Financial Officer for Air Canada; quite simply it amounted to a desire on behalf of these creditors to shift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was also disclosed and the challenge by Resurgence regarding their vote in the unsecured class was dismissed There

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is nothing inappropriate in the voting of the deficiency claims of Air Canada or the Senior Secured Noteholders in the unsecured class. There is no evidence of secret vote buying such as discussed in ***Northland Properties Ltd. (Re)***.

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

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

[106] The authorities which address minority creditors' complaints speak of "substantial injustice" (***Keddy Motor Inns Ltd. (Re)*** (1992) 13 C.B.R. (3d) 245 (N.S.C.A.), "confiscation" of rights (***Campeau Corp. (Re)*** (1992), 10 C.B.R. (3d) 104 (Ont. Ct. (Gen.Div.); ***Skydome Corp. (Re)*** (1999), 87 A.C.W.S (3d) 421 (Ont. Ct. Gen. Div.)) and majorities "feasting upon" the rights of the minority (***Quintette Coal Ltd. (Re)***, (1992), 13 C.B.R.(3d) 146 (B.C.S.C.). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: ***Algoma Steel Corp.*** **v.** ***Royal Bank*** (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.)and ***Northland Properties (Re)***, *supra* at 9.

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

[108] Resurgence represents 58.2% of the Unsecured Noteholders or $96 million in claims. The total claim of the Unsecured Noteholders ranges from $146 million to $161 million. The

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affected unsecured class, excluding aircraft financing, tax claims, the noteholders and claims under $50,000, ranges from $116.3 million to $449.7 million depending on the resolutions of certain claims by the Claims Officer. Resurgence represents between 15.7% - 35% of that portion of the class.

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

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

b. Receipts on liquidation or bankruptcy

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

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

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

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

Pension Plan Surplus

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

1) The summaries of the solvency surplus/deficit positions indicated a cumulative net deficit position for the seven registered plans, after consideration of contingent liabilities;
2) The possibility, based on the previous splitting out of the seven plans from a single plan in 1988, that the plans could be held to be consolidated for financial purposes, which would remove any potential solvency surplus since the total estimated contingent liabilities exceeded the total estimated solvency surplus;
3) The actual calculations were prepared by CAIL's actuaries and actuaries representing the unions could conclude liabilities were greater; and
4) CAIL did not have a legal opinion confirming that surpluses belonged to CAIL.

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

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

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

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

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

CRAL

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

[122] For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

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

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

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

International Routes

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

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

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

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

[130] Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million , which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

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

Capital Loss Pools

[132] The capital loss pools at CAC will not be available to Air Canada since CAC is to be left out of the corporate reorganization and will be severed from CAIL. Those capital losses

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can essentially only be used to absorb a portion of the debt forgiveness liability associated with the restructuring. CAC, who has virtually all of its senior debt compromised in the plan, receives compensation for this small advantage, which cost them nothing.

Undepreciated capital cost ("UCC")

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

Operating Losses

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

Fuel tax rebates

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

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

c. Alternatives to the Plan

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

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future. As Farley J. stated in ***Re T. Eaton Co.*** (1999) O.J. No. 4216 (Ont. Sup. Ct.) at paragraph 6:

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

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

d. Oppression

Oppression and the CCAA

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

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

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

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

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

[143] Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: ***Re Royal Oak Mines Ltd.***, *supra*, para. 4., ***Re Cadillac Fairview***, [1995] O.J. 707 (Ont. Sup. Ct), and ***Re T. Eaton Company,*** *supra*.

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

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

Oppression allegations by Resurgence

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

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

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moratorium, Canadian defaulted on the payments due under its various credit facilities and aircraft leases.

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

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

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

[151] Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

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

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

[154] The evidence demonstrates that the sales of the Toronto - Tokyo route, the Dash 8s and the simulators were at the suggestion of Canadian, who was in desperate need of operating cash. Air Canada paid what Canadian asked, based on its cash flow requirements. The

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evidence established that absent the injection of cash at that critical juncture, Canadian would have ceased operations. It is for that reason that the Government of Canada willingly provided the approval for the transfer on December 21, 2000.

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

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

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

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

e. Unfairness to Shareholders

[159] The Minority Shareholders essentially complained that they were being unfairly stripped of their only asset in CAC - the shares of CAIL. They suggested they were being squeezed out by the new CAC majority shareholder 853350, without any compensation or any

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vote. When the reorganization is completed as contemplated by the Plan , their shares will remain in CAC but CAC will be a bare shell.

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

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

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

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

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

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[165] The Minority Shareholders raise concerns about assets that are ascribed limited or no value in the Monitor's report as does Resurgence (although to support an opposite proposition). Considerable argument was directed to the future operational savings and profitability forecasted for Air Canada, its subsidiaries and CAIL and its subsidiaries. Mr. Peterson estimated it to be in the order of $650 to $800 million on an annual basis, commencing in 2001. The Minority Shareholders point to the tax pools of a restructured company that they submit will be of great value once CAIL becomes profitable as anticipated. They point to a pension surplus that at the very least has value by virtue of the contribution holidays that it affords. They also look to the value of the compromised claims of the restructuring itself which they submit are in the order of $449 million. They submit these cumulative benefits add value, currently or at least realizable in the future. In sharp contrast to the Resurgence position that these acts constitute oppressive behaviour, the Minority Shareholders view them as enhancing the value of their shares. They go so far as to suggest that there may well be a current going concern value of the CAC shares that has been conveniently ignored or unquantified and that the Petitioners must put evidence before the court as to what that value is.

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

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

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

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

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

e. The Public Interest

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

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

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

[173] In ***Re Repap British Columbia Inc.*** (1998), 1 C.B.R. 449 (B.C.S.C.) the court noted that the fairness of the plan must be measured against the overall economic and business environment and against the interests of the citizens of British Columbia who are affected as "shareholders" of the company, and creditors, of suppliers, employees and competitors of the company. The court approved the plan even though it was unable to conclude that it was necessarily fair and reasonable. In ***Re Quintette Coal Ltd.,*** *supra*, Thackray J. acknowledged the significance of the coal mine to the British Columbia economy, its importance to the people who lived and worked in the region and to the employees of the company and their families. Other cases in which the court considered the public interest in determining whether to sanction a plan under the CCAA include ***Canadian Red Cross Society (Re)***, (1998),5

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C.B.R.(4th) (Ont. Gen. Div.) and ***Algoma Steel Corp. v. Royal Bank of Canada (Trustee of***), [1992] O.J. No. 795 (Ont. Gen. Div.)

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

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

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

[177] The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the ***Transportation Act*** , which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

[178] In summary, in assessing whether a plan is fair and reasonable, courts have emphasized that perfection is not required: see for example ***Wandlyn Inns Ltd. (Re)*** (1992), 15 C.B.R. (3d)

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316 (N.BQ.B), ***Quintette Coal***, *supra* and ***Repap***, *supra*. Rather, various rights and remedies must be sacrificed to varying degrees to result in a reasonable, viable compromise for all concerned. The court is required to view the "big picture" of the plan and assess its impact as a whole. I return to ***Algoma Steel v. Royal Bank of Canada***., *supra* at 9 in which Farley J. endorsed this approach:

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

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

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

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

IV. CONCLUSION

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

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

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

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

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

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HEARD on the 5th day of June to the 19th day of June, 2000.
DATED at Calgary, Alberta this 27th day of June, 2000.

J.C.Q.B.A.

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

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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

[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.

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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.

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[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.

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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.

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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.

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(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

[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.

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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.).

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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.

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[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.).

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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.

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[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.

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(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.

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SUPERIOR COURT

2010 QCCS 4450 (CanLII)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **SEPTEMBER 23, 2010**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
THE OTHER PETITIONERS LISTED ON SCHEDULES "A", "B" AND "C"
Debtors

And
ERNST & YOUNG INC.
Monitor

REASONS FOR JUDGMENT ON SANCTION ORDER (#733)

INTRODUCTION

[1] This judgment deals with the sanction and approval of a plan of arrangement under the *CCAA*[1]. The sole issue to resolve is the fair and reasonable character of the plan. While the debtor company, the monitor and an overwhelming majority of stakeholders strongly support this sanction and approval, three dissenting voices raise limited objections. The Court provides these reasons in support of the Sanction Order it considers appropriate and justified to issue under the circumstances.

[1] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

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THE RELEVANT BACKGROUND

[2] On April 17, 2009, the Court issued an Initial Order pursuant to the *CCAA* with respect to the Abitibi Petitioners (listed in Schedule A), the Bowater Petitioners (listed in Schedule B) and the Partnerships (listed in Schedule C).

[3] On the day before, April 16, 2009, AbitibiBowater Inc., Bowater Inc. and certain of their U.S. and Canadian Subsidiaries (the "**U.S. Debtors**") had, similarly, filed Voluntary Petitions for Relief under Chapter 11 of the U.S. Bankruptcy Code.

[4] Since the Initial Order, the Abitibi Petitioners, the Bowater Petitioners and the Partnerships (collectively, "**Abitibi**") have, under the protection of the Court, undertaken a huge and complex restructuring of their insolvent business.

[5] The restructuring of Abitibi's imposing debt of several billion dollars was a cross-border undertaking that affected tens of thousands of stakeholders, from employees, pensioners, suppliers, unions, creditors and lenders to government authorities.

[6] The process has required huge efforts on the part of many, including important sacrifices from most of the stakeholders involved. To name just a few, these restructuring efforts have included the closure of certain facilities, the sale of assets, contracts repudiations, the renegotiation of collective agreements and several costs saving initiatives[2].

[7] In a span of less than 18 months, more than 740 entries have been docketed in the Court record that now comprises in excess of 12 boxes of documents. The Court has, so far, rendered over 100 different judgments and orders. The Stay Period has been extended seven times. It presently expires on September 30, 2010.

[8] Abitibi is now nearing emergence from this *CCAA* restructuring process.

[9] In May 2010, after an extensive review of the available alternatives, and pursuant to lengthy negotiations and consultations with creditors' groups, regulators and stakeholders, Abitibi filed its Plan of Reorganization and Compromise in the *CCAA* restructuring process (the "***CCAA* Plan**[3]"). A joint Plan of Reorganization was also filed at the same time in the U.S. Bankruptcy Court process (the "**U.S. Plan**").

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[2] See Monitor's Fifty-Seventh Report dated September 7, 2010, and Monitor's Fifty-Ninth Report dated September 17, 2010.

[3] This Plan of Reorganisation and Compromise (as modified, amended or supplemented by *CCAA* Plan Supplements 3.2, 6.1(a)(i) (as amended on September 13, 2010) and 6.1(a)(ii) dated September 1, 2010, *CCAA* Plan Supplements 6.8(a), 6.8(b) (as amended on September 13, 2010), 6.8(d), 6.9(1) and 6.9(2) dated September 3, 2010, and the First Plan Amendment dated September 10, 2010, and as may be further modified, amended, or supplemented in accordance with the terms of such Plan of Reorganization and Compromise) (collectively, the "***CCAA* Plan**") is included as Schedules E and F to the Supplemental 59th Report of the Monitor dated September 21, 2010.

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[10] In essence, the Plans provided for the payment in full, on the Implementation Date and consummation of the U.S. Plan, of all of Abitibi's and U.S. Debtors' secured debt obligations.

[11] As for their unsecured debt obligations, save for few exceptions, the Plans contemplated their conversion to equity of the post emergence reorganized Abitibi. If the Plans are implemented, the net value would likely translate into a recovery under the *CCAA* Plan corresponding to the following approximate rates for the various Affected Unsecured Creditors Classes:

(a) 3.4% for the ACI Affected Unsecured Creditor Class;

(b) 17.1% for the ACCC Affected Unsecured Creditor Class;

(c) 4.2% for the Saguenay Forest Products Affected Unsecured Creditor Class;

(d) 36.5% for the BCFPI Affected Unsecured Creditor Class;

(e) 20.8% for the Bowater Maritimes Affected Unsecured Creditor Class; and

(f) 43% for the ACNSI Affected Unsecured Creditor Class.

[12] With respect to the remaining Petitioners, the illustrative recoveries under the *CCAA* Plan would be nil, as these entities have nominal assets.

[13] As an alternative to this debt to equity swap, the basic structure of the *CCAA* Plan included as well the possibility of smaller unsecured creditors receiving a cash distribution of 50% of the face amount of their Proven Claim if such was less than $6,073, or if they opted to reduce their claim to that amount.

[14] In short, the purpose of the *CCAA* Plan was to provide for a coordinated restructuring and compromise of Abitibi's debt obligations, while at the same time reorganizing and simplifying its corporate and capital structure.

[15] On September 14, 2010, Abitibi's Creditors' Meeting to vote on the *CCAA* Plan was convened, held and conducted. The resolution approving the *CCAA* Plan was overwhelmingly approved by the Affected Unsecured Creditors of Abitibi, save for the Creditors of one the twenty Classes involved, namely, the BCFC Affected Unsecured Creditors Class.

[16] Majorities well in excess of the statutorily required simple majority in number and two-third majority in value of the Affected Unsecured Claims held by the Affected Unsecured Creditors were attained. On a combined basis, the percentages were 97.07% in number and 93.47% in value.

[17] Of the 5,793 votes cast by creditors holding claims totalling some 8,9 billion dollars, over 8,3 billion dollars worth of claims voted in favour of approving the *CCAA* Plan.

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THE MOTION[4] AT ISSUE

[18] Today, as required by Section 6 of the *CCAA*, the Court is asked to sanction and approve the *CCAA* Plan. The effect of the Court's approval is to bind Abitibi and its Affected Unsecured Creditors to the terms of the *CCAA* Plan.

[19] The exercise of the Court's authority to sanction a compromise or arrangement under the *CCAA* is a matter of judicial discretion. In that exercise, the general requirements to be met are well established. In summary, before doing so, the Court must be satisfied that[5]:

a) There has been strict compliance with all statutory requirements;

b) Nothing has been done or purported to be done that was not authorized by the *CCAA*; and

c) The Plan is fair and reasonable.

[20] Only the third condition is truly at stake here. Despite Abitibi's creditors' huge support of the fairness and the reasonableness of the *CCAA* Plan, some dissenting voices have raised objections.

[21] They include:

a) The BCFC Noteholders' Objection;

b) The Contestations of the Provinces of Ontario and British Columbia; and

c) The Contestation of NPower Cogen Limited.

[22] For the reasons that follow, the Court is satisfied that the *CCAA* Plan is fair and reasonable. The Contestations of the Provinces of Ontario and British Columbia and of NPower Cogen Limited have now been satisfactorily resolved by adding to the Sanction Order sought limited "carve-out" provisions in that regard. As for the only other objection that remains, namely that of some of the BCFC Noteholders, the Court considers that it should be discarded.

[23] It is thus appropriate to immediately approve the *CCAA* Plan and issue the Sanction Order sought, albeit with some minor modifications to the wording of specific conclusions that the Court deems necessary.

[24] In the Court's view, it is important to allow Abitibi to move forthwith towards emergence from the *CCAA* restructuring process it undertook eighteen month ago.

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[4] *Motion for an Order Sanctioning the Plan of Reorganization and Compromise and Other Relief* (the "**Motion**"), pursuant to Sections 6, 9 and 10 of the *CCAA* and Section 191 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "***CBCA***").

[5] *Boutiques San Francisco Inc. (Arrangement relatif aux)*, SOQUIJ AZ-50263185, B.E. 2004BE-775 (S.C.); *Cable Satisfaction International Inc. (Arrangement relatif à),* J.E. 2004-907 (S.C.).

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[25] No one seriously disputes that there is risk associated with delaying the sanction of the *CCAA* Plan. This risk includes the fact that part of the exit financing sought by Abitibi is dependent upon the capital markets being receptive to the high yield notes or term debt being offered, in a context where such markets are volatile. There is, undoubtedly, continuing uncertainty with respect to the strength of the economic recovery and the effect this could have on the financial markets.

[26] Moreover, there are numerous arrangements that Abitibi and their key stakeholders have agreed to or are in the process of settling that are key to the successful implementation of the *CCAA* Plan, including collective bargaining agreements with employees and pension funding arrangements with regulators. Any undue delay with implementation of the *CCAA* Plan increases the risk that these arrangements may require alterations or amendments.

[27] Finally, at hearing, Mr. Robertson, the Chief Restructuring Officer, testified that the monthly cost of any delay in Abitibi's emergence from this *CCAA* process is the neighbourhood of 30 million dollars. That includes the direct professional costs and financing costs of the restructuring itself, as well as the savings that the labour cost reductions and the exit financing negotiated by Abitibi will generate as of the Implementation Date.

[28] The Court cannot ignore this reality in dealing rapidly with the objections raised to the sanction and approval of the *CCAA* Plan.

ANALYSIS

1. The Court's approval of the *CCAA* Plan

[29] As already indicated, the first and second general requirements set out previously dealing with the statutory requirements and the absence of unauthorized conduct are not at issue.

[30] On the one hand, the Monitor has reached the conclusion that Abitibi is and has been in strict compliance with all statutory requirements. Nobody suggests that this is not the case.

[31] On the other hand, all materials filed and procedures taken by Abitibi were authorized by the *CCAA* and the orders of this Court. The numerous reports of the Monitor (well over sixty to date) make no reference to any act or conduct by Abitibi that was not authorized by the *CCAA*; rather, the Monitor is of the view that Abitibi has not done or purported to do anything that was not authorized by the *CCAA*[6].

[32] In fact, in connection with each request for an extension of the stay of proceedings, the Monitor has reported that Abitibi was acting in good faith and with due

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6 See Monitor's Fifty-Eight Report dated September 16, 2010.

diligence. The Court has not made any contrary finding during the course of these proceedings.

[33] Turning to the fairness and reasonableness of a *CCAA* Plan requirement, its assessment requires the Court to consider the relative degrees of prejudice that would flow from granting or refusing the relief sought. To that end, in reviewing the fairness and reasonableness of a given plan, the Court does not and should not require perfection[7].

[34] Considering that a plan is, first and foremost, a compromise and arrangement reached, between a debtor company and its creditors, there is, indeed, a heavy onus on parties seeking to upset a plan where the required majorities have overwhelmingly supported it. From that standpoint, a court should not lightly second-guess the business decisions reached by the creditors as a body[8].

[35] In that regard, courts in this country have held that the level of approval by the creditors is a significant factor in determining whether a *CCAA* Plan is fair and reasonable[9]. Here, the majorities in favour of the *CCAA* Plan, both in number and in value, are very high. This indicates a significant and very strong support of the *CCAA* Plan by the Affected Unsecured Creditors of Abitibi.

[36] Likewise, in its Fifty-Seventh Report, the Monitor advised the creditors that their approval of the *CCAA* Plan would be a reasonable decision. He recommended that they approve the *CCAA* Plan then. In its Fifty-Eighth Report, the Monitor reaffirmed its view that the *CCAA* Plan was fair and reasonable. The recommendation was for the Court to sanction and approve the *CCAA* Plan.

[37] In a matter such as this one, where the Monitor has worked through out the restructuring with professionalism, objectivity and competence, such a recommendation carries a lot of weight.

[38] The Court considers that the *CCAA* Plan represents a truly successful compromise and restructuring, fully in line with the objectives of the *CCAA*. Despite its weaknesses and imperfections, and notwithstanding the huge sacrifices and losses it imposes upon numerous stakeholders, the *CCAA* Plan remains a practical, reasonable and responsible solution to Abitibi's insolvency.

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7 *Re T. Eaton Co.,* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]); *Sammi Atlas Inc. (Re),* (1998), 3 C.B.R. (4th) 171 (Ont.S.C.J. [Commercial List]); *PSINet Lt. (Re)*, [2002] O.J. No. 1156 (Ont. S.C.J.) (QL).

8 *Uniforêt inc. (Arrangement relatif à)*, J.E. 2003-1408; *T.Q.S. inc.* (*Arrangement relatif à*), 2008 QCCS 2448, B.E. 2008BE-834; *PSINet Ltd. (Re)*, [2002] O.J. No. 1156 (Ont. S.C.J.) (QL); *Olympia & York Developments Ltd. (Re)*, (1993) 12 O.R. (3d) 500 (Gen. Div.).

9 *Olympia & York Developments Ltd. (Re)*, (1993) 12 O.R. (3d) 500 (Gen. Div.); *Boutiques San Francisco inc. (Arrangement relatif aux)*, SOQUIJ AZ-50263185 , B.E. 2004BE-775; *PSINet Ltd. (Re)*, [2002] O.J. No. 1156 (Ont. S.C.J.) (QL); *Northland Properties Ltd. (Re)*, (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.), affirmed (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.).

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[39] Its implementation will preserve significant social and economic benefits to the Canadian economy, including enabling about 11,900 employees (as of March 31, 2010) to retain their employment, and allowing hundreds of municipalities, suppliers and contractors in several regions of Ontario and Quebec to continue deriving benefits from a stronger and more competitive important player in the forest products industry.

[40] In addition, the business of Abitibi will continue to operate, pension plans will not be terminated, and the Affected Unsecured Creditors will receive distributions (including payment in full to small creditors).

[41] Moreover, simply no alternative to the *CCAA* Plan has been offered to the creditors of Abitibi. To the contrary, it appears obvious that in the event the Court does not sanction the *CCAA* Plan, the considerable advantages that it creates will be most likely lost, such that Abitibi may well be placed into bankruptcy.

[42] If that were to be the case, no one seriously disputes that most of the creditors would end up being in a more disadvantageous position than with the approval of the *CCAA* Plan. As outlined in the Monitor's 57th Report, the alternative scenario, a liquidation of Abitibi's business, will not prove to be as advantageous for its creditors, let alone its stakeholders as a whole.

[43] All in all, the economic and business interests of those directly concerned with the end result have spoken vigorously pursuant to a well-conducted democratic process. This is certainly not a case where the Court should override the express and strong wishes of the debtor company and its creditors and the Monitor's objective analysis that supports it.

[44] Bearing these comments in mind, the Court notes as well that none of the objections raised support the conclusion that the *CCAA* Plan is unfair or unreasonable.

2. The BCFC Noteholders' objections

[45] In the end, only Aurelius Capital Management LP and Contrarian Capital Management LLC (the "**Noteholders**") oppose the sanction of the *CCAA* Plan[10].

[46] These Noteholders, through their managed funds entities, hold about one-third of some six hundred million US dollars of Unsecured Notes issued by Bowater Canada Finance Company ("**BCFC**") and which are guaranteed by Bowater Incorporated. These notes are BCFC's only material liabilities.

[47] BCFC was a Petitioner under the *CCAA* proceedings and a Debtor in the parallel proceedings under Chapter 11 of the U.S. Bankruptcy Code. However, its creditors voted to reject the *CCAA* Plan: while 76.8% of the Class of Affected Unsecured Creditors of BCFC approved the *CCAA* Plan in number, only 48% thereof voted in favour in dollar value. The required majorities of the *CCAA* were therefore not met.

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[10] The Indenture Trustee acting under the Unsecured Notes supports the Noteholders in their objections.

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[48] As a result of this no vote occurrence, the Affected Unsecured Creditors of BCFC, including the Noteholders, are Unaffected Creditors under the *CCAA* Plan: they will not receive the distribution contemplated by the plan. As for BCFC itself, this outcome entails that it is not an "Applicant" for the purpose of this Sanction Order.

[49] Still, the terms of the *CCAA* Plan specifically provide for the compromise and release of any claims BCFC may have against the other Petitioners pursuant, for instance, to any inter company transactions. Similarly, the *CCAA* Plan specifies that BCFC's equity interests in any other Petitioner can be exchanged, cancelled, redeemed or otherwise dealt with for nil consideration.

[50] In their objections to the sanction of the *CCAA* Plan, the Noteholders raise, in essence, three arguments:

(a) They maintain that BCFC did not have an opportunity to vote on the *CCAA* Plan and that no process has been established to provide for BCFC to receive distribution as a creditor of the other Petitioners;

(b) They criticize the overly broad and inappropriate character of the release provisions of the *CCAA* Plan;

(c) They contend that the NAFTA Settlement Funds have not been appropriately allocated.

[51] With respect, the Court considers that these objections are ill founded.

[52] First, given the vote by the creditors of BCFC that rejected the *CCAA* Plan and its specific terms in the event of such a situation, the initial ground of contestation is moot for all intents and purposes.

[53] In addition, pursuant to a hearing held on September 16 and 17, 2010, on an Abitibi's *Motion for Advice and Directions*, Mayrand J. already concluded that BCFC had simply no claims against the other Petitioners, save with respect to the Contribution Claim referred to in that motion and that is not affected by the *CCAA* Plan in any event.

[54] There is no need to now review or reconsider this issue that has been heard, argued and decided, mostly in a context where the Noteholders had ample opportunity to then present fully their arguments.

[55] In her reasons for judgment filed earlier today in the Court record, Mayrand J. notably ruled that the alleged Inter Company Claims of BCFC had no merit pursuant to a detailed analysis of what took place.

[56] For one, the Monitor, in its Amended 49th Report, had made a thorough review of the transactions at issue and concluded that they did not appear to give rise to any inter company debt owing to BCFC.

[57] On top of that, Mayrand J. noted as well that the Independent Advisors, who were appointed in the Chapter 11 U.S. Proceedings to investigate the Inter Company Transactions that were the subject of the Inter Company Claims, had completed their report in this regard. As explained in its 58th Report, the Monitor understands that they were of the view that BCFC had no other claims to file against any other Petitioner. In her reasons, Mayrand J. concluded that this was the only reasonable inference to draw from the evidence she heard.

[58] As highlighted by Mayrand J. in these reasons, despite having received this report of the Independent Advisors, the Noteholders have not agreed to release its content. Conversely, they have not invoked any of its findings in support of their position either.

[59] That is not all. In her reasons for judgment, Mayrand J. indicated that a detailed presentation of the Independent Advisors report was made to BCFC's Board of Directors on September 7, 2010. This notwithstanding, BCFC elected not to do anything in that regard since then.

[60] As a matter of fact, at no point in time did BCFC ever file, in the context of the current *CCAA* Proceedings, any claim against any other Petitioner. None of its creditors, including the Noteholders, have either purported to do so for and/or on behalf of BCFC. This is quite telling. After all, the transactions at issue date back many years and this restructuring process has been going on for close to eighteen months.

[61] To sum up, short of making allegations that no facts or analysis appear to support or claiming an insufficiency of process because the independent and objective ones followed so far did not lead to the result they wanted, the Noteholders simply have nothing of substance to put forward.

[62] Contrary to what they contend, there is no need for yet again another additional process to deal with this question. To so conclude would be tantamount to allowing the Noteholders to take hostage the *CCAA* restructuring process and derail Abitibi's emergence for no valid reason.

[63] The other argument of the Noteholders to the effect that BCFC would have had a claim as the holder of preferred shares of BCHI leads to similar comments. It is, again, hardly supported by anything. In any event, assuming the restructuring transactions contemplated under the *CCAA* Plan entail their cancellation for nil consideration, which is apparently not necessarily the case for the time being, there would be nothing unusual in having the equity holders of insolvent companies not receive anything in a compromise and plan of arrangement approved in a *CCAA* restructuring process.

[64] In such a context, the Court disagrees with the Noteholders' assertion that BCFC did not have an opportunity to vote on the *CCAA* Plan or that no process was established to provide the latter to receive distribution as a potential creditor of the other Petitioners.

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[65] To argue that the *CCAA* Plan is not fair and reasonable on the basis of these alleged claims of BCFC against the other Petitioners has no support based on the relevant facts and Mayrand J.'s analysis of that specific point.

[66] Second, given these findings, the issue of the breadth and appropriateness of the releases provided under the *CCAA* Plan simply does not concern the Noteholders.

[67] As stated by Abitibi's Counsel at hearing, BCFC is neither an "Applicant" under the terms of the releases of the *CCAA* Plan nor pursuant to the Sanction Order. As such, BCFC does not give or get releases as a result of the Sanction Order. The *CCAA* Plan does not release BCFC nor its directors or officers acting as such.

[68] As it is not included as an "Applicant", there is no need to provide any type of convoluted "carve-out" provision as the Noteholders requested. As properly suggested by Abitibi, it will rather suffice to include a mere clarification at paragraph 15 of the Sanction Order to reaffirm that in the context of the releases and the Sanction Order, "Applicant" does not include BCFC.

[69] As for the Noteholders themselves, they are Unaffected Creditors under the *CCAA* Plan as a result of the no vote of their Class.

[70] In essence, the main concern of the Noteholders as to the scope of the releases contemplated by the *CCAA* Plan and the Sanction Order is a mere issue of clarity. In the Court's opinion, this is sufficiently dealt with by the addition made to the wording of paragraph 15 of the Sanction Order.

[71] Besides that, as explained earlier, any complaint by the Noteholders that the alleged inter company claims of BCFC are improperly compromised by the *CCAA* Plan has no merit. If their true objective is to indirectly protect their contentions to that end by challenging the wording of the releases, it is unjustified and without basis. The Court already said so.

[72] Save for these arguments raised by the Noteholders that the Court rejects, it is worth noting that none of the stakeholders of Abitibi object to the scope of the releases of the *CCAA* Plan or their appropriateness given the global compromise reached through the debt to equity swap and the reorganization contemplated by the plan.

[73] The *CCAA* permits the inclusion of releases (even ones involving third parties) in a plan of compromise or arrangement when there is a reasonable connection between the claims being released and compromised and the restructuring achieved by the plan. Amongst others, the broad nature of the terms "compromise or arrangement", the binding nature of a plan that has received creditors' approval, and the principles that parties should be able to put in a plan what could lawfully be incorporated into any other contract support the authority of the Court to approve these kind of releases[11]. In

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[11] See, in this respect, *ATB Financial* v. *Metcalfe & Mansfield Alternative Investments II Corp.*, [2008] ONCA 587; *Charles-Auguste Fortier inc. (Arrangement relatif à)*, J.E. 2009-9, 2008 QCCS 5388 (S.C.); *Hy Bloom inc.* v. *Banque Nationale du Canada*, [2010] R.J.Q. 912 (S.C.).

accordance with these principles, the Quebec Superior Court has, in the past, sanctioned plans that included releases of parties making significant contribution to a restructuring[12].

[74] The additional argument raised by the Noteholders with respect to the difference between the releases that could be approved by this Court as compared to those that the U.S. Bankruptcy Court may issue in respect of the Chapter 11 Plan is not convincing.

[75] The fact that under the Chapter 11 Plan, creditors may elect not to provide releases to directors and officers of applicable entities does not render similar kind of releases granted under the *CCAA* Plan invalid or improper. That the result may be different in a jurisdiction as opposed to the other does not make the *CCAA* Plan unfair and unreasonable simply for that reason.

[76] Third, the last objection of the Noteholders to the effect that the NAFTA Settlement Funds have not been properly allocated is simply a red herring. It is aimed at provoking a useless debate with respect to which the Noteholders have, in essence, no standing.

[77] The Monitor testified that the NAFTA Settlement has no impact whatsoever upon BCFC. If it is at all relevant, all the assets involved in this settlement belonged to another of the Petitioners, ACCC, with respect to whom the Noteholders are not a creditor.

[78] In addition, this apparent contestation of the allocation of the NAFTA Settlement Funds is a collateral attack on the Order granted by this Court on September 1, 2010, which approved the settlement of Abitibi's NAFTA claims against the Government of Canada, as well as the related payment to be made to the reorganised successor Canadian operating entity upon emergence. No one has appealed this NAFTA Settlement Order.

[79] That said, in their oral argument, the Noteholders have finally argued that the Court should lift the Stay of Proceedings Order inasmuch as BCFC was concerned. The last extension of the Stay was granted on September 1, 2010, without objection; it expires on September 30, 2010. It is clear from the wording of this Sanction Order that any extension beyond September 30, 2010 will not apply to BCFC.

[80] The Court considers this request made verbally by the Noteholders as unfounded.

[81] No written motion was ever served in that regard to start with. In addition, the Stay remains in effect against BCFC up until September 30, 2010, that is, for about a week or so. The explanations offered by Abitibi's Counsel to leave it as such for the time being are reasonable under the circumstances. It appears proper to allow a few

[12] *Quebecor World Inc. (Arrangement relatif à),* S.C. Montreal, Nº 500-11-032338-085, 2009-06-30, Mongeon J.

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days to the interested parties to ascertain the impact, if any, of the Stay not being applicable anymore to BCFC, if alone to ascertain how this impacts upon the various charges created by the Initial Order and subsequent Orders issued by the Court during the course of these proceedings.

[82] There is no support for the concern of the Noteholders as to an ulterior motive of Abitibi for maintaining in place this Stay of Proceedings against BCFC up until September 30, 2010.

[83] All things considered, in the Court's opinion, it would be quite unfair and unreasonable to deny the sanction of the *CCAA* Plan for the benefit of all the stakeholders involved on the basis of the arguments raised by the Noteholders.

[84] Their objections either reargue issues that have been heard, considered and decided, complain of a lack a clarity of the scope of releases that the addition of a few words to the Sanction Order properly addresses, or voice queries about the allocation of important funds to the Abitibi's emergence from the *CCAA* that simply do not concern the entities of which the Noteholders are allegedly creditors, be it in Canada or in the U.S.

[85] When one remains mindful of the relative degrees of prejudice that would flow from granting or refusing the relief sought, it is obvious that the scales heavily tilt in favour of granting the Sanction Order sought.

3. The Contestations of the Provinces of Ontario and British Columbia

[86] Following negotiations that the Provinces involved and Abitibi pursued, with the assistance of the Monitor, up to the very last minute, the interested parties have agreed upon a "carve-out" wording that is satisfactory to every one with respect to some potential environmental liabilities of Abitibi in the event future circumstances trigger a concrete dispute in that regard.

[87] In the Court's view, this is, by far, the most preferred solution to adopt with respect to the disagreement that exists on their respective position as to potential proceedings that may arise in the future under environmental legislation. This approach facilitates the approval of the *CCAA* Plan and the successful restructuring of Abitibi, without affecting the right of any affected party in this respect.

[88] The "carve-out" provisions agreed upon will be included in the Sanction Order.

4. The Contestation of NPower Cogen Limited

[89] By its Contestation, NPower Cogen Limited sought to preserve its rights with respect to what it called the "Cogen Motion", namely a "*motion to be brought by Cogen before this Honourable Court to have various claims heard*" (para. 24(b) and 43 of NPower Cogen Limited Contestation).

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[90] Here again, Abitibi and NPower Cogen Limited have agreed on an acceptable "carve-out" wording to be included in the Sanction Order in that regard. As a result, there is no need to discuss the impact of this Contestation any further.

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5. Abitibi's Reorganization

[91] The Motion finally deals with the corporate reorganization of Abitibi and the Sanction Order includes declarations and orders dealing with it.

[92] The test to be applied by the Court in determining whether to approve a reorganization under Section 191 of the *CBCA* is similar to the test applied in deciding whether to sanction a plan of arrangement under the *CCAA*, namely: (a) there must be compliance with all statutory requirements; (b) the debtor company must be acting in good faith; and (c) the capital restructuring must be fair and reasonable[13].

[93] It is not disputed by anyone that these requirements have been fulfilled here.

6. The wording of the Sanction Order

[94] In closing, the Court made numerous comments to Abitibi's Counsel on the wording of the Sanction Order initially sought in the Motion. These comments have been taken into account in the subsequent in depth revisions of the Sanction Order that the Court is now issuing. The Court is satisfied with the corrections, adjustments and deletions made to what was originally requested.

FOR THESE REASONS, THE COURT:

[1] **GRANTS** the Motion**.**

Definitions

[2] **DECLARES** that any capitalized terms not otherwise defined in this Order shall have the meaning ascribed thereto in the *CCAA* Plan[14] and the Creditors' Meeting Order, as the case may be.

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[13] *Raymor Industries inc. (Proposition de),* [2010] R.J.Q. 608 (S.C.), 2010 QCCS 376; *Quebecor World Inc. (Arrangement relatif à),* S.C. Montreal, Nº 500-11-032338-085, 2009-06-30, Mongeon J., at para. 7-8; *Mei Computer Technology Group Inc. (Arrangement relatif à*), (S.C., 2005-11-14), SOQUIJ AZ-50380254, 2005 CanLII 54083 (QC C.S.); *Doman Industries Ltd. (Re),* 2003 BCSC 375; *Laidlaw Inc. (Re)*, [2003] O.J. No. 865 (Ont. S.C.J.).

[14] It is understood that for the purposes of this Sanction Order, the *CCAA* Plan is the Plan of Reorganisation and Compromise (as modified, amended or supplemented by *CCAA* Plan Supplements 3.2, 6.1(a)(i) (as amended on September 13, 2010) and 6.1(a)(ii) dated September 1, 2010, *CCAA* Plan Supplements 6.8(a), 6.8(b) (as amended on September 13, 2010), 6.8(d), 6.9(1) and 6.9(2) dated September 3, 2010, and the First Plan Amendment dated September 10, 2010, and as may be further modified, amended, or supplemented in accordance with the terms of such Plan of Reorganization and Compromise) included as Schedules E and F to the Supplemental 59th Report of the Monitor dated September 21, 2010.

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Service and Meeting

[3] **DECLARES** that the notices given of the presentation of the Motion and related Sanction Hearing are proper and sufficient, and in accordance with the Creditors' Meeting Order.

[4] **DECLARES** that there has been proper and sufficient service and notice of the Meeting Materials, including the *CCAA* Plan, the Circular and the Notice to Creditors in connection with the Creditors' Meeting, to all Affected Unsecured Creditors, and that the Creditors' Meeting was duly convened, held and conducted in conformity with the *CCAA*, the Creditors' Meeting Order and all other applicable orders of the Court.

[5] **DECLARES** that no meetings or votes of (i) holders of Equity Securities and/or (ii) holders of equity securities of ABH are required in connection with the *CCAA* Plan and its implementation, including the implementation of the Restructuring Transactions as set out in the Restructuring Transactions Notice dated September 1, 2010, as amended on September 13, 2010.

***CCAA* Plan Sanction**

[6] **DECLARES** that:

a) the *CCAA* Plan and its implementation (including the implementation of the Restructuring Transactions) have been approved by the Required Majorities of Affected Unsecured Creditors in each of the following classes in conformity with the *CCAA*: ACI Affected Unsecured Creditor Class, the ACCC Affected Unsecured Creditor Class, the 15.5% Guarantor Applicant Affected Unsecured Creditor Classes, the Saguenay Forest Products Affected Unsecured Creditor Class, the BCFPI Affected Unsecured Creditor Class, the AbitibiBowater Canada Affected Unsecured Creditor Class, the Bowater Maritimes Affected Unsecured Creditor Class, the ACNSI Affected Unsecured Creditor Class, the Office Products Affected Unsecured Creditor Class and the Recycling Affected Unsecured Creditor Class;

b) the *CCAA* Plan was not approved by the Required Majority of Affected Unsecured Creditors in the BCFC Affected Unsecured Creditors Class and that the Holders of BCFC Affected Unsecured Claims are therefore deemed to be Unaffected Creditors holding Excluded Claims against BCFC for the purpose of the *CCAA* Plan and this Order, and that BCFC is therefore deemed not to be an Applicant for the purpose of this Order;

c) the Court is satisfied that the Petitioners and the Partnerships have complied with the provisions of the *CCAA* and all the orders made by this Court in the context of these *CCAA* Proceedings in all respects;

d) the Court is satisfied that no Petitioner or Partnership has either done or purported to do anything that is not authorized by the *CCAA*; and

e) the *CCAA* Plan (and its implementation, including the implementation of the Restructuring Transactions), is fair and reasonable, and in the best interests of the Applicants and the Partnerships, the Affected Unsecured Creditors, the other stakeholders of the Applicants and all other Persons stipulated in the *CCAA* Plan.

[7] **ORDERS** that the *CCAA* Plan and its implementation, including the implementation of the Restructuring Transactions, are sanctioned and approved pursuant to Section 6 of the *CCAA* and Section 191 of the *CBCA*, and, as at the Implementation Date, will be effective and will enure to the benefit of and be binding upon the Applicants, the Partnerships, the Reorganized Debtors, the Affected Unsecured Creditors, the other stakeholders of the Applicants and all other Persons stipulated in the *CCAA* Plan.

CCAA Plan Implementation

[8] **DECLARES** that the Applicants, the Partnerships, the Reorganized Debtors and the Monitor, as the case may be, are authorized and directed to take all steps and actions necessary or appropriate, as determined by the Applicants, the Partnerships and the Reorganized Debtors in accordance with and subject to the terms of the *CCAA* Plan, to implement and effect the *CCAA* Plan, including the Restructuring Transactions, in the manner and the sequence as set forth in the *CCAA* Plan, the Restructuring Transactions Notice and this Order, and such steps and actions are hereby approved.

[9] **AUTHORIZES** the Applicants, the Partnerships and the Reorganized Debtors to request, if need be, one or more order(s) from this Court, including *CCAA* Vesting Order(s), for the transfer and assignment of assets to the Applicants, the Partnerships, the Reorganized Debtors or other entities referred to in the Restructuring Transactions Notice, free and clear of any financial charges, as necessary or desirable to implement and effect the Restructuring Transactions as set forth in the Restructuring Transactions Notice.

[10] **DECLARES** that, pursuant to Section 191 of the *CBCA*, the articles of AbitibiBowater Canada will be amended by new articles of reorganization in the manner and at the time set forth in the Restructuring Transactions Notice.

[11] **DECLARES** that all Applicants and Partnerships to be dissolved pursuant to the Restructuring Transactions shall be deemed dissolved for all purposes without the necessity for any other or further action by or on behalf of any Person, including the Applicants or the Partnerships or their respective securityholders, directors, officers, managers or partners or for any payments to be made in connection therewith, provided, however, that the Applicants, the Partnerships and the Reorganized Debtors shall cause to be filed with the appropriate Governmental Entities articles, agreements

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or other documents of dissolution for the dissolved Applicants or Partnerships to the extent required by applicable Law.

[12] **DECLARES** that, subject to the performance by the Applicants and the Partnerships of their obligations under the *CCAA* Plan, and in accordance with Section 8.1 of the *CCAA* Plan, all contracts, leases, Timber Supply and Forest Management Agreements ("TSFMA") and outstanding and unused volumes of cutting rights (backlog) thereunder, joint venture agreements, agreements and other arrangements to which the Applicants or the Partnerships are a party and that have not been terminated including as part of the Restructuring Transactions or repudiated in accordance with the terms of the Initial Order will be and remain in full force and effect, unamended, as at the Implementation Date, and no Person who is a party to any such contract, lease, agreement or other arrangement may accelerate, terminate, rescind, refuse to perform or otherwise repudiate its obligations thereunder, or enforce or exercise any right (including any right of dilution or other remedy) or make any demand under or in respect of any such contract, lease, agreement or other arrangement and no automatic termination will have any validity or effect by reason of:

a) any event that occurred on or prior to the Implementation Date and is not continuing that would have entitled such Person to enforce those rights or remedies (including defaults, events of default, or termination events arising as a result of the insolvency of the Applicants and the Partnerships);

b) the insolvency of the Applicants, the Partnerships or any affiliate thereof or the fact that the Applicants, the Partnerships or any affiliate thereof sought or obtained relief under the *CCAA*, the CBCA or the Bankruptcy Code or any other applicable legislation;

c) any of the terms of the *CCAA* Plan, the U.S. Plan or any action contemplated therein, including the Restructuring Transactions Notice;

d) any settlements, compromises or arrangements effected pursuant to the *CCAA* Plan or the U.S. Plan or any action taken or transaction effected pursuant to the *CCAA* Plan or the U.S. Plan; or

e) any change in the control, transfer of equity interest or transfer of assets of the Applicants, the Partnerships, the joint ventures, or any affiliate thereof, or of any entity in which any of the Applicants or the Partnerships held an equity interest arising from the implementation of the *CCAA* Plan (including the Restructuring Transactions Notice) or the U.S. Plan, or the transfer of any asset as part of or in connection with the Restructuring Transactions Notice.

[13] **DECLARES** that any consent or authorization required from a third party, including any Governmental Entity, under any such contracts, leases, TSFMAs and outstanding and unused volumes of cutting rights (backlog) thereunder, joint venture agreements, agreements or other arrangements in respect of any change of control,

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transfer of equity interest, transfer of assets or transfer of any asset as part of or in connection with the Restructuring Transactions Notice be deemed satisfied or obtained, as applicable.

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[14] **DECLARES** that the determination of Proven Claims in accordance with the Claims Procedure Orders, the Cross-border Claims Protocol, the Cross-border Voting Protocol and the Creditors' Meeting Order shall be final and binding on the Applicants, the Partnerships, the Reorganized Debtors and all Affected Unsecured Creditors.

Releases and Discharges

[15] **CONFIRMS** the releases contemplated by Section 6.10 of the *CCAA* Plan and **DECLARES** that the said releases constitute good faith compromises and settlements of the matters covered thereby, and that such compromises and settlements are in the best interests of the Applicants and its stakeholders, are fair, equitable, and are integral elements of the restructuring and resolution of these proceedings in accordance with the *CCAA* Plan, it being understood that for the purpose of these releases and/or this Order, the terms "Applicants" or "Applicant" are not meant to include Bowater Canada Finance Corporation ("**BCFC**").

[16] **ORDERS** that, upon payment in full in cash of all BI DIP Claims and ULC DIP Claim in accordance with the *CCAA* Plan, the BI DIP Lenders and the BI DIP Agent or ULC, as the case may be, shall at the request of the Applicants, the Partnerships or the Reorganized Debtors, without delay, execute and deliver to the Applicants, the Partnerships or the Reorganized Debtors such releases, discharges, authorizations and directions, instruments, notices and other documents as the Applicants, the Partnerships or the Reorganized Debtors may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charges with respect to the BI DIP Claims or the ULC DIP Claim, as the case may be, the whole at the expense of the Applicants, the Partnerships or the Reorganized Debtors.

[17] **ORDERS** that, upon payment in full in cash of their Secured Claims in accordance with the *CCAA* Plan, the ACCC Administrative Agent, the ACCC Term Lenders, the BCFPI Administrative Agent, the BCFPI Lenders, the Canadian Secured Notes Indenture Trustee and any Holders of a Secured Claim, as the case may be, shall at the request of the Applicants, the Partnerships or the Reorganized Debtors, without delay, execute and deliver to the Applicants, the Partnerships or the Reorganized Debtors such releases, discharges, authorizations and directions, instruments, notices and other documents as the Applicants, the Partnerships or the Reorganized Debtors may reasonably request for the purpose of evidencing and/or registering the release and discharge of any and all Financial Charges with respect to the ACCC Term Loan Claim, BCFPI Secured Bank Claim, Canadian Secured Notes Claim or any other Secured Claim, as the case may be, the whole at the expense of the Applicants, the Partnerships or the Reorganized Debtors.

For the purposes of the present paragraph [17], in the event of any dispute as to the amount of any Secured Claim, the Applicants, Partnerships or Reorganized Debtors, as the case may be, shall be permitted to pay to the Monitor the full amount in dispute (as specified by the affected Secured Creditor or by this Court upon summary application) and, upon payment of the amount not in dispute, receive the releases, discharges, authorizations, directions, instruments notices or other documents as provided for therein. Any amount paid to the Monitor in accordance with this paragraph shall be held in trust by the Monitor for the holder of the Secured Claim and the payer as their interests shall be determined by agreement between the parties or, failing agreement, as directed by this Court after summary application.

[18] **PRECLUDES** the prosecution against the Applicants, the Partnerships or the Reorganized Debtors, whether directly, derivatively or otherwise, of any claim, obligation, suit, judgment, damage, demand, debt, right, cause of action, liability or interest released, discharged or terminated pursuant to the *CCAA* Plan.

Accounts with Financial Institutions

[19] **ORDERS** that any and all financial institutions (the "Financial Institutions") with which the Applicants, the Partnerships and the Reorganized Debtors have or will have accounts (the "Accounts") shall process and/or facilitate the transfer of, or changes to, such Accounts in order to implement the *CCAA* Plan and the transactions contemplated thereby, including the Restructuring Transactions.

[20] **ORDERS** that Mr. Allen Dea, Vice-President and Treasurer of ABH, or any other officer or director of the Reorganized Debtors, is empowered to take all required acts with any of the Financial Institutions to affect the transfer of, or changes to, the Accounts in order to facilitate the implementation of the *CCAA* Plan and the transactions contemplated thereby, including the Restructuring Transactions.

Effect of failure to implement *CCAA* Plan

[21] **ORDERS** that, in the event that the Implementation Date does not occur, Affected Unsecured Creditors shall not be bound to the valuation, settlement or compromise of their Affected Claims at the amount of their Proven Claims in accordance with the *CCAA* Plan, the Claims Procedure Orders or the Creditors' Meeting Order. For greater certainty, nothing in the *CCAA* Plan, the Claims Procedure Orders, the Creditors' Meeting Order or in any settlement, compromise, agreement, document or instrument made or entered into in connection therewith or in contemplation thereof shall, in any way, prejudice, quantify, adjudicate, modify, release, waive or otherwise affect the validity, enforceability or quantum of any Claim against the Applicants or the Partnerships, including in the *CCAA* Proceedings or any other proceeding or process, in the event that the Implementation Date does not occur.

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Charges created in the *CCAA* Proceedings

[22] **ORDERS** that, upon the Implementation Date, all *CCAA* Charges against the Applicants and the Partnerships or their property created by the *CCAA* Initial Order or any subsequent orders shall be determined, discharged and released, provided that the BI DIP Lenders Charge shall be cancelled on the condition that the BI DIP Claims are paid in full on the Implementation Date.

Fees and Disbursements

[23] **ORDERS** and **DECLARES** that, on and after the Implementation Date, the obligation to pay the reasonable fees and disbursements of the Monitor, counsel to the Monitor and counsel to the Applicants and the Partnerships, in each case at their standard rates and charges and including any amounts outstanding as of the Implementation Date, in respect of the *CCAA* Plan, including the implementation of the Restructuring Transactions, shall become obligations of Reorganized ABH.

Exit Financing

[24] **ORDERS** that the Applicants are authorized and empowered to execute, deliver and perform any credit agreements, instruments of indebtedness, guarantees, security documents, deeds, and other documents, as may be required in connection with the Exit Facilities.

Stay Extension

[25] **EXTENDS** the Stay Period in respect of the Applicants until the Implementation Date.

[26] **DECLARES** that all orders made in the *CCAA* Proceedings shall continue in full force and effect in accordance with their respective terms, except to the extent that such Orders are varied by, or inconsistent with, this Order, the Creditors' Meeting Order, or any further Order of this Court.

Monitor and Chief Restructuring Officer

[27] **DECLARES** that the protections afforded to Ernst & Young Inc., as Monitor and as officer of this Court, and to the Chief Restructuring Officer pursuant to the terms of the Initial Order and the other Orders made in the *CCAA* Proceedings, shall not expire or terminate on the Implementation Date and, subject to the terms hereof, shall remain effective and in full force and effect.

[28] **ORDERS** and **DECLARES** that any distributions under the *CCAA* Plan and this Order shall not constitute a "distribution" and the Monitor shall not constitute a "legal representative" or "representative" of the Applicants for the purposes of section 159 of the Income Tax Act (Canada), section 270 of the Excise Tax Act (Canada), section 14 of the Act Respecting the Ministère du Revenu (Québec), section 107 of the

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Corporations Tax Act (Ontario), section 22 of the Retail Sales Tax Act (Ontario), section 117 of the Taxation Act, 2007 (Ontario) or any other similar federal, provincial or territorial tax legislation (collectively the "Tax Statutes") given that the Monitor is only a Disbursing Agent under the *CCAA* Plan, and the Monitor in making such payments is not "distributing", nor shall be considered to "distribute" nor to have "distributed", such funds for the purpose of the Tax Statutes, and the Monitor shall not incur any liability under the Tax Statutes in respect of it making any payments ordered or permitted hereunder, and is hereby forever released, remised and discharged from any claims against it under or pursuant to the Tax Statutes or otherwise at law, arising in respect of payments made under the *CCAA* Plan and this Order and any claims of this nature are hereby forever barred.

[29] **ORDERS** and **DECLARES** that the Disbursing Agent, the Applicants and the Reorganized Debtors, as necessary, are authorized to take any and all actions as may be necessary or appropriate to comply with applicable Tax withholding and reporting requirements, including withholding a number of shares of New ABH Common Stock equal in value to the amount required to comply with such withholding requirements from the shares of New ABH Common Stock to be distributed to current or former employees and making the necessary arrangements for the sale of such shares on the TSX or the New York Stock Exchange on behalf of the current or former employees to satisfy such withholding requirements. All amounts withheld on account of Taxes shall be treated for all purposes as having been paid to the Affected Unsecured Creditor in respect of which such withholding was made, provided such withheld amounts are remitted to the appropriate Governmental Entity.

Claims Officers

[30] **DECLARES** that, in accordance with paragraph [25] hereof, any claims officer appointed in accordance with the Claims Procedure Orders shall continue to have the authority conferred upon, and to the benefit from all protections afforded to, claims officers pursuant to Orders in the *CCAA* Proceedings.

General

[31] **ORDERS** that, notwithstanding any other provision in this Order, the *CCAA* Plan or these *CCAA* Proceedings, the rights of the public authorities of British Columbia, Ontario or New Brunswick to take the position in or with respect to any future proceedings under environmental legislation that this or any other Order does not affect such proceedings by reason that such proceedings are not in relation to a claim within the meaning of the *CCAA* or are otherwise beyond the jurisdiction of Parliament or a court under the *CCAA* to affect in any way is fully reserved; as is reserved the right of any affected party to take any position to the contrary.

[32] **DECLARES** that nothing in this Order or the *CCAA* Plan shall preclude NPower Cogen Limited ("Cogen") from bringing a motion for, or this Court from granting, the relief sought in respect of the facts and issues set out in the Claims Submission of

Cogen dated August 10, 2010 (the "Claim Submission"), and the Reply Submission of Cogen dated August 24, 2010, provided that such relief shall be limited to the following:

a) a declaration that Cogen's claim against Abitibi Consolidated Inc. ("Abitibi") and its officers and directors, arising from the supply of electricity and steam to Bridgewater Paper Company Limited between November 1, 2009 and February 2, 2010 in the amount of £9,447,548 plus interest accruing at the rate of 3% *per annum* from February 2, 2010 onwards (the "Claim Amount") is (i) unaffected by the *CCAA* Plan or Sanction Order; (ii) is an Excluded Claim; or (iii) is a Secured Claim; (iv) is a D&O Claim; or (v) is a liability of Abitibi under its Guarantee;

b) an Order directing Abitibi and its Directors and Officers to pay the Claim Amount to Cogen forthwith; or

c) in the alternative to (b), an order granting leave, if leave be required, to commence proceedings for the payment of the Claim Amount under s. 241 of the *CBCA* and otherwise against Abitibi and its directors and officers in respect of same.

[33] **DECLARES** that any of the Applicants, the Partnerships, the Reorganized Debtors or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of the Order on notice to the Service List.

[34] **DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

[35] **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of the Order, including the registration of this Order in any office of public record by any such court or administrative body or by any Person affected by the Order.

Provisional Execution

[36] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security;

[37] **WITHOUT COSTS.**

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CLÉMENT GASCON, J.S.C.

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Dates of hearing: September 20 and 21, 2010

2010 QCCS 4450 (CanLII)

SCHEDULE "A"

ABITIBI PETITIONERS

1. **ABITIBI-CONSOLIDATED INC.**
2. **ABITIBI-CONSOLIDATED COMPANY OF CANADA**
3. **3224112 NOVA SCOTIA LIMITED**
4. **MARKETING DONOHUE INC.**
5. **ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.**
6. **3834328 CANADA INC.**
7. **6169678 CANADA INC.**
8. **4042140 CANADA INC.**
9. **DONOHUE RECYCLING INC.**
10. **1508756 ONTARIO INC.**
11. **3217925 NOVA SCOTIA COMPANY**
12. **LA TUQUE FOREST PRODUCTS INC.**
13. **ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED**
14. **SAGUENAY FOREST PRODUCTS INC.**
15. **TERRA NOVA EXPLORATIONS LTD.**
16. **THE JONQUIERE PULP COMPANY**
17. **THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY**
18. **SCRAMBLE MINING LTD.**
19. **9150-3383 QUÉBEC INC.**
20. **ABITIBI-CONSOLIDATED (U.K.) INC.**

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SCHEDULE "B"

BOWATER PETITIONERS

1. **BOWATER CANADIAN HOLDINGS INC.**
2. **BOWATER CANADA FINANCE CORPORATION**
3. **BOWATER CANADIAN LIMITED**
4. **3231378 NOVA SCOTIA COMPANY**
5. **ABITIBIBOWATER CANADA INC.**
6. **BOWATER CANADA TREASURY CORPORATION**
7. **BOWATER CANADIAN FOREST PRODUCTS INC.**
8. **BOWATER SHELBURNE CORPORATION**
9. **BOWATER LAHAVE CORPORATION**
10. **ST-MAURICE RIVER DRIVE COMPANY LIMITED**
11. **BOWATER TREATED WOOD INC.**
12. **CANEXEL HARDBOARD INC.**
13. **9068-9050 QUÉBEC INC.**
14. **ALLIANCE FOREST PRODUCTS (2001) INC.**
15. **BOWATER BELLEDUNE SAWMILL INC.**
16. **BOWATER MARITIMES INC.**
17. **BOWATER MITIS INC.**
18. **BOWATER GUÉRETTE INC.**
19. **BOWATER COUTURIER INC.**

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SCHEDULE "C"

18.6 *CCAA* PETITIONERS

1. **ABITIBIBOWATER INC.**
2. **ABITIBIBOWATER US HOLDING 1 CORP.**
3. **BOWATER VENTURES INC.**
4. **BOWATER INCORPORATED**
5. **BOWATER NUWAY INC.**
6. **BOWATER NUWAY MID-STATES INC.**
7. **CATAWBA PROPERTY HOLDINGS LLC**
8. **BOWATER FINANCE COMPANY INC.**
9. **BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED**
10. **BOWATER AMERICA INC.**
11. **LAKE SUPERIOR FOREST PRODUCTS INC.**
12. **BOWATER NEWSPRINT SOUTH LLC**
13. **BOWATER NEWSPRINT SOUTH OPERATIONS LLC**
14. **BOWATER FINANCE II, LLC**
15. **BOWATER ALABAMA LLC**
16. **COOSA PINES GOLF CLUB HOLDINGS LLC**

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

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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 entre 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.

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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.

Cases referred to

Steinberg Inc. c. Michaud, [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, [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), 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, 19 B.L.R. (3d) 286, 110 A.C.W.S. (3d) 259 (S.C.); Stelco Inc. (Re) (2005), 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

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C.B.R. (5th) 307, 144 A.C.W.S. (3d) 15 (C.A.); Stelco Inc. (Re), [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] 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

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Air Canada (Re), [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, 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] 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] 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), 24 C.B.R. (4th) 201 (Ont. C.A.); Country Style Food Services (Re), [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 Associs lte, [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] 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., [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] 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] 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), 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, 31 C.B.R. (5th)

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233, 156 A.C.W.S. (3d) 824, 159 A.C.W.S. (3d) 541; Reference re: Constitutional Creditors Arrangement Act (Canada), [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, [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), 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 210-006; 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), 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.)

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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

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House of Commons Debates (Hansard), (20 April 1933) at 4091 (Hon. C.H. Cahan)

APPEAL from the sanction order of C.L. Campbell J., [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.

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

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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), 24 C.B.R. (4th) 201 (Ont. C.A.) and Re Country Style Food Services, [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.) are met. I would grant leave to appeal.

Appeal

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[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.

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[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

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[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.

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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

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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

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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

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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

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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

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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

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(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 entre 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] O.J. No. 3306, 5 C.B.R. (4th) 299 (Gen. Div.). As Farley J. noted in Dylex Ltd. (Re), [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

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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), 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] 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

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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 Qubec 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] 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

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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), 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

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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

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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;

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(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

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> 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., [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), 50 O.R. (3d) 688,

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[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] O.J. No. 1909, 2 C.B.R. (5th) 4 (S.C.J.), at para. 6; Olympia & York Developments Ltd. (Re) (1993), 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)

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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

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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

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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

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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] A.J. No. 771, 265 A.R. 201 (Q.B.), leave to appeal refused by Resurgence Asset Management LLC v. Canadian Airlines Corp., [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] O.J. No. 4087, 25 C.B.R. (5th) 231 (S.C.J.), Justice Ground remarked (para. 8):

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> [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

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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), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.); Pacific Coastal Airlines Ltd. v. Air Canada, [2001] B.C.J. No. 2580, 19 B.L.R. (3d) 286 (S.C.); and Stelco Inc. (Re) (2005), 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

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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

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allowing the respondent to pursue its claim against him would undermine or subvert the purposes of the Act. As this court noted in Elan Corp. v. Comiskey (1990), 1 O.R. (3d) 289 at 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)

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[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--vis the creditors themselves and not directly involving the company.

(Citations omitted; emphasis added)
See Stelco Inc. (Re), [2005] O.J. No. 4814, 15 C.B.R. (5th) 297 (S.C.J.), at para. 7.

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[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] 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

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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

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> 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.

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[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

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(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

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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 Associs lte), [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

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[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] S.C.R. 659, [1934] S.C.J. No. 46. As the Supreme Court confirmed in that case (p.

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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.

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[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] 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.

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[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] 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

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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

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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

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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 dpt et placement du Qubec
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

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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 Dpt et Placement du Qubec

(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

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(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, Sbastien Richemont and Marie-Anne Paquette, for Air Transat A.T. Inc., Transat Tours Canada Inc., The Jean Coutu Group (PJC) Inc., Aroports de Montral, Aroports de Montral Capital Inc., Pomerleau Ontario Inc., Pomerleau Inc., Labopharm Inc., Agence Mtropolitaine de Transport (AMT), Giro Inc., Vtements 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.

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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] 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.

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CITATION: Lydian International Limited (Re), 2020 ONSC 4006
COURT FILE NO.: CV-19-00633392-00CL
DATE: 2020-07-10

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

2020 ONSC 4006 (CanLII)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LYDIAN INTERNATIONAL LIMITED, LYDIAN CANADA VENTURES CORPORATION AND LYDIAN U.K. CORPORATION LIMITED

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Elizabeth Pillon*, *Maria Konyukhova*, *Sanja Sopic*, and *Nicholas Avis*, for the Applicants

D. J. Miller and *Rachel Bergino*, for Alvarez & Marsal Inc.

Robert Mason and *Virginie Gauthier*, for Osisko Bermuda Limited

Pamela Huff and *Chris Burr*, for Resource Capital Fund VI L.P.

David Bish and *Michael Pickersgill*, for Orion Capital Management

Alexander Steele, for Caterpillar Financial Services (UK) Limited

Bruce Darlington, for ING Bank N.V./Abs Svensk Exportkredit (publ)

John LeRoux, *Hasan Ciftehan*, *Mehmet Ali Ekingen and Atilla Bozkay*, each in their capacity as a Shareholders of Lydian International Limited

HEARD by ZOOM Hearing and DECIDED: **June 29, 2020**

REASONS RELEASED: **July 10, 2020**

ENDORSEMENT

[1] Lydian International Limited, Lydian Canada Ventures Corporation and Lydian U.K. Corporation Limited (the "Applicants") bring this motion for an order (the "Sanction and Implementation Order"), among other things:

a) declaring that the Meeting of Affected Creditors held on June 19, 2020 was duly convened and held, all in accordance with the Meeting Order;

b) sanctioning and approving the Applicants' Plan of Arrangement (the "Plan") as approved by a requisite majority of Affected Creditors at the Meeting, in accordance with the Plan Meeting Order (each as defined below), a copy of which is attached as Schedule "A" to the draft Sanction and Implementation Order; and

c) granting various other related relief (as more particularly outlined below).

[2] The Applicants submit that the Plan represents the culmination of the Applicants' restructuring efforts and allows for the resolution of these CCAA Proceedings. The Monitor and the majority of the Affected Creditors are supportive of the Plan and if sanctioned and implemented, the Plan will provide a path forward for Lydian Canada and Lydian UK as part of a privatized Restructured Lydian Group (as defined in the Plan) and ultimately lead to the termination of these CCAA Proceedings.

[3] Shortly after the conclusion of the hearing on June 29, 2020, which was conducted by Zoom, I granted the motion with reasons to follow.

[4] The facts with respect to this motion are more fully set out in the Affidavit of Edward A. Sellers sworn June 24, 2020 (the "Sellers Sanction Affidavit"), the Affidavit of Edward A. Sellers sworn June 15, 2020 (the "Sellers Meeting Affidavit") and the Affidavit of Mark Caiger sworn June 11, 2020 (the "BMO Affidavit"). Mr. Sellers and Mr. Caiger were not cross-examined. Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Sellers Sanction Affidavit, the Sellers Meeting Affidavit, and the Plan. All references to currency in this factum are references to United States dollars, unless otherwise indicated.

Background

[5] The Applicants are three entities at the top of the Lydian Group. The Lydian Group owns a development-stage gold mine in south-central Armenia through its wholly owned non-applicant operating subsidiary Lydian Armenia. The Applicants contend that they have been unable to access their main operating asset, the Amulsar mine, since June 2018 due to blockades and the associated actions and inactions of the Government of Armenia ("GOA"), and as a result, this has prevented the Applicants from completing construction of the mine and generating revenue in the ordinary course.

[6] The Applicants further contend that the effects of the blockades, amongst other factors, caused the Applicants to seek protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). An Initial Order was granted on December 23, 2019. Alvarez & Marsal Canada Inc. was appointed as Monitor.

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[7] In the two years since the blockades began, the Applicants contend that they have used their best efforts to resolve the factors that led to their insolvency, including engaging in negotiations with the GOA, defending their commercial rights and commencing legal proceedings in Armenia to attempt to remove the blockades but these efforts have yet to result in the Applicants re-gaining access to the Amulsar site.

[8] In early 2018, the Applicants retained BMO to canvass the market for potential refinancing or sale options. BMO has conducted multiple rounds of a sales process to market the Lydian Group's mining assets. BMO also ran a process to solicit interest in financing the Applicants' potential Treaty Arbitration. These efforts have not yet resulted in a transaction capable of satisfying the claims of the Applicants' secured lenders.

[9] Since the blockades began, the Senior Lenders have been funding the Applicants' efforts to find a solution to the situation caused by the blockades. The Senior Lenders provided additional financial support to the Lydian Group totalling in excess of $43 million.

[10] As of March 31, 2020, the Lydian Group owed its secured lenders more than $406.8 million.

[11] According to the Applicants, the secured lenders are no longer willing to support the Applicants' efforts to monetize their assets. The Equipment Financiers CAT and ING have taken enforcement steps and Ameriabank has issued preliminary notice of enforcement.

[12] Further, the Applicants point out that the liquidity made available to the Applicants since April 30, 2020 has been conditioned on the Applicants: (i) proposing a restructuring that would be equivalent to the Senior Lenders enforcing their security over the shares of Lydian Canada; and (ii) meeting a deadline to exit the CCAA Proceedings imposed by a majority of the Applicants' Senior Lenders, or further enforcement steps would be taken.

[13] The Applicants submit that the Plan represents the most efficient mechanism to effect an orderly transition of the Lydian Group's affairs. The Applicants contend that the Plan minimizes adverse collateral impacts on Lydian Armenia, provides for winding down the proceedings before this court and the Jersey Court and avoids uncoordinated enforcement steps being taken on the Lydian Group's property to the detriment of the Lydian Group's stakeholders generally.

The Plan

[14] The Plan recognizes and continues the priority position of the Senior Lenders in the Restructured Lydian Group. The Senior Lenders make up the only class eligible to vote on the Plan and receive a distribution thereunder.

[15] According to the Applicants, secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders. Stakeholders with claims at the Lydian International level will continue to have their claims on the Plan Implementation Date, which are intended to be addressed through

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the proposed J&E Process in Jersey. Equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan.

[16] The purpose of the Plan is to (a) implement a corporate and financial restructuring of the Applicants, (b) provide for the assignment or settlement of all intercompany debts owing to the Applicants prior to the Effective Time to, among other things, minimize adverse tax consequences to Lydian Armenia and its stakeholders, (c) provide for the equivalent of an assignment of substantially all of the assets of Lydian International to an entity owned and controlled by the Senior Lenders ("SL Newco"), through an amalgamation of Lydian Canada with SL Newco resulting in a new entity ("Restructured Lydian"), and (d) provide a release of all of the existing indebtedness and obligations owing by Lydian International to the Senior Lenders. The Plan will result in the privatization of the Lydian Group to continue as the Restructured Lydian Group.

[17] The steps involved in the Plan's execution are described in detailed in paragraphs 71 to 74 of the Sellers Meeting Affidavit.

[18] The Plan provides for certain releases. The releases are more fully described in the Sellers Meeting Affidavit at paragraph 83.

[19] Mr. Sellers in the Sellers Sanction Affidavit at para. 16 states that the releases were critical components of the negotiations and decision-making process for the D&Os and Senior Lenders in obtaining support for the Plan and resolving these CCAA Proceedings for the benefit of the Restructured Lydian Group, including Lydian Armenia, and all of its stakeholders.

[20] Mr. Sellers further states that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings, which resulted directly in the preservation of the Lydian Group's business, provided numerous opportunities for the Applicants to seek to monetize their assets for the benefit of stakeholders generally and led to the successful negotiation of the Plan for the benefit of the Restructured Lydian Group.

[21] The Plan provides for a Plan Implementation Date on or prior to June 30, 2020. The majority of the Applicants' Senior Lenders have agreed to fund the costs associated with implementing the Plan and termination of the CCAA Proceedings and the J&E Process in Jersey, through the DIP Exit Facility Amendment, which will make a DIP Exit Credit Facility available to the Applicants totalling an estimated additional $1.866 million.

[22] The test that a debtor company must satisfy in seeking the Court's approval for a plan of compromise or arrangement under the CCAA is well established:

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

b) all materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA and prior Orders of the Court in the CCAA proceedings; and

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c) the plan must be fair and reasonable.

Issues

[23] The issues for determination on this motion are whether:

a) the Plan is fair and reasonable and should be sanctioned;

b) the releases contemplated by the Plan are appropriate;

c) the increase to the DIP Charge to capture the amounts to be advanced under the DIP Exit Credit Facilities is appropriate;

d) the Stay Period should be extended;

e) the unredacted Sellers Sanction Affidavit should be sealed; and

f) the Monitor's activities, as detailed in the Fifth Report, Sixth Report and Seventh Report, should be approved and the fees of Monitor and its counsel through to June 23, 2020 should be approved.

LAW AND ANALYSIS

Approval of the Plan

[24] To determine whether there has been strict compliance with all statutory requirements, the court considers factors such as whether: (a) the applicant meets the definition of a "debtor company" under section 2 of the CCAA; (b) the applicant has total claims against it in excess of C$5 million; (c) the notice calling the creditors' meeting was sent in accordance with the order of the court; (d) the creditors were properly classified; (e) the meeting of creditors was properly constituted; (f) the voting was properly carried out; and (g) the plan was approved by the requisite majority.

[25] The Applicants submit that they have complied with the procedural requirements of the CCAA, the Initial Order, the Amended and Restated Initial Order, the Meeting Order and all other Orders granted by this Court during these CCAA Proceedings. In particular:

a) at the time the Initial Order was granted, the Applicants were found to be "debtor companies" to which the CCAA applied and that the Applicants' liabilities exceeded the C$5 million threshold amount under the CCAA;

b) the classification of the Applicants' Senior Lenders into one voting class (namely, the Affected Creditors class) was approved pursuant to the Meeting Order. This classification was not opposed at the hearing to approve the Meeting, nor was the Meeting Order appealed; the Applicants properly effected notice in accordance with the Meeting Order prior to the

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Meeting. In addition, the Applicants issued a press release on June 15, 2020 announcing their intention to seek an Order of the Court to file the Plan and call, hold and conduct a meeting of the Senior Lenders;

c) the Meeting was properly constituted and the voting on the Plan was carried out in accordance with the Meeting Order; and

d) the Plan was approved by the Required Majority.

[26] Sections 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. The Applicants' submit that these provisions of the CCAA are satisfied by the Plan. Crown claims and employee claims are treated by the Plan as Unaffected Claims, meaning that such claims, if any, are not compromised or otherwise affected. The Applicants do not maintain any pension plans, and thus section 6(6) of the CCAA does not apply. In compliance with s. 6(8) of the CCAA, the Plan does not provide for any recovery to equity holders.

[27] I accept the foregoing submissions. I am satisfied that the statutory prerequisites to approval of the Plan have been satisfied, and that there has been strict compliance with all statutory requirements.

[28] The Applicants submit that no unauthorized steps have been taken in these CCAA Proceedings and throughout the entirety of these CCAA Proceedings, they have kept this Court and Monitor appraised of all material aspects of the Applicants' conduct, activities, and key issues they have worked to resolve. I accept this submission.

[29] The Applicants' submit that when considering whether a plan of compromise and arrangement is fair and reasonable, the court should consider the relative degree of prejudice that would flow from granting or refusing to grant the relief sought. Courts should also consider whether the proposed plan represents a reasonable and fair balancing of interests, in light of the other commercial alternatives available (see: *Re Canadian Airlines Corp*, 2000 ABQB 442 at paras. 3, 94, 96, and 137 – 138; and *Re Canwest Global Communications Corp*, 2010 ONSC 4209).

[30] The CCAA permits the filing of a Plan by an Applicant to its secured creditors. The Applicants' submit the fact that unsecured creditors may receive no recovery under a proposed plan of arrangement does not, of itself, negate the fairness and reasonableness of a plan of arrangement (*Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA); and *1078385 Ontario Ltd., (Re)*, 2004 CanLII 55041 (ONCA) at paras 30-31 (CanLII), affirming 2004 CanLII 66329 (ONSC)).

[31] The Plan was presented to the Senior Lenders, who are the Applicants' only secured creditors and they voted on the Plan as a single class. The Senior Lenders voted in favour of the Plan by the Required Majority. The value of the claims of Orion and Osisko, who voted in

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favour of the Plan comprise 77.8% of the total value of the Affected Creditors who were present and voting.

[32] RCF, a secured lender and 32% shareholder, did not vote in favour of the Plan. RCF has advised that it "does not intend at this time to propose or fund an alternative to the Plan, and in the absence of such an alternative we expect that the Court will have no choice but to issue the Sanction and Implementation Order."

[33] I have been advised that an issue as between the Senior Lenders and ING has been resolved and for greater certainty this Plan does not compromise any claim that ING may have in respect of proceeds from a successfully-asserted arbitration claim. In addition, the Senior Lenders have agreed that, after payment of all claims of the Senior Lenders to proceeds from a successfully-asserted arbitration claim whether on account of: (i) claims of the Senior Lenders prior to the Plan Implementation Date; or (ii) further advances made by the Senior Lenders (or their affiliates) after the Plan Implementation Date, (whether such further advances are made as equity, secured debt or unsecured debt), the proceeds will be paid to Lydian Armenia in an amount sufficient and to be used to pay ING's claims against Lydian Armenia prior to any further monies being returned to equity holders.

[34] The Applicants submit that the structure and the nature of the releases in the Plan recognizes and continues the priority position of the Senior Lenders. Secured creditors and unsecured creditors with claims at or below Restructured Lydian will continue to maintain their claims in the Restructured Lydian Group, including Lydian Armenia, with the same priority as they previously had, ranking behind the Senior Lenders.

[35] The Applicants state that they have considered and believe the Plan is the best available outcome for the Applicants, and the interests of the stakeholders generally in the Lydian Group.

[36] As noted in the BMO Affidavit, despite multiple rounds of the SISP and the Treaty Arbitration financing solicitation process, the Applicants submit that no transaction which would satisfy the Lydian Group's secured obligations is currently available to the Applicants.

[37] The Applicants submit that the monetization of Treaty Arbitration is also not open to the Applicants at this time, and if initiated would require an extended period to litigate and significant additional financial resources.

[38] The Applicants submit that for the purposes of valuing an estate at a plan sanction hearing, the "value has to be determined on a current basis. […] It is inappropriate to value the assets on a speculative or (remote) possibility basis." A relevant consideration in this analysis is the scope and extent of previous sale or capital raising efforts undertaken by the company and any financial advisors. In support of this submission, the Applicants reference: *Anvil Range Mining Corp. (Re)*, 2002 CanLII 42003 (ONCA), para 36 (CanLII); *Philip Services Corp., Re*, 1999 CanLII 15012 (ONSC) at para 9 (CanLII) *1078385 Ontario Ltd., (Re*), 2004 CanLII 55041 (ONCA) at paras 30-31 (CanLII), affirming *1078385 Ontario Ltd. (Re)*, 2004 CanLII 66329 (ONSC) (CanLII).

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[39] The Applicants submit that the outcome of the Plan, that being the distribution of the Applicants' estates to the Senior Lenders, is essentially identical to what would be achieved with any other options available in the circumstances. Without the Plan, the Senior Lenders could (a) privatize the Applicants' assets through the enforcement of share pledges and other security, or (b) could credit bid their debt to acquire the shares or assets; or (c) enforce their secured positions following the Applicants filing for bankruptcy, administration, or liquidation proceedings across multiple jurisdictions. In each scenario (as with the Plan), the Applicants' assets are transitioned to the Senior Lenders.

[40] The foregoing submissions were not challenged.

[41] The Monitor supports the Plan. As noted in the Monitor's Seventh Report, "it is the Monitor's view that the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable."

[42] I am aware that concerns with respect to the fairness of the Plan have been raised by numerous shareholders of Lydian International and oral submissions were made by John LeRoux, Hasan Ciftehan, Mehmet Ali Ekingen and Atilla Bozkay.

[43] In addition, a number of emails were sent directly to the court, which were forwarded to counsel to the Monitor. In addition, certain emails were sent to the Monitor. None of the emails were in a proper evidentiary form.

[44] The concerns of the shareholders included criminal complaints of activities in Armenia, the content of certain press releases and the impact of the COVID-19 pandemic. Some shareholders requested a delay of three months in these proceedings.

[45] As previously noted, equity claims and unsecured claims against Lydian International will not be assumed by Restructured Lydian as part of the Plan. Simply put, the shareholders of Lydian International will not receive any compensation for their shareholdings. This is a reflection of the insolvency of the Applicants and the priority position afforded to shareholders by the CCAA.

[46] I recognize that the shareholders' monetary loss will be crystalized if the Plan is sanctioned. However, a monetary loss resulting from the ownership, purchase or sale of their equity interest is an "equity claim" as defined in s. 2(1) of the CCAA. This definition is significant as s. 6(8) of the CCAA provides:

> 6(8) Payment – equity claims – No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[47] The Plan does not provide for payment in full of claims that are not equity claims. Consequently, equity claimants are not in the position to receive any compensation.

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[48] The economic reality facing the shareholders existed prior to the COVID-19 pandemic. The Applicants were insolvent when they filed these proceedings on December 23, 2019. The financial situation facing the Applicants has not improved since the filing. In fact, it has declined. The mine is not operating with the obvious result that it is not generating revenues and interest continues to accrue on the secured debt. The fact that shareholders will receive no compensation is unfortunate but is a reflection of reality which does not preclude a finding that the Plan is fair and reasonable for the purposes of this motion.

[49] The Senior Lenders have voted in sufficient numbers in favour of the Plan. I am satisfied that there are no viable alternatives, and, in my view, it is not feasible to further delay these proceedings.

[50] Section 6.6 of the Plan provides for full and final releases in favour of the Released Parties, who consist of (a) the Applicants, their employees, agents and advisors (including counsel) and each of the members of the Existing Lydian Group's current and former directors and officers; (b) the Monitor and its counsel; and (c) the Senior Lenders and each of their respective affiliates, affiliated funds, their directors, officers, employees, agents and advisors (including counsel) (collectively, the "Ancillary Releases"). A chart setting out the impact of the releases is attached as Schedule "A" to these reasons.

[51] The Applicants submit that the releases apply to the extent permitted by law and expressly do not apply to, among other things:

a) Lydian Canada's, Lydian UK's or the Senior Lenders' obligations under the Plan or incorporated into the Plan;

b) obligations of any Existing Lydian Group member other than Lydian International under the Credit Agreement and Stream Agreement, and any agreements entered into relating to the foregoing, from and after the Plan Implementation Date;

c) any claims arising from the willful misconduct or gross negligence of any applicable Released Party; and

d) any Director from any Director Claim that is not permitted to be released pursuant to section 5.1(2) of the CCAA.

[52] Unsecured creditors' claims, other than the Ancillary Releases in favour of the Directors, are not compromised or released and remain in the Restructured Lydian Group.

[53] The Applicants submit that it is accepted that there is jurisdiction to sanction plans containing releases if the release was negotiated in favour of a third party as part of the "compromise" or "arrangement" where the release reasonably relates to the proposed restructuring and is not overly broad. 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 (see: *Re Canadian Airlines Corp*, 2000 ABQB 442

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at para 92 (CanLII) CCAA at s. 5(1); *Re Metcalfe & Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 61 and 70 (CanLII); *Re Canwest Global Communications Corp*, 2010 ONSC 4209 at para 28-30 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 85-88 (CanLII).

[54] The Applicants submit that in considering whether to approve releases in favour of third parties, courts will consider the particular circumstances of the case and the objectives of the CCAA. While no single factor will be determinative, the courts have considered the following factors:

a) Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b) Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c) Whether the plan could succeed without the releases;

d) Whether the parties being released were contributing to the plan; and

e) Whether the release benefitted the debtors as well as the creditors generally.

[55] The Applicants submit that the releases were critical components of the decision-making process for the Applicants' directors and officers and Senior Lenders' participation in these CCAA Proceedings in proposing the Plan and the Applicants submit that they would not have brought forward the Plan absent the inclusion of the releases.

[56] The Applicants also submit that the support of the Senior Lenders is essential to the Plan's viability. Without such support, which is conditional on the releases, the Plan would not succeed.

[57] The Applicants submit that the Released Parties made significant contributions to the Applicants' restructuring, both prior to and throughout these CCAA Proceedings. The extensive efforts of the Applicants' directors and officers and the Senior Lenders and Monitor resulted in the negotiation of the Plan, which forms the foundation for the completion of these CCAA Proceedings. The Senior Lenders financial contributions through forbearances, additional advances and DIP and Exit Financing were instrumental.

[58] The Applicants also submit that the releases are an integral part of the CCAA Plan which provides an orderly and effective alternative to uncoordinated and disruptive secured lender enforcement proceedings. The Plan permits unsecured creditors future potential recovery in the Restructured Lydian Group, which may not exist in bankruptcy (*Re Metcalfe &Mansfield Alternative Investments II Corp*., 2008 ONCA 587 at paras 71 (CanLII); and *Re Kitchener Frame Ltd*, 2012 ONSC 234 at paras 80-82 (CanLII).

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[59] The Applicants submit that this Court has exercised its authority to grant similar releases, including in circumstances where the released claims included claims of parties who did not vote on the plan and were not eligible to receive distributions (*Target Canada Co. et al*. (2 June 2016), Toronto CV-15-10832-00CL (Ont. Sup. Ct. [Comm. List]) Sanction and Vesting Order at Schedule "B" art. 7 (Monitor's website); *Rubicon Minerals Corporation et al*. (8 December 2016), Toronto CV-16-11566-00CL (Ont. Sup. Ct. [Comm. List]) Sanction Order at Schedule "A" art. 7 (Monitor's website); and *Nortel Networks Corporation et al*. (30 November 2016), Toronto 09-CL-7950 (Ont. Sup. Ct. [Comm. List]) Plan of Compromise and Arrangement at art. 7 (Monitor's website)).

[60] Full disclosure of the releases was made in (a) the draft Plan that was circulated to the Service List and filed with this Court as part of the Applicants' Motion Record (returnable June 18, 2020); and (b) the Plan attached to the Meeting Order. The Applicants also issued the Press Releases. This notification process ensured that the Applicants' stakeholders had notice of the nature and effect of the Plan and releases.

[61] The foregoing submissions with respect to the releases were not challenged.

[62] In my view, each of the Released Parties has made a contribution to the development of the Plan. In arriving at this determination, I have taken into account the activities of the Released Parties as described in the Reports of the court-appointed Monitor. I am satisfied that it is appropriate for the Plan to include the releases in favour of the Released Parties.

[63] The development of this Plan has been challenging and as the Monitor has stated, "the Plan represents a better path forward than any other alternative that is available to the Applicants and is fair and reasonable".

[64] I accept this assessment and find that the Plan is fair and reasonable in the circumstances.

DIP Charge

[65] The terms of the DIP Exit Facility Amendment are described in the Sellers Sanction Affidavit. The DIP Exit Facility Amendment provides for exit financing totalling $1.866 million to assist in implementing the Plan and taking the necessary ancillary steps to terminate the CCAA Proceedings and support the J&E Process.

[66] This Court has the jurisdiction to authorize funding in the context of a CCAA restructuring pursuant to s. 11.2(1) and 11.2(2) of the CCAA. In considering whether to approve DIP financing, the Court is to consider the non-exhaustive list of factors set out in s. 11.2(4) of the CCAA. These same provisions of the CCAA provide this Court with the authority to approve amendments to a DIP agreement and secure all obligations arising from the amended DIP loans with an increased DIP charge.

[67] The Applicants submit that, based on the following, the DIP Amendment should be approved and the increase to the DIP Facility should be secured by the DIP Charge:

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a) the DIP Exit Credit Facility is necessary to enable the Applicants to implement the Plan;

b) the Monitor is supportive of the DIP Exit Facility Amendment;

c) the DIP Exit Facility Amendment is not anticipated to give rise to any material financial prejudice; and

d) the DIP Lenders are the majority of Senior Lenders.

[68] I am satisfied that the requested relief in respect to the DIP Amendment is reasonably necessary and appropriate in the circumstances.

Sealing Request

[69] The Applicants seek to seal the unredacted Sellers Sanction Affidavit on the basis that the redacted portions of the Sellers Sanction Affidavit contain commercially sensitive information, the disclosure of which could be harmful to stakeholders.

[70] The redactions currently being sought are consistent with previous Orders in these CCAA Proceedings. In my view, the documents in question contain sensitive commercial information. Having considered the principles set out in *Sierra Club of Canada* v. *Canada (Minister of Finance)*, 2002 Sec. 41 at para. 53 I am satisfied that the request for a sealing order is appropriate and is granted.

Stay Period

[71] On the Plan Implementation Date, the CCAA Proceedings with respect to Lydian UK and Lydian Canada will be terminated, such that Lydian International will be the only remaining Applicant in the CCAA Proceedings. The Applicants are requesting an extension of the Stay Period for Lydian International until and including the earlier of (i) the issuance of the Monitor's CCAA Termination Certificate and (ii) December 21, 2020 to enable the remaining Applicant and the Monitor to take the steps necessary to implement the Plan and terminate the CCAA Proceedings and initiate the J&E Process. The Applicants are also requesting an extension of the Stay Period for the Non-Applicant Stay Parties (other than Lydian US) until and including the earlier of the issuance of the Monitor's Plan Implementation Certificate.

[72] I am satisfied that the Applicants in requesting the extension of the Stay Period have demonstrated that circumstances exist that make the order appropriate; and that they have acted and are acting in good faith and with due diligence such that the request is appropriate.

Approval of Monitor's Activities

[73] The Applicants are seeking an order approving the Monitor's activities to date, as detailed in the Fifth Report, Sixth Report and the Seventh Report (collectively, the "Reports").

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This Court has already approved the activities of the Monitor that were detailed in its previous reports. There was no opposition to the request.

[74] I am satisfied that the Reports and the activities described therein should be approved. The Reports were prepared in a manner consistent with the Monitor's duties and the provisions of the CCAA and in compliance with the Initial Order. The Reports are approved in accordance with the language provided in the draft order.

Approval of Monitor's Fees

[75] The Applicants further seek approval of the fees and disbursements of (i) the Monitor for the period April 14, 2020 to June 23, 2020, inclusive, and (ii) counsel to the Monitor for the period April 16, 2020 to June 23, 2020. The Applicants have reviewed the fees of the Monitor and its counsel and support the payment of the same.

[76] I am satisfied that the fee requests are appropriate in the circumstances and they are approved.

DISPOSITION

[77] The Applicants' motion is granted. The Plan is sanctioned and approved. The ancillary relief referenced in the motion is also granted and an Order reflecting the foregoing has been signed.

Chief Justice Geoffrey B. Morawetz

Date: July 10, 2020

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SCHEDULE "A"

Lydian International Limited et al.

Impact of the Releases Described in s. 6.6 of the Plan

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Lydian Jersey		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Guarantee of Equipment Lessors ING, CAT, Ameriabank	Not Released. Addressed in the J&E Process in Jersey	Section 6.6 (carve-out (E))
Other Unsecured Claims Includes Maverix Metals claim against Lydian Jersey	Not Released. Addressed in the J&E Process in Jersey.	Section 6.6 (carve-out (E))
Equity Claims Held by RCF, Orion, and public Shareholders	Not Released. Addressed in the J&E Process in Jersey.	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Intercompany Claims Claims by Lydian Jersey against Lydian Canada and other subsidiaries	Assigned to Lydian Canada	Section 6.3(h)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian Canada		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors[1] ING, CAT, Ameriabank	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Jersey in Lydian Canada	Not Released (but subject to amalgamation with SL Newco)	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

[1] This includes contractual rights as outlined in the Waiver and Consent Agreement between Lydian Jersey, Lydian Canada, Lydian UK and Lydian Armenia dated November 26, 2018 (the "**Waiver**").

Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

Lydian UK		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims of Equipment Lessors ING, CAT, Ameriabank[2]	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in Lydian UK	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Priority Claims Admin Charge, DIP Lender's Charge, Transaction Charge, D&O Charge	Transaction Charge and D&O Charge to be terminated on Plan Implementation Date Admin Charge and DIP Lender's Charge to be terminated on CCAA Termination Date	Section 5.2(i)

[2] This includes the contractual rights outlined in the Waiver.

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11910728 Canada Inc. ("DirectorCo")		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Unsecured Claims	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian Canada in DirectorCo	Not Released	Section 3.5
D&O Claims Claims against the Directors and their legal cousnel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian International Holdings Limited, Lydian Resources Armenia Limited, and Lydian Resources Kosovo Limited		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Other Secured Claims Includes claim of Maverix Metals in shares of Lydian Resources Armenia Limited, which is subordinated to claims of Senior Lenders	Not Released	Section 6.6
Unsecured Claims Includes Maverix Metals claim against Lydian International Holdings Limited	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings of Lydian UK in Lydian International Holdings Limited, and shareholdings of Lydian International Holdings Limited in Lydian Resources Armenia ("**BVI**") and Lydian Resources Kosovo Limited Includes Maverix Metals' share pledge in BVI	Not Released	Section 6.6 (carve-out (E))
D&O Claims Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii) of the Plan
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

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Lydian Armenia		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Not Released	Section 6.6
Equipment Lessor Secured Claims ING, CAT and Ameriabank (to the extent secured by their collateral)	Not Released	Section 6.6 (carve-out (E))
Equipment Lessor Unsecured Claims ING, CAT and Ameriabank (unsecured deficiency claims)	Not Released	Section 6.6 (carve-out (E))
Other Unsecured Claims e.g. Trade creditors	Not Released	Section 6.6 (carve-out (E))
Equity Claims Shareholdings held by BVI / DirectorCo (as sole shareholder representative of BVI	Not Released	Section 3.5
D&O Claims Claims against the Directors	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6 (i) and (ii)
Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

Lydian US Lydian Zoloto, Lydian Resources Georgia Limited ("Lydian Georgia") and Georgian Resource Company LLC ("Lydian GRC", and collectively with Lydian US, Lydian Zoloto and Lydian Georgia, the "Released Guarantors" under the Plan)		
Type of Claim	**Treatment**	**Plan Reference**
Senior Lender Claims Held by RCF, Orion and Osisko	Released	Section 6.3(n)
Unsecured Claims	Not Released	Section 6.6
Equity Claims (a) Shareholdings of Lydian Jersey in Lydian US, Lydian Georgia and Lydian Zoloto; and (b) Shareholdings of Lydian Georgia in Lydian GRC	(a) Not Released. Per s. 6.4 of the Plan, Lydian US and Lydian Zoloto to be wound-up and dissolved pursuant to the laws of Colorado and Armenia, respectively. (b) Lydian Georgia shares held by Lydian Jersey to be transferred to Lydian Georgia Purchaser on Plan Implementation Date. (b) Shares of Lydian GRC held by Lydian Georgia not released. See note re: Lydian Georgia above.	Section 3.5 and section 6.4
D&O Claims, Claims against the Directors and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

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Claims against Monitor Claims against the Monitor, and Monitor's legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)
Claims against Senior Lenders Claims against the Senior Lenders and their legal counsel	Released (subject to s. 5.1(2) of the CCAA)	Section 6.6(i) and (ii)

2020 ONSC 4006 (CanLII)

2016 ONSC 3651
Ontario Superior Court of Justice

Target Canada Co., Re

2016 CarswellOnt 21083, 2016 ONSC 3651, 274 A.C.W.S. (3d) 259, 42 C.B.R. (6th) 330

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

In the Matter of a plan of compromise or arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC

Morawetz J.

Heard: June 2, 2016
Judgment: June 2, 2016
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, John MacDonald, Shawn Irving, for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz, for Target Corporation
William Sasso, Sharon Strosberg, Jacqueline Horvat, for Pharmacy Franchisee Association of Canada
Susan Philpott, for Employees of Applicants
Alan Mark, Melaney Wagner, Graham Smith, Francy Kussner, for Monitor, Alvarez & Marsal Inc.
Jane Dietrich, for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A. Retail Canada ULC
Andrew Hodhod, for Bell Canada
Harvey Chaiton, for Directors and Officers

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.2 Initial application
XIX.2.a Grant and length of stay
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by court

MOTION by applicant companies for approval of amended plan of arrangement under *Companies' Creditors Arrangement Act* and for extension of stay.

***Morawetz J.* (orally):**

1 Target Canada Co. ("TCC"), the other applicants listed above and certain related partnerships, (collectively, the "Target Canada Entities"), obtained relief under the *Companies' Creditors Arrangement Act*, (the "CCAA") by an Initial Order dated January 15, 2015, (the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor in this proceeding (the "Monitor"). The reasons which gave rise to the Initial Order are reported as *Target Canada Co., Re*,

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2015 ONSC 303 (Ont. S.C.J.) . Those reasons set out the factual background giving rise to the CCAA filing. The Initial Order granted a stay of proceedings until February 13, 2015, which was later extended eight times, most recently to June 6, 2016.

2 Today the Applicants bring this motion for Court sanction of their Second Amended and Restated Joint Plan of Compromise and Arrangement dated May 19, 2016 (the "Amended Plan") and to obtain an order extending the Stay Period until September 23, 2016 to allow for the implementation of the Amended Plan and the continuation of the Claims Process for the benefit of all stakeholders.

3 The facts with respect to this motion are set out in the Sanction Affidavit of Mark J. Wong. Additional facts, including the background to, and mechanics of, the Amended Plan are described in the Meeting Order Affidavit of Mark J. Wong. In addition, factual information is also contained in the 28th Report of the Monitor.

4 Counsel for the Applicants submits that the Amended Plan is the product of extensive negotiations and consultations with key stakeholders, including Landlord Guarantee Creditors, Landlord Non-Guarantee Creditors, Target Corporation and the Consultative Committee, all with the assistance of the Monitor.

5 Noteworthy, each of the Monitor, the Landlords and the Consultative Committee of creditors support the Amended Plan.

6 The Amended Plan has been designed to isolate and address Claims against Propco and Property LP, on one hand, and TCC and the remaining Target Canada Entities on a consolidated basis, on the other. The Amended Plan provides for the consolidation for Plan purposes of the Target Canada Entities other than Propco and Property LP. The Monitor has commented on the impact of the substantive consolidation of the estates of the Target Canada Entities for the purposes of this proceeding. Such commentary contained in Monitor's 27th report.

7 I note that there is no opposition to the proposed consolidation, which has been brought to the attention of the affected creditors and I am satisfied that the effect of such consolidation is not prejudicial to the position of any creditor or creditor group.

8 The primary features of the Amended Plan are summarized in Meeting Order Affidavit, the Sanction Affidavit and the Monitor's Report. Some of the more significant features include:

a. Affected Creditors voted on the Amended Plan as a single class.

b. Affected Creditors with Proven Claims that are less than or equal to $25,000 (the "Convenience Class Creditors") will be paid in full. Affected Creditors with Proven Claims in excess of $25,000 had the option to elect to be treated for all purposes as Convenience Class Creditors.

c. Landlord Guarantee Creditors will be paid the full amount of their Proven Claims on the Initial Distribution Date.

d. Landlord Non-Guarantee Creditors will be paid, in addition to their Pro Rata Share of their Proven Claims, a Landlord Non-Guaranteed Creditor Equalization Amount.

e. Other Affected Creditors with Proven Claims will receive their Pro Rata Share of the remaining TCC Cash Pool.

f. All CCAA Charges will be discharged, except the Directors' Charge and the Administrative Charge.

g. The Target Canada Entities will transfer their remaining IP assets to Target Coporation's designees and the Pharmacy Shares to the Pharmacy Purchaser.

h. The Employee Trust will be terminated in accordance with the Amended Plan and any surplus funds returned to Target Corporation.

9 On November, 27, 2015 the Target Canada Entities brought a motion to file their original Plan of Compromise and Arrangement, ("the Original Plan"), and an Order authorizing the Target Canada Entities to call and hold a creditors' meeting to vote on it. I dismissed the motion on January 13, 2016, for reasons released on January 15, 2016 (the "January 15 Endorsement").

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The reasons are reported as *Target Canada Co., Re* (2015), 2016 ONSC 316 (Ont. S.C.J.). Among other things, the Applicants' motion was dismissed as the Original Plan violated paragraph 19A of the Initial Order by seeking to compromise the Landlord Guarantee Claims without the consent of such affected Landlords.

10 After the January 15 Endorsement was issued, the Target Canada Entities continued their negotiations with the Landlords to develop framework for a consensual resolution that would preserve Target Corporation's agreement to maintain the subordination contained in the Original Plan, while the same time addressing certain Landlords' concerns and complying with the January 15th Endorsement.

11 On March 4, 2016 the Target Canada Entities announced that agreements had been entered into with all of the Landlord Guarantee Creditors and all of the Landlord Non-Guarantee Creditors.

12 The terms of these Agreements were disclosed and explained to Affected Creditors and to this Court prior to Creditors' Meeting.

13 The Landlord Guarantee Creditor Settlement Agreement and the Landlord Non-Guarantee Creditor Consent and Support Agreements are conditional upon (a) the Amended Plan's approval by the Affected Creditors; (b) sanction by this Court; and (c) Plan Implementation.

14 On April 13, 2016 an order was issued permitting the Applicants to put the Amended Plan before the Affected Creditors for approval at the Creditors' Meeting.

15 On April 14, 2016 the Monitor published the Meeting Materials on its website. The Meeting Materials were sent to Affected Creditors on April 19, 2016. In addition, notices were published in major national and US newspapers at the end of April.

16 The Creditors' Meeting was held on May 25, 2016. The required quorum was present and the meeting was properly constituted.

17 According to the Monitor's tabulation, 100% in number representing 100% in value of the Affected Creditors holding Proven Claims that were present in person or by proxy and voting at the Meeting, voted (or were deemed to vote) to approve the Resolution in favour of the Amended Plan. According to the Monitor's tabulation, 1246 Affected Creditors representing approximately $554 million in value voted (or were deemed to vote pursuant to the Meeting Order) at the Creditors' Meeting.

18 Based on the most up-to-date information from the Monitor, the Target Canada Entities expect that, subject to certain exceptions, Affected Creditors will be paid in a range from 71% to 80% of their Proven Claims.

19 The issue on this motion is:

a. Should this Court approve the Amended Plan as fair and reasonable?

20 Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the plan.

21 The general requirements for court approval of the CCAA Plan are well-established:

a. there must be strict compliance with all statutory requirements;

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

c. the plan must be fair and reasonable.

22 See *SkyLink Aviation Inc., Re*, 2013 ONSC 2519 (Ont. S.C.J. [Commercial List]).

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23 Having reviewed the record and hearing the submissions, I am satisfied that the foregoing test for approval has been met. In arriving at this conclusion, I have taken into account the following:

(a) In granting the Initial Order, it was determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that the Applicants were insolvent;

(b) Affected Creditors were classified for the purposes of voting and receiving distributions under the Amended Plan and they voted on the Amended Plan as a single class; and

(c) The Monitor published the required notices and provided copies of the Meeting Materials to Affected Creditors;

(d) Affected Creditors were provided with Target Canada's letter to creditors containing an overview of the terms of the Amended Plan, as well as a letter from the Consultative Committee of creditors communicating the Consultative Committee's support of the Amended Plan and recommendation that Affected Creditors vote in favour of the Amended Plan;

(e) the Creditors' Meeting was properly-constituted;

(f) 100% in number representing 100% in value voted in favour of the Plan. Such unanimous approval of the Amended Plan far exceeds the required statutory majority under section 6(1).

24 Sections 6(2), 6(5) and 6(6) of the CCAA provide that the Court may not sanction the plan unless the plan contains specified provisions concerning crown claims, employee claims and pension claims. I am satisfied that all of these requirements have been met.

25 The claims of Affected Creditors are not being paid in full. In compliance with section 6(8) of the CCAA, the Amended Plan does not provide for any recovery for equity holders. In addition, Target Corporation, the indirect shareholder of TCC and the largest single creditor of TCC, has agreed to subordinate the majority of its Intercompany Claims.

26 I also note that the Monitor is of the view that the Amended Plan complies with the requirements of the CCAA, including the requirements under section 6 of the CCAA.

27 Having reviewed the record, I am satisfied that the statutory prerequisites to sanction the Amended Plan have been satisfied. I am also satisfied that no unauthorized steps have been taken in placing the Amended Plan before the Court to be sanctioned.

28 In assessing whether a proposed plan is fair and reasonable, the Court will consider the following:

a. whether the claims have been properly classified and whether the requisite majority of creditors approved the plan;

b. what creditors would receive on bankruptcy or liquidation as compared to the plan;

c. alternatives available to the plan;

d. oppression of the rights of creditors;

e. unfairness to shareholders; and

f. the public interest.

29 (See to *Sino-Forest Corp., Re*, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]) ("Sino-Forest").

30 I am satisfied that each of these factors supports approval of the Amended Plan.

31 In arriving at this conclusion, I have taken into account the following:

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a. Classification and Creditor Approval: The Amended Plan was unanimously approved.

b. Recovery on Bankruptcy: The Monitor has expressed the view that recoveries under the Amended Plan are well in excess of those that would have been received on a bankruptcy of the Target Canada Entities. Recoveries against TCC in a bankruptcy would be 30%, as compared to the expected range of 71 to 80% under the Amended Plan.

c. Alternatives to the Amended Plan: The Amended Plan is the only alternative to bankruptcy.

d. No Oppression of Creditors: I am satisfied that the pre-insolvency rights and priorities of Affected Creditors are respected under the Amended Plan.

e. No Unfairness to Shareholders: Given that Affected Creditors are not being paid in full, there is no unfairness to shareholders in receiving no recovery.

f. Public interest: The Amended Plan resolves the Proven Claims against Target Canada Entities in a manner that is efficient and timely, and which avoids costly litigation.

32 Article 7.1 of the Amended Plan provides for full and final releases in favour of:

a. The Target Canada Released Parties;

b. The Third-Party Released Parties (which includes the Monitor and its affiliates, their directors, officers, employees, legal counsel, agents and advisors, as well as the Pharmacists' Representative Counsel and members of the Consultative Committee and their advisors;

c. It also provides a released in favour of the Plan Sponsor Released Parties, (Target Corporation and its subsidiaries other than the Target Canada Entities and the NE1, the HBC Entities and their respective directors, officers, employees, legal counsel agents and advisors), except in respect of the Landlord Guarantee Claims.

33 Finally, there is also release of the Employee Trust Released Parties.

34 It is accepted that Canadian courts have jurisdiction to sanction plans that containing releases in favour of third parties. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (Ont. C.A.) the Court of Appeal held that the CCAA Court has the jurisdiction to approve a plan of compromise or arrangement that includes third-party releases, stating that a release negotiated in favour of a third-party as part of the "compromise" or "arrangement" that reasonably relates to the proposed restructuring falls within the objectives and flexible framework of the CCAA.

35 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.

36 In considering whether to approve releases in favour of third parties, the factors to be considered by the court include:

a. Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;

b. Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;

c. Whether the plan could succeed without the releases;

d. Whether the parties being released were contributing to the plan;

e. Whether the release benefitted the debtors as well as the creditors generally;

f. Whether the creditors voting on the plan had knowledge of the nature and the effect of the releases or;

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g. Whether the releases were fair and reasonable and not overly broad.

37 (See *Metcalfe, Cline Mining Corp.*, 2015 ONSC 662; and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]).)

38 In determining whether to approve a third-party release, the Court will take into account the particular circumstances of the case and the objectives of the CCAA. No single factor set out above will be determinative.

39 (See *Skylink and Cline Mining*.)

40 Courts have approved releases that benefit affiliates of the debtor corporation where the *Metcalfe* criteria is satisfied. In Sino-Forest, the subsidiaries of the debtor company were entitled to the benefit from the release under the plan as they were contributing their assets to satisfy the obligations of the debtor company for the benefit of affected creditors. It is not uncommon for CCAA courts to approve third-party releases in favour of person, such as directors or officers or other third parties, who could assert contribution and indemnity claims against the debtor company.

41 (See *Skylink and Cline Mining.)*

42 In my view, each of the Released Parties has contributed in tangible and material ways to the orderly wind down the Target Canada Entities' businesses. I accept that without the Releases, it is unlikely that all of the Released Parties would have been prepared to support the Amended Plan. The Releases are a significant part of the various compromises that were required to achieve the Amended Plan. They are a necessary element of the global, consensual resolution of this CCAA proceeding.

43 In particular, the economic contributions by Target Corporation, as Plan Sponsor, have demonstrably increased the available recoveries for Affected Creditors, as attested by the Monitor. Target Corporation's material direct and indirect contributions as Plan Sponsor include:

a. subordinating a number of Intercompany Claims against TCC;

b. partially subordinating various other Intercompany Claims;

c. a cash contribution of approximately $25.45 million towards the aggregate Landlord Guaranteed Enhancement;

d. a net cash contribution of approximately $4.1 million to fund the Landlord Non-Guaranteed Creditor Equalization;

e. a cash contribution of $700,000 towards costs of certain Landlord Guaranteed Creditors;

f. funding the Employee Trust in the amount of $95 million.

44 I am satisfied that the Releases are appropriately narrow and rationally connected to the overall purposes of the Amended Plan. The Plan Sponsor Released Parties are not released from the Landlord Guarantee Claims, which are separately resolved in the Landlord Guarantee Creditors Settlement Agreement. Nor will Target Corporation be released under the Amended Plan from any indemnity or guarantee in favour of any Director, Officer or employee.

45 I am also satisfied that the Releases apply to the extent permitted by law and expressly do not apply to liability for criminal, fraudulent or other willful misconduct, or to other claims that are not permitted to be compromised or released under the CCAA.

46 Full disclosure of the Releases was made to the Affected Creditors in the Meeting Order Affidavit, in the Amended Plan and in the Letter to Creditors. The terms of the Release were also disclosed to creditors in the Original Plan. No party has objected to the scope of the Releases as contained in the Amended Plan.

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47 Having considered the Record and the applicable law, I am satisfied that the Amended Plan represents an equitable balancing of the interests of all Stakeholders in accordance with the provisions and obligations of the CCAA and I find that the Amended Plan is both fair and reasonable to all Stakeholders. The Amended Plan is sanctioned and approved.

48 The Applicants have also requested an extension of the stay period to September 23, 2016. It is clear that the CCAA proceedings have to be extended so as to permit Plan Implementation to occur and to provide sufficient time to complete post implementation details. I am satisfied the parties are working in good faith and with due diligence in this matter and that there are sufficient resources available to fund the Applicants during the proposed extension period. The extension of the stay period is approved. In order to accommodate my schedule, the stay period is extended to September 26, 2016, being three days longer than the requested period. The Applicants also request an extension of the Notice of Objection Bar Date to the Plan Implementation Date. This request is reasonable in the circumstances and it is ordered that the Notice of Objection Bar Date expire on the Plan Implementation Date.

49 The motion is therefore granted and the Sanction Order has been signed by me.

50 In closing, I would like to thank all parties and their representatives for the manner in which this proceeding has been conducted. All parties and their counsel, by working in a constructive and cooperative manner, have made a contribution to the Amended Plan. It is very rare to have a CCAA plan of this magnitude supported by 100 percent of the affected creditors who voted at the creditors' meetings. This Sanctioned Amended Plan represents the best outcome from this unfortunate commercial venture.

Motion granted.

End of Document

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CITATION: Sino-Forest Corporation (Re), 2012 ONSC 7050
COURT FILE NO.: CV-12-9667-00CL
DATE: 20121212

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

2012 ONSC 7050 (CanLII)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SINO-FOREST CORPORATION, Applicant

BEFORE: **MORAWETZ J.**

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

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

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

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

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

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

Peter Greene and Ken Dekkar, for BDO Limited

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

John Pirie and David Gadsden, for Poyry (Beijing)

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

David Bish, for the Underwriters

Simon Bieber and Erin Pleet, for David Horsley

James Grout, for the Ontario Securities Commission

Emily Cole and Joseph Marin, for Allen Chan

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

Paul Emerson, for ACE/Chubb

Sam Sasso, for Travelers

HEARD: DECEMBER 7, 2012

ENDORSED: DECEMBER 10, 2012

REASONS: DECEMBER 12, 2012

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ENDORSEMENT

[1] On December 10, 2012, I released an endorsement granting this motion with reasons to follow. These are those reasons.

Overview

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

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

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

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

[6] SFC's counsel submits that the Plan represents a fair and reasonable compromise reached with SFC's creditors following months of negotiation. SFC's counsel submits that the Plan, including its treatment of holders of equity claims, complies with CCAA requirements and is consistent with this court's decision on the equity claims motions (the "Equity Claims Decision")

(2012 ONSC 4377, 92 C.B.R. (5th) 99), which was subsequently upheld by the Court of Appeal for Ontario (2012 ONCA 816).

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

[8] The Plan has the support of the following parties:

(a) the Monitor;

(b) SFC's largest creditors, the Ad Hoc Committee of Noteholders (the "Ad Hoc Noteholders");

(c) Ernst & Young LLP ("E&Y");

(d) BDO Limited ("BDO"); and

(e) the Underwriters.

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

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

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

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

Facts

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

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

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

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

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

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

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

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

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preserved and pursued for the benefit of SFC's stakeholders in accordance with the Support Agreement (concurrently, the "Restructuring Transaction").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[42] With respect to the indemnified Noteholder Class Action Claims, these relate to claims by former noteholders against third parties who, in turn, have alleged corresponding indemnification claims against SFC. The Class Action Plaintiffs have agreed that the aggregate

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amount of those former noteholder claims will not exceed the Indemnified Noteholder Class Action Limit of $150 million. In turn, indemnification claims of Third Party Defendants against SFC with respect to indemnified Noteholder Class Action Claims are also limited to the $150 million Indemnified Noteholder Class Action Limit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[47] E&Y has now entered into a settlement (“E&Y Settlement”) with the Ontario plaintiffs and the Quebec plaintiffs, subject to several conditions and approval of the E&Y Settlement itself.

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

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

Law and Argument

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

[51] To establish the court’s approval of a plan of compromise, the debtor company must establish the following:

(a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;

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(b) nothing has been done or purported to be done that is not authorized by the CCAA; and

(c) the plan is fair and reasonable.

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

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

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

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

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

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

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

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

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

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

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

1. The claims must have been properly classified, there must be no secret arrangements to give an advantage to a creditor or creditor; the approval of the plan by the requisite majority of creditors is most important;

2. It is helpful if the Monitor or some other disinterested person has prepared an analysis of anticipated receipts and liquidation or bankruptcy;

3. If other options or alternatives have been explored and rejected as workable, this will be significant;

4. Consideration of the oppression rights of certain creditors; and

5. Unfairness to shareholders.

6. The court will consider the public interest.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Disposition

[79] Having considered the foregoing, I am satisfied that SFC has established that:

(i) there has been strict compliance with all statutory requirements and adherence to the previous orders of the court;

(ii) nothing has been done or purported to be done that is not authorized by the CCAA; and

(iii) the Plan is fair and reasonable.

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

MORAWETZ J.

Date: December 12, 2012

2012 ONSC 7050 (CanLII)

CITATION: Nordstrom Canada Retail, Inc., 2024 ONSC 1622
COURT FILE NO.: CV-23-00695619-00CL
DATE: 2024-03-20

2024 ONSC 1622 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **NORDSTROM CANADA RETAIL, INC., NORDSTROM CANADA HOLDINGS, LLC** and **NORDSTROM CANADA HOLDINGS II, LLC**

APPLICANTS

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Jeremy Dacks, Tracy Sandler, and Martino Calvaruso, for the Applicants*

Brendan O'Neill, Bradley Wiffen, for the Monitor, Alvarez & Marsal Canada Inc.

Aubrey Kauffman, Canadian Counsel Nordstrom Inc.

Susan Ursel and Karen Ensslen, Employee Representative

David Bish, for Cadillac Fairview

HEARD: March 19, 2024

ENDORSEMENT

[1] The Applicants seek an order (the "Sanction and Vesting Order"), among other things: (i) sanctioning the Consolidated Plan of Compromise and Arrangement dated December 13, 2023 (as amended, the "Plan") and authorizing its implementation; and (ii) extending the Stay Period (and by extension, the Co-Tenancy Stay) until and including June 28, 2024.

[2] There was no opposition to the motion.

[3] The evidentiary support for the requested relief is set out in the Affidavit of Misti Heckel, sworn March 8, 2024 (the "Sanction Affidavit"), in the Eighth Report and the Ninth Report of the Monitor, Alvarez & Marsal Canada Inc. (the "Monitor"). Capitalized terms have the same meaning as in the Sanction Affidavit unless otherwise stated.

[4] The Applicants obtained the initial order on March 2, 2023 (the "Initial Order"). The stay of proceedings and other benefits and authorizations of the Initial Order were extended to Canada Leasing LP. An Amended and Restated Initial Order was subsequently granted on March 10, 2023. The Stay Period has been extended on a number of subsequent occasions, most recently to April 5, 2024.

[5] On May 30, 2023, the Court granted an order (the "Claims Procedure Order") establishing a process (the "Claims Process") to determine the nature, quantum, and validity of claims against the Nordstrom Canada Entities and their directors and officers.

[6] On December 20, 2023, the Court granted an order (the "Meeting Order") that, among other things: accepted the filing of the Plan; authorized the Nordstrom Canada Entities to call and hold the Creditors' Meeting; and extended the Stay Period until and including April 5, 2024.

[7] The Nordstrom Canada Entities, with the oversight of the Monitor and the support of Nordstrom US as Plan Sponsor, have negotiated a global resolution to these proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA").

[8] In addition to obtaining unanimous approval of the Plan at the Creditors' Meeting, the Nordstrom Canada Entities, in close consultation with the Monitor, have made significant progress in these CCAA proceedings since the Meeting Order's issuance, including the following:

(a) Claims Process: Of the 742 Claims that had been filed with the Monitor as of February 20, 2024, 699 have now been resolved.

(b) Agreements with Landlords: The Nordstrom Canada Entities have entered into separate settlement agreements with each Supporting Rack Landlord in respect of, among other things, such Landlords' Proven Claims pursuant to the Claims Procedure Order and the Plan (each a "Supporting Rack Landlord Settlement Agreement").

(c) Termination of Employee Trust: After receiving the confirmations required to terminate and wind-up the Employee Trust, the Monitor delivered the Employee Trust Termination Certificate on December 28, 2023.

(d) Letter Agreement with the CRA: Pursuant to the CRA Agreement, NIL delivered an original irrevocable standby letter of credit in the amount of $39,298,779 to the Minister on December 20, 2023 and a replacement standby letter of credit was subsequently delivered by NIL in accordance with the agreement. The Minister vacated the CRA NCH Assessments on January 10, 2024, and new Notices of Assessment were issued to NIL. These actions have satisfied a condition precedent to the implementation of the Plan.

[9] The meeting of the Affected Creditors (the "Creditors' Meeting") was held virtually on March 1, 2024. The Plan received unanimous approval from Affected Creditors holding Proven Claims that were present and voting in person or by proxy (or who were deemed to vote).

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[10] The Plan includes a single class of Affected Creditors for voting and distribution purposes. An Affected Creditor was deemed to be a "Convenience Class Creditor" if their Proven Claims in the aggregate were less than or equal to $15,000 or were in excess of that amount but they elected to be treated as such. Certain Claims are to be unaffected by the Plan and will not be compromised.

[11] The Nordstrom Canada Entities will use all of their available cash to establish the Consolidated Cash Pool, NCL ITC Cash Pool, Administrative Reserve Account, and Disputed Claims Reserve Account.

[12] On the Initial Distribution Date, each Other Priority Claim Creditor and Convenience Class Creditor will receive a distribution in the full amount of its Other Priority Claim or Convenience Class Claim, respectively. Each Affected Creditor with a Proven Claim will receive an initial distribution in an amount equal to its Pro Rata Share of the Cash in the Consolidated Cash Pool Account on that date, with further distributions to follow (except for the Supporting Rack Landlords, each of which will receive the full amount required to be paid under its Supporting Rack Landlord Settlement Agreement, with no further distributions to be made to them under the Plan). Nordstrom US will receive certain amounts distributed to the FLS Landlords pursuant to the Plan in accordance with the FLS Landlord Settlement Agreements.

[13] From and after the Initial Distribution Date, distributions will be made to each Affected Creditor with a Disputed Claim that has become a Proven Claim. Once there are no remaining Disputed Claims, additional actions on the Final Distribution Date include Nordstrom Canada's payment, on behalf of itself and each of the other Nordstrom Canada Entities, of any final Administrative Reserve Costs from the Administrative Reserve Account.

[14] On the Plan Implementation Date certain parties will be granted a release subject to certain specified carve-outs. In accordance with the Initial Order, the FLS Landlord Guarantee Claims are excluded from the release in the Plan. The FLS Landlords and Nordstrom US have reached agreements, outside of the Plan, that resolve all FLS Landlord Guarantee Claims and contractually release Nordstrom US from such claims.

[15] The implementation of the Plan is conditional upon the fulfilment or waiver of certain conditions precedent. The Plan Implementation Date will occur as soon as reasonably possible, likely in April 2024.

[16] According to the Monitor's tabulation, a total of 515 Affected Claims, representing approximately $33.8 million in value, were voted (or were deemed to have voted). The 515 Affected Claims included 367 Convenience Class Claims deemed to be voted in favour of the Plan, representing $2,310,076 in value, and two Disputed Claims, representing approximately $77,080 in value, which were also voted in favour of the Plan.

[17] The issues on this motion are whether:

(a) the Court should approve the Plan as fair and reasonable and grant the Sanction and Vesting Order; and

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(b) the Stay Period should be extended until and including June 28, 2024.

[18] In seeking approval of a plan of compromise or arrangement under the CCAA, the debtor company must establish that:

(a) there has been strict compliance with all statutory requirements;

(b) nothing has been done or purported to be done that is not authorized by the CCAA and prior orders of the Court in the CCAA proceedings; and

(c) the plan must be fair and reasonable.

(See: *Laurentian University of Sudbury*, 2022 ONSC 5645 at para. 23; and *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 22)

[19] In order to determine whether there has been strict compliance with all statutory requirements, the Court typically considers a number of factors (See: *Canadian Airlines Corp. (Re)*, 2000 ABQB 442 at para. 62 [*Canadian Airlines*], leave to appeal ref'd 2000 ABCA 238, variation ref'd 2001 ABCA 9, leave to appeal ref'd [2001] 2 S.C.R. xii (note); *Laurentian* at para. 24; *Lydian International* at para. 24).

[20] I find that the Applicants have satisfied all of these requirements. In particular:

(a) Definition of "Debtor Company": In granting the Initial Order, a determination was made that the Applicants are affiliated debtor companies with total claims against them in excess of $5 million, that each is a "company" for the purposes of s. 2 of the CCAA, and that each is insolvent (See: *Nordstrom Canada Retail Inc.*, 2023 ONSC 1422 at paras. 25-27).

(b) Notice of Meeting: The Applicants and the Monitor have complied with all of the requirements in the Meeting Order to disseminate materials concerning the Plan and the Creditors' Meeting to the Affected Creditors and other interested persons.

(c) Classification: The Affected Creditors voted as a single class, in accordance with the classification approved by this Court in granting the Meeting Order.

(d) Constitution and Voting: The Creditors' Meeting was properly constituted and the voting was carried out in accordance with the Meeting Order.

(e) Majority Vote: The required double majority of Affected Creditors approved the Plan. The approval was unanimous.

[21] A plan is not to be sanctioned unless it contains specified provisions concerning Crown, employee, and pension claims. The Plan provides that the following amounts are Administrative

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Reserve Costs that are to be paid in full from the Administrative Reserve no later than the Initial Distribution Date:

(a) Government Priority Claims enumerated in section 6(3) of the CCAA;

(b) Post-Filing Tax Claims encompassing any unremitted source deductions arising after the Filing Date to which section 6(4) of the CCAA would apply; and

(c) Employee Priority Claims enumerated in section 6(5) of the CCAA.

[22] As the Nordstrom Canada Entities do not participate in any prescribed pension plans, s. 6(6) of the CCAA does not apply. Finally, in compliance with s. 6(8) of the CCAA, the Plan does not provide for any recovery for equity holders.

[23] I am satisfied that the statutory prerequisites to the sanction of the Plan have been satisfied.

[24] In determining whether anything has been done – or is purported to have been done – that is not authorized by the CCAA, the Monitor has filed nine reports detailing the activities of the Nordstrom Canada Entities throughout these CCAA proceedings. In each court-ordered extension of the stay of proceedings, I found that the Nordstrom Canada Entities acted in good faith and with due diligence.

[25] I am satisfied that the Plan complies with the requirements under the CCAA and the orders of this Court and there is no suggestion that anything has been done that is not authorized either by the CCAA or this Court.

[26] In assessing whether a proposed plan is fair and reasonable, the Court considers a number of factors, as referenced in *Laurentian* at para. 32, citing *Canwest Global Communications Corp.*, 2010 ONSC 4209 at para. 21.

(a) Classification: The Affected Creditors were classified in a single class to reflect their commonality of interest as unsecured creditors of one or more of the Nordstrom Canada Entities. There was no objection to this classification at the Meeting Order Hearing (See: *Nordstrom Canada Retail, Inc.*, 2023 ONSC 7194 at para. 5 [*Meeting Order Endorsement*]).

(b) Recovery on Bankruptcy: The Monitor has expressed the view that the Affected Creditors as a whole will derive a greater benefit from the implementation of the Plan than the results that could have been achieved in a bankruptcy. The Monitor and the Nordstrom Canada Entities estimate that Affected Creditors will receive distributions of approximately 72% to 75% of their Affected Claims that are Proven Claims.

(c) Alternatives to the Plan: The Nordstrom Canada Entities submit that the Affected Creditors will derive a greater benefit from the consolidated Plan than they would from a non-consolidated plan. I accept this submission.

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(d) No Oppression of Creditors: No Affected Creditor has raised any objection to the treatment of their Affected Claims under the Plan.

(e) No Unfairness to Shareholders: As the Affected Creditors are not all being paid in full, there is no unfairness to shareholders in receiving no recovery under the Plan.

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[27] Article 7.1 of the Plan provides for releases of the following parties, subject to certain carve-outs:

> (a) the Nordstrom Canada Entities Released Parties, consisting of each of the Nordstrom Canada Entities and their respective Directors, Officers, current and former employees, advisors, legal counsel and agents;
>
> (b) the Third Party Released Parties, consisting of:
>
> (i) the Monitor, A&M, and their respective affiliates, and each of their current and former directors, officers, employees, representatives, advisors, legal counsel and agents;
>
> (ii) counsel to the Directors and Officers;
>
> (iii) the Trustee; and
>
> (iv) Employee Representative Counsel; and
>
> (c) the Plan Sponsor Released Parties, consisting of the Plan Sponsor (Nordstrom US), the Plan Sponsor Subsidiaries and their current and former directors, officers and employees and their respective advisors, legal counsel and agents.

[28] It is well-established that the Court has jurisdiction, in appropriate circumstances, to sanction plans containing releases in favour of third parties (See: *Metcalfe & Mansfield Alternative Investments II Corp. (Re)*, 2008 ONCA 587 [*Metcalfe*] at para. 61, leave to appeal ref'd 2008 CanLII 46997 (S.C.C.)). In addition to approving releases of directors and officers, courts have also sanctioned plans releasing other third parties that contributed to a plan, including the debtor's affiliates, employee representatives and others (See: *Sino-Forest Corporation (Re)*, 2012 ONSC 7050 at paras. 70-74, leave to appeal ref'd 2013 ONCA 456, leave to appeal ref'd 2014 CanLII 11054 (S.C.C.) (releasing the debtor's subsidiaries); *Target Canada Co., Re*, 2016 ONSC 3651 at paras. 40-47, reproduced below in Schedule "C" [*Target*] (releasing the debtor's parent company, who was also the plan sponsor); *Laurentian* at paras. 39-45 (releasing a university with which the debtor had a relationship); *Lydian International* at paras. 50-64 (releasing senior lenders)).

[29] In determining whether to approve a third-party release, the Court will consider the following factors, none of which alone is determinative:

> (a) whether the parties to be released from claims are necessary and essential to the restructuring of the debtor;
>
> (b) whether the claims to be released are rationally connected to the purpose of the plan and necessary for it;
>
> (c) whether the plan could succeed without the releases;

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(d) whether the parties being released are contributing to the plan;

(e) whether the release benefits the debtors as well as the creditors generally;

(f) whether the creditors who voted on the plan had knowledge of the nature and effect of the releases; and

(g) whether the releases are fair and reasonable and not overly broad or offensive to public policy (See: *Metcalfe* at para. 113; *Laurentian* at para. 40, citing *Lydian International* at para. 54).

[30] This Court has already applied the factors cited above to approve a release in favour of the Employee Trust Trustee of any claims relating to its activities as trustee (See: *Nordstrom Canada Retail, Inc.*, 2023 ONSC 5450 at paras. 15-19).

[31] The Monitor has expressed the view that:

(a) The Nordstrom Canada Entities Released Parties have been essential to the restructuring, as they have been responsible for overseeing critical business functions and wind-down activities, resolving creditor and stakeholder issues in a timely manner, and developing the Plan to effect a global resolution of all matters in connection with the Nordstrom Canada Entities' exit from the Canadian marketplace.

(b) The Third Party Released Parties contributed significantly to the restructuring process. Employee Representative Counsel's involvement in these CCAA proceedings enabled employee claims and issues arising from the former employees' employment with Nordstrom Canada to be resolved in a productive, efficient and timely manner. The Employee Trust Trustee was key in providing enhanced and timely recoveries to Nordstrom Canada's employees through the Employee Trust from the outset of these CCAA proceedings. The Monitor, with the assistance of its counsel, has filed nine reports detailing the progress of these CCAA proceedings and has overseen the Nordstrom Canada Entities' negotiations to resolve these CCAA proceedings.

(c) The Eighth Report also addressed the contribution of the Plan Sponsor. The Plan Sponsor's efforts included:

(i) establishing the Employee Trust and providing it with $15.2 million of aggregate funding (the Plan Sponsor will not recover approximately $3.6 million to $4.1 million of its subrogated claim for certain of these amounts under the Plan), permitting eligible employees to obtain payment in full of their statutory entitlements on a timely basis;

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(ii) facilitating a resolution of the FLS Landlords' claims;

(iii) causing its wholly-owned subsidiary NIL to enter into the CRA Agreement, removing a large contingent claim from the CCAA estate that would have delayed the development of the Plan and distributions to Affected Creditors;

(iv) providing approximately 47% of the cash that will fund the Plan by paying the approximately $70 million Net NCRI Transfer Pricing Claim to the Consolidated Cash Pool for the benefit of Affected Creditors in accordance with the Transfer Pricing Policy without opposition or delay; and

(v) not recovering on over $300 million of the NIL Canada Expansion Loan Claim and other claims of approximately $1 million.

[32] I am satisfied that the Plan Sponsor's economic contributions have demonstrably increased the available recoveries for Affected Creditors.

[33] All Affected Creditors received full notice of the terms of the Plan and the releases contained therein, including through the Letter to Creditors distributed pursuant to the Meeting Order.

[34] Having considered the record and factors set out in [26] – [33], I find that in all respects, the Plan is fair and reasonable. I am satisfied that the proposed releases in the Plan are fair and reasonable and are not excessive in scope.

[35] The Stay Period has been extended a number of times, most recently to April 5, 2024. The Applicants submit that the Stay Period should be extended until and including June 28, 2024, as extending the Stay Period is necessary to permit the Nordstrom Canada Entities to implement the Plan. Maintaining the Co-Tenancy Stay during the next stage of the case will continue to provide stability to these CCAA proceedings. The Monitor reports that the Applicants have sufficient cash resources to continue their wind down through June 28, 2024.

[36] I am satisfied that the Applicants are continuing to work in good faith and with due diligence such that this request to extend the Stay Period is reasonable and is granted.

DISPOSITION

[37] The requested Sanction and Vesting Order and related relief is granted.

ADDENDUM

[38] One aspect of the release requires further comment.

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[39] Court-appointed Employee Representative Counsel, Ursel Phillis Fellows Hopkinson LLP ("UPFH"), has advised the Court that UPFH's IT service provider recently experienced a data security breach of its systems (the "Data Security Breach"), which affects certain UPFH IT systems involving personal information of certain former employees of Nordstrom Canada. Employee Representative Counsel has advised the Court that UPFH is taking the necessary steps to determine the scope and extent of the Data Security Breach for the purpose of notifying former Nordstrom Canada employees. UPFH will provide appropriate notification to former Nordstrom Canada employees. UPFH will provide regular updates to Nordstrom Canada and the Monitor about UPFH's notification and other relevant efforts in this regard.

[40] Notwithstanding the sanction and approval of the Plan in the Sanction and Vesting Order of this Court dated March 19, 2024, and in particular the approval of the releases set out in Article 7 of the Plan, for greater certainty, UPFH, the Applicants and the Monitor agree that the releases set out in Article 7 of the Plan shall not release UPFH from any claims that any Person may have against UPFH arising out of or related to the Data Security Breach.

[41] In closing, I want to state that the outcome in these CCAA proceedings was achieved in just over one year. It started with the unfortunate announcement that the Applicants had decided to cease operations in Canada. It ended with a CCAA Sanctioned Plan that will provide Affected Creditors with at least a 72¢/$1.00 recovery. It also resulted in settlement of all landlord claims. Further, the Applicants addressed all employee claims in a timely and responsible manner with the able assistance of Employee Representative Counsel. The result was achieved through the hard work of all participants involved. The communication between parties was exceptional and the Applicants' and the Monitor's materials were consistently prepared for court hearings in advance of the scheduled dates. I express my thanks to all involved.

Chief Justice Geoffrey B. Morawetz

Date: March 20, 2024

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CITATION: Re Green Relief Inc.
2020 ONSC 6837
COURT FILE NO.: CV-20-00639217-00CL
DATE: 20201109

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SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF **GREEN RELIEF INC.** (the "**Applicant**")

BEFORE: Koehnen J.

COUNSEL: C *Robert I. Thornton, Rebecca L. Kennedy, Mitchell Grossell,* for the Applicant

Peter Osborne, Christopher Yung for the directors Neilank Jha, Tony Battaglia, Brian Ranson, Christopher McNamara and Stephen Massel.

Mark Abradjian for Tony Battaglia in his capacity as shareholder and creditor

David Ward for 2650064 Ontario Inc.

Alex Henderson for Susan Basmaji

Gavin Finlayson for Auxley Cannabis Group Inc. and Kolab Project Inc.

Anton Granic on his own behalf

Rory McGovern, for Steve LeBlanc

Alan Dick and Adrienne Boudreau for Thomas Saunders

Steven Weisz and Amanda McInnis for Lyn Mary Bravo

Brian Duxbury for Warren Bravo

Alex Henderson for Susan Basmaji

Robert Kennaley, Joshua W. Winter for Henry Schilthuis and Mark Lloyd

Danny Nunes, for the Monitor

HEARD: November 2 and 3, 2020

ENDORSEMENT

[1] The Applicant, Green Relief Inc., seeks an order approving a transaction for the sale of its assets in the course of a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"). The sale transaction is generally not contested. Certain stakeholders do however, take issue with the release that the approval and vesting order purports to grant in favour of certain releasees as a condition precedent to the sale. For ease of reference, I refer to Green Relief alternatively by its name, as the Applicant or as the Company in these reasons.

[2] For the reasons set out below, I:

a. Approve the sales transaction as Green Relief seeks, including the release. There is substantial difference of opinion on the proper interpretation of the release. It is not appropriate to interpret the release in a vacuum. It is preferable to do so on the basis of concrete circumstances which might present themselves if and when any claim is brought that implicates the release. I will however remain seized of the interpretation of the release. If any claim arises that calls for interpretation of the release, including an interpretation of any available insurance coverage, that issue must be brought before me for determination.

b. Temporarily lift the stay of proceedings until 12:01 a.m. November 27, 2020 to permit the filing of claims that might attract insurance coverage the that the release refers to.

c. Decline to extend the benefit of the release to Susan Basmaji.

I. The Sale Transaction

[3] Green Relief seeks approval of the sale of certain assets to 2650064 Ontario Inc. (265 Co.) (the "Transaction"). As a result of the proposed transaction, 265 Co. will acquire new common shares of Green Relief in a sufficient quantity to reduce the holdings of existing shareholders to fractional shares which would be cancelled on the close of the transaction. On closing, Residual Co. will be established and added as an applicant to the CCAA proceeding. In effect, all obligations and liabilities of Green Relief will be transferred to Residual Co.

[4] 265 Co. will pay $5,000,000 for the common shares. Approximately $1,500,000 of that is an operating loan with the balance being available for creditors. In addition, 265 Co. will

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pay Residual Co. up to $7,000,000 as an earn out during the first two fiscal years following closing. The earn out is based on a payment of 25% of annual EBITDA above $5,000,000.

[5] Section 36(3) of the CCAA provides that, when deciding whether to authorize a sale of assets, the court should consider, among other things:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the Monitor approved the process leading to the proposed sale;

(c) whether the Monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which creditors were consulted;

(e) the effects of the proposed sale or distribution on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[6] These factors are consistent with the principles set out in *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON CA) at para. 16 for the approval of a sales transaction.

[7] I am satisfied that the principles of *Soundair* and the factors set out in section 36 (3) of the CCAA have been met here.

[8] The process leading to the Transaction was reasonable in the circumstances. While there was no formal sale and investor solicitation process, the transaction was the culmination of a seven-month long Notice of Intention and CCAA proceeding. The proceeding involved vigorously competing stakeholders and a competitive bidding process between interested purchasers. The competing stakeholder groups had ample opportunity to bring the business to the attention of potential purchasers. I am satisfied that there was ample information available and ample time for stakeholders to participate in the purchase process or bring the purchase to the attention of market players who may be interested in acquiring Green Relief. The Monitor approved the process and the Transaction. The Monitor notes that its liquidation analysis demonstrates that the Transaction is preferable to a bankruptcy. While creditors were not formally consulted on the process, they had ample information about it as a result of the ongoing CCAA proceeding. Creditors appeared at the various hearings. At times they made submissions in favour of an alternative bid, which submissions I gave effect to. The creditors who have made submissions before me on this motion approve of the Transaction and the release. No creditors ever objected to the process that was being followed. The Transaction makes funds available for creditors and is the best transaction available.

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[9] No one opposes the Transaction. Those who spoke in opposition on the motion did not oppose the Transaction but opposed only the release.

II. The Release

[10] The release is opposed by the founders of Green Relief, Steven Leblanc, Warren Bravo and Lynn Bravo. They are supported on this motion by three other shareholders, Thomas Saunders, Henry Schilthuis and Mark Lloyd. For ease of reference, I will refer to those who oppose the release as the Objectors.

[11] There is a long, bitter history of litigation and threats of litigation between the founders, the existing board and Green Relief's approximately 700 other shareholders.

[12] The Objectors argue that I should reject the release because:

(i) It was improper to include it as a condition precedent to the Transaction.

(ii) I have no jurisdiction to approve the release.

(iii) The release fails to meet the test set out in case law concerning releases.

(iv) The release is too broad in scope.

(i) Release as a Condition Precedent

[13] The Objectors note that the term sheet that preceded this motion and that I approved, did not contain any releases, let alone as a condition precedent to a transaction. Mr. Leblanc says he did not oppose the term sheet because it did not refer to releases. As negotiations towards a final agreement developed, the Company and the Monitor advised that Green Relief would be bringing a motion to approve releases. When the issue of a motion to approve releases arose, 265 Co. advised that it was agnostic about releases and that the releases were not theirs to give or ask for. The Objectors note that, instead of a motion to approve a release, Green Relief presented a transaction that contains a release as a condition precedent. The Objectors submit that the court should not be strong-armed in this fashion.

[14] Both Green Relief and the Monitor did advise the court they would be bringing a motion to seek permission to include a release in the Transaction. It is certainly preferable for parties to live by representations they make to the court rather than represent one thing and do another. There is no evidence before me about how the release came to be a condition precedent in the transaction. 265 Co. made no representations in support of the release although it wants the Transaction to be approved. I infer from 265 Co.'s submissions that it does not care about the release and that the release was inserted at the insistence of others.

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[15] That certain parties have characterized the release as a condition precedent, is irrelevant to my analysis. Given that Green Relief and the Monitor represented to the court that they would be seeking the court's approval for any release, I will hold them to that representation. I do not feel in any way constrained to accept or reject the release simply because it has been included as a condition precedent. I consider myself free to approve the Transaction with or without the release.

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(ii) Jurisdiction to Grant Release

[16] The Objectors submit that I have no jurisdiction to grant the release because the wording of the CCAA does not permit it on the facts of this case.

[17] The Objectors begin their analysis with section 5.1 (1) of the CCAA which provides:

> 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 (emphasis added).

[18] The Objectors note that the section contains two qualifications. First it provides that a compromise or arrangement may include a release. Second, it limits the release to prefiling claims

[19] The Objectors note that the cases to which Green Relief points for the authority to grant a release address the release at the same time as the plan is being approved. Here, there is no plan to approve yet.

[20] The Objectors submit that the distinction is significant because a plan is only approved after a claims process, negotiation for a plan, a meeting approving the plan and a two thirds majority vote in favour of the plan. Those steps are important in their view because they refine the claims against the company and ascertain the value of those claims.

[21] Green Relief has not yet conducted a claims process or proposed a plan. Instead, the objective is to complete the Transaction, put $3,500,000 into Residual Co. and conduct a claims process once Residual Co. has been funded.

[22] Green Relief has not yet decided whether it will address litigation claims inside or outside the CCAA claims process.

[23] While the presence of a plan is relevant to the approval of releases for the reasons the Objectors cite, I do not agree that the absence of a plan deprives the court of jurisdiction to approve a release.

[24] The primary advantage of approving a release on a plan approval is that it gives creditors better insight into the parameters of the plan they are being asked to approve. The interests of creditors are a prime consideration in any step of a CCAA proceeding. While the creditors have not approved a plan here, they have had the opportunity to make submissions throughout the process. They availed themselves of that opportunity. In large part I acceded to their requests as the primary beneficiaries of any plan. When certain creditors asked me to allow the Company to pursue a transaction other than one that 265 Co. was proposing at the time, I did so. When that possibility did not materialize, they spoke in favour of newer 265 Co. proposals and now speak in favour of Transaction and the proposed release. They favour the release because it maximizes the size of the estate available for distribution amongst creditors.

[25] Returning the language of s. 5.1 (1), it is drafted permissively. It does not limit the overall jurisdiction of the court under section 11 of the CCAA to make any order that it considers appropriate in the circumstances.

[26] At least one other court has approved a release in the absence of a plan and in the face of opposition to the release: *Re Nemaska Lithium Inc.* 2020 QCCS 3218 where Gouin J. noted that the carveout provided by s. 5.1 (2) of the CCAA adequately protected the shareholders who opposed the release.

(iii) The Test for a Release

[27] In *Lydian International Limited (Re)* 2020 ONSC 4006 at paragraph 54, Morawetz J. (as he then was) summarized the factors relevant to the approval of releases in CCAA proceedings as including the following:

(a) Whether the claims to be released are rationally connected to the purpose of the plan;

(b) Whether the plan can succeed without the releases;

(c) Whether the parties being released contributed to the plan;

(d) Whether the releases benefit the debtors as well as the creditors generally;

(e) Whether the creditors voting on the plan have knowledge of the nature and the effect of the releases; and

(f) Whether the releases are fair, reasonable and not overly-broad.

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[28] As in most discretionary exercises, it is not necessary for each of the factors to apply in order for the release to be granted: *Target Canada Co., Re*, endorsement of Morawetz J. (as he then was) at p. 14. Some factors may assume greater weight in one case than another.

[29] In this case, I would add to these factors an additional factor, the quality of the claims the Objectors wish to maintain. While this may already be implicit in some of the considerations set out in *Lydian*, it warrants separate identification on the facts of the case before me.

[30] The Objectors argue vigorously that this is not the stage to assess the strength of any potential action against proposed defendants or the size of damage claims available against them. I agree. At the same time, however, the court should not entirely ignore the nature of the proposed claim. If the court is being asked to release claims, it is helpful to know what is being released. The court's impression of the nature of the claim is a relevant factor to consider when determining whether releases should be granted. I do not think it would be advisable to lay down a precise definition of the quality of claim required to determine whether releases should or should not be granted nor would I described this as a threshold test to grant or deny the release. It is more of a directional or qualitative factor to consider in deciding whether to grant a release rather than a precise legal test. The stronger a claim appears, the less likely a court may be to grant a release. The thinner and more speculative a claim, the more likely a court may be to grant a release.

The Quality of the Claims being Released

[31] As noted earlier, the principal Objectors are the founders of Green Relief Steven Leblanc, Warren Bravo and Lynn Bravo. Relations between the founders on the one hand and the existing board and other shareholders are poisoned.

[32] On the motion before me, shareholders spoke out against the founders and made submissions to the effect that the release should not preclude any claims by shareholders against the founders. Those shareholders see themselves as having been deprived of their entire investment, in some cases their life savings, because of alleged misrepresentations or improper transactions by the founders. None of those allegations are before me. I raise them only to set the highly litigious context in which the release arises. The release does not propose to release claims against the founders but only releases claims against current directors, Green Relief's legal counsel, the Monitor and its legal counsel.

[33] This proceeding has been highly litigious from the outset, particularly in light of the relatively modest size of the estate at issue. It has been marred by litigation over who is a shareholder, who is or should be a director and who is a creditor.

[34] This follows on a highly contentious corporate history involving struggles between shareholder groups, allegations of misrepresentation and allegations of fraud.

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[35] The Objectors' primary opposition to the release is based on their desire to bring an action against the current directors, the Company's legal advisors during the CCAA proceedings, the Monitor and its counsel for their conduct during the CCAA proceedings. The Objectors submit that the current Board, the Monitor and their legal counsel misled the court by suggesting that they had a transaction in the offing that would have injected $20,000,000 into Green Relief. The Objectors say that the releasees did insufficient due diligence to determine whether the proposed purchaser in fact had $20,000,000 available.

[36] The Objectors submit that the Company has incurred needless professional fees because of the fruitless pursuit of the $20,000,000 transaction and that Green Relief suffered a loss of chance in that it was deprived of the ability to pursue alternative transactions.

[37] If anything, the proposed action demonstrates the need for a release. In the overall circumstances of the case, the threat of litigation against the current board, the Company's counsel, the Monitor and its counsel is unfounded and disproportionate. To demonstrate this requires some context and background.

[38] At the outset of the proceeding, 265 Co. proposed to extend a $5,000,000 operating loan to Green Relief. The loan provided no money for creditors. The board feared that accepting the loan would inevitably put Green Relief further into debt and ultimately end up with 265 Co. having ownership of Green Relief without having provided anything for other stakeholders. Mr. Leblanc supported the 265 Co. proposal and urged that I adopt it.

[39] The board urged me to allow them to pursue a proposal from another investor, Mr. Vercouteren. The Vercouteren proposal would have injected $20,000,000 into Green Relief. As it turns out, the Vercouteren proposal did not materialize. Initially the court was advised that the Vercouteren proposal was being delayed because of administrative holdups attributable to the Covid 19 pandemic. A few months later it was discovered that the delays were attributable to the fact that the Vercouteren proposal was contingent upon the completion of another transaction in Europe. The nature of that transaction, its status, closing date, likelihood of closing and reason for not closing to date were never revealed.

[40] It is fair to say that when I discovered this, I expressed frustration to the Applicant for having failed to disclose the true status of the Vercouteren proposal from the outset. The Applicant assured me that they had done due diligence on Mr. Vercouteren and had been assured by his counsel, a reputable law firm, that he was a person of financial substance with the means to complete a transaction of the sort he had proposed.

[41] With the benefit of hindsight one can debate whether the board acted perfectly, their conduct, however, ultimately led to the situation we find ourselves in now which is one that has 265 Co. offering more money to creditors and potentially other stakeholders than its initial proposal did. The proposal I am being asked to approve would see 265 Co. inject $5,000,000 of which $1,500,000 would be for operating purposes and $3,500,000 would be for distribution to creditors. In addition, the 265 Co. proposal contains an earn out of up to an additional $7,000,000 for distribution to creditors. While I agree that it does not offer $20,000,000, the reality is that $20,000,000 was not on the table.

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[42] Mr. McGovern, on behalf of Mr. Leblanc submits that the fact that the current offer of 265 Co. is superior to the prior offer does not end the analysis because the board and its advisors got that superior offer by engaging in questionable conduct. According to Mr. McGovern, this introduces moral hazard into the equation which is undesirable.

[43] On that analysis, if anyone has been damaged by the alleged moral hazard, it is 265 Co. which has been led to improve its previous offers based on allegedly misleading information. However, 265 Co. does not complain. It wishes to close the Transaction.

[44] Mr. Dick on behalf of Mr. Saunders and Mr. Kennaley on behalf of Messrs. Schilthuis and Lloyd submit that the Objectors should be able to pursue their loss of chance claim. They argue that there were no other bids for Green Relief because the size of the Vercouteren proposal inhibited others from bidding. While perhaps initially appealing as a basis to speculate about what other bids may have been available, I do not accept the submission for three reasons.

[45] First, the Vercouteren proposal did not stop 265 Co. from making its $5,000,000 operating loan proposal. It also did not stop 265 Co. from making a significantly more superior offer later subject to an exit right based on what its due diligence revealed. Anyone who was seriously interested in the business could have made an offer with a due diligence exit right. There is nothing unusual in that type of proposal

[46] Second, the founders supported 265 Co.'s initial inferior proposal. Had they truly believed Green Relief was worth $20,000,000, it is unlikely they would have done so. In addition, the founders were ideally placed to find other financial solutions preferable to the one on offer. They did not do so. Even when they learned that the current proposal was conditional on the release, the Objectors did not suggest that the company return to the drawing board to search for another transaction. The Objectors want me to approve the Transaction but with the release removed.

[47] Third, no creditor objects to the Transaction. Any hope of a transaction that would offer more funds for creditors, let alone shareholders, than the Transaction does is illusory. At an earlier stage in this proceeding, Mr. Weisz stated that "Green Relief is hopelessly insolvent": see my endorsement of April 20, 2020 at para. 6. At the time, Green Relief was in default of leases, had tax arrears of over $100,000 and was over five months in arrears on a mortgage in favour of Rescom. Hopelessly insolvent companies do not have enough money to pay off creditors, let alone provide value to shareholders. This particular hopelessly insolvent company is a cannabis business. The entire cannabis industry is undergoing a fundamental shakeup. There is no shortage of CCAA proceedings involving players in the cannabis industry. The harsh business reality is that creditors, let alone shareholders, will come out short in these restructurings. If anyone stands to gain from a superior offer, it is creditors. Yet no creditor, apart from Ms. Bravo who asserts that she is a creditor, wants to pursue a claim against anyone for their conduct of the CCAA proceeding.

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[48] In those circumstances, I am satisfied that whatever right of action is being removed by the release is so insubstantial that the court need not be concerned about depriving anyone of a cause of action that has even a remote chance of success. At best, it is a cause of action that is entirely without legal merit but which might have some economic value if a defendant were prepared to settle on the basis of the claim's nuisance value. Permitting unmeritorious claims to proceed so that the founders can try to extract a nuisance value settlement arising from steps that were approved by the court at each stage would amount to legally authorized extortion which I am not inclined to permit.

[49] In the circumstances described above, the quality of the claims released would incline me to approve the release.

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Application of the Lydian Factors

[50] **Releasees necessary and essential:** The released parties here were necessary and essential to the restructuring. A CCAA proceeding quite obviously cannot proceed without a Monitor, Monitor's counsel or company counsel. Similarly, a restructuring cannot proceed without the other releasees like directors, officers and employees.

[51] **Rational connection between claims released and the purpose of the plan:** The claims released are rationally connected to the purpose of the plan. The object of the release is to diminish indemnity claims by the releasees against Residual Co. and the pool of cash that is being created in its hands to satisfy creditor claims. Given that one purpose of a CCAA proceeding is to maximize creditor recovery, a release which helps do that is rationally connected to the purpose of the plan.

[52] **Whether the plan can succeed without the releases** is unknown. The directors have made the releases a condition precedent to the plan. The court should not accept the release simply because it is said to be a condition precedent. In the circumstances of this case, the condition precedent strikes me as more of a strong-arm tactic that courts should resist. I feel myself at liberty to call the directors' bluff and approve the Transaction without the release.

[53] Success of the plan without releases should, however, also be assessed with regard to factors other than potential strong-arming by incumbent directors. Here, the pool of assets immediately available for distribution of creditors is approximately $3,500,000. As noted, the releasees may have a claim on those funds to satisfy any indemnity claims arising out of the litigation. Mr. McGovern's announced desire to sue the Monitor, its counsel, the directors and Green Relief's counsel for their conduct during the restructuring may give rise to indemnity claims of a size that would make a significant dent in the cash available for creditors. That diminution would make the plan significantly less successful and, depending on circumstances, could eliminate assets available for creditors.

[54] **Did the releasees contribute to the plan:** While there is not yet a plan, the releasees have clearly contributed to get the Company to this stage. The Monitor, its counsel, the directors and Company counsel dedicated time and effort to the CCAA proceedings. Professional advisors contributed further by deferring billing and collection. Messrs. Jha and Battaglia contributed $1,500,000 of their personal funds to provide DIP financing at relatively modest interest rates. Mr. Battaglia contributed $220,000. Dr. Jha initially contributed $500,000 and then increased his contribution to $1,250,000 in June 2020.

[55] **Does the release benefit the debtor as well as creditors:** The release benefits the debtor in that it helps facilitate a transaction that will make funds available to creditors. In the absence of the release, the funds available to creditors could be significantly diminished because of indemnity claims by the releasees. Those indemnity claims would include claims for advancement of defence costs. The advancement of defence costs would be claimed in relation to an action that questions the conduct of the releasees during a court supervised and court approved the process. As noted above, the nature of those claims is highly tenuous.

[56] **Creditors knowledge of the nature and effect of the release:** All creditors on the service list were served with materials relating to this motion. Creditors were free to attend the hearing, several did. Those creditors who made submissions on the motion supported the release.

[57] A consideration of the foregoing *Lydian* factors would also incline me to approve the release. If I balance the right to the Objectors to pursue the releasees for their conduct during the CCAA proceeding against the right of creditors to maximize recovery against the Green Relief estate, there is simply no contest. The creditors with proven claims have legitimate, verified demands against the corporate estate. The Objectors have tenuous claims based on objections to a court supervised process that would in effect amount to a collateral attack on court orders. In those circumstances I am satisfied that the release benefits the debtor and creditors generally.

Scope of the Releases

[58] Although the scope of the releases is captured by the factor that Lydian describes as whether the releases are fair, reasonable and not overly broad, I consider the scope of the release here in a standalone section because of the prominence given to it during argument.

[59] The release is found in paragraph 24 of the proposed order. Its material language provides:

> …the current directors, officers, employees, independent contractors that have provided legal or financial services to the Applicant, legal counsel and advisors of the Applicant, and (ii) the Monitor and its legal counsel (collectively, the "Released Parties") shall be … released … from …all … claims …of any nature or

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> kind whatsoever … based in whole or in part on any act or omission, … taking place prior to the filing of the Monitor's Certificate and that relate in any manner whatsoever to the Applicant or any of its assets (current or historical), obligations, business or affairs or this CCAA Proceeding, … provided that nothing in this paragraph shall … release… any claim: (i) that is not permitted to be released pursuant to section 5.1(2) of the CCAA, (ii) against the former directors and officers of the Applicant for breach of trust arising from acts or omissions occurring before the date of the Initial Order, (iii) that may be made against any applicable insurance policy of the Applicant prior to the date of the Initial Order, or (iv) that may be made against the current directors and officers that would be covered by the Directors' Charge granted pursuant to the Initial Order.

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[60] While the release appears broad at first blush, a closer reading narrows it scope considerably. The parties being released are by and large parties who provided services to the company during the CCAA process. Given that the incremental steps in the CCAA process were approved by the court and were subject to submission by a wide variety of parties, the release is not, prima facie, unreasonable. In addition, while current directors are also released, the longest-serving of those are Messrs. Jha and Battaglia who became directors on March 7, 2019, approximately one year before the Notice of Intention was filed. The time period for which they are being released outside of the court proceedings is therefore relatively limited. On the motion, no one advanced any basis for a claim against them for pre-Notice of Intention conduct.

[61] The release then goes on to carve out certain types of claims that are not being released even as against the limited population of releasees. The carveouts include claims not permitted to be released under section 5.1 (2) of the CCAA and claims that may be made against any applicable insurance policy.

[62] Section 5.1 (2) of the CCAA prohibits releases for, among other things, "wrongful or oppressive conduct by directors. " Just what that means was the subject of much argument on the motion.

[63] On behalf of Green Relief, Mr. Thornton submitted that the carveout for "wrongful or oppressive conduct" is broad and would include negligence claims. In other words, in the Company's view, negligence claims are not being released. Mr. Thornton submitted that the language of section 5.1 (2) of the CCAA effectively releases the directors from statutory liabilities for which they may be liable because the corporation failed to do something even though that failure is not attributable to any wrongdoing by directors. By way of example, directors' statutory liability for unpaid wages would fall into this category and would be captured by the release.

[64] In *BlueStar Battery Systems International Corp., Re*, 2000 CanLII 22 678 (ON SC) Farley J. said the following about the scope of section 5.1 (2) at para 14:

> "However it seems to me that the directors of any corporation in difficulty and contemplating a CCAA plan would be unwise to engage in a game of hide and go seek since the language of s. 5.1 (2)(b) appears wide enough to encompass those situations where the directors stand idly by and do nothing to correct any misstatements or other wrongful or oppressive conduct of others in the corporation (either other directors acting qua directors, or officers or underlings). There was no evidence presented that the directors here had knowledge or ought to have had knowledge of such here. One may have the greatest of suspicion that they did or ought to have had such knowledge. This could have been crystallized if RevCan had put the directors on notice of the promises to pay GST. It would seem to me at first glance that the oppression claims cases which arise pursuant to corporate legislation such as the Canada Business Corporations Act and the Business Corporations Act (Ontario) would be of assistance in defining "oppressive conduct". Similarly it would appear that "wrongful conduct" would be conduct which would be tortious (or akin thereto) as well as any conduct which was illegal."

[65] This passage would appear to support Mr. Thornton's submission.

[66] Mr. Osborne, on behalf of the current directors took a narrower view of the meaning of "wrongful or oppressive" conduct and described it as referring to "active but not "passive torts". In Mr. Osborne's submission, the release covers claims in respect of which the corporation can indemnify directors, including negligence, but does not include intentional conduct like fraud.

[67] Given the difference of views, some counsel asked me to define specifically what was or was not excluded by section 5.1 (2) while others urged me not to define the scope of the section at this stage.

[68] My inclination is to not to define the scope of the section or the release in a vacuum. Both the release and section 5.1 (2) are better interpreted in light of a specific claim in the context of the circumstances existing if and when any such claim arises.

[69] In that regard I would urge a heavy dose of restraint on all parties. There has been no shortage of animosity and litigation between the parties. Temperatures have run high throughout. Before continuing any existing litigation or commencing new litigation, I would urge all parties to consider whether they are proceeding out of anger and frustration, however justified it may be, or are they proceeding on a rational economic basis because there is a cogent basis for a claim that will lead to recovery considerably in excess of the costs of litigating. This is a situation where suing "out of principle" warrants considerable restraint.

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[70] The release also carves out claims "that may be made against any applicable insurance policy of the Applicant prior to the date of the initial order." I was advised during the motion that the directors were unable to obtain insurance after the Notice of Intention was filed in March 2020 but that the company purchased tail coverage that extended coverage for past conduct of directors. The tail coverage expires on November 26, 2020. That still provides plaintiffs with a period of time to commence an action for which there might be insurance coverage and to which the release might therefore not apply. The tail coverage may for example, cover current and former directors for conduct that arose before the Notice of Intention was filed.

[71] To permit such claims to be filed, I am temporarily lifting the stay of proceedings against officers and directors of Green Relief solely for the purpose of initiating claims that would potentially obtain the benefit of the carveouts under the release.

[72] Given my preference for interpreting the release in light of actual circumstances rather than in a vacuum and given my temporary lift of the stay of proceedings against officers and directors, there is considerable benefit to the parties and considerable judicial efficiency in having the release interpreted by the same judicial officer who approved it and who had oversight of the CCAA proceedings. I will therefore remain seized of this issue and order that any issue about whether the release applies (including the issue of insurance coverage) will be determined by me.

[73] To be clear, if any actions are commenced because of the temporary lift stay, the parties will still have to agree that such actions are carved out of the release by virtue of insurance coverage or I will have to determine that issue. The actions will not proceed and need not be defended until such agreement is reached or until I have determined whether the release applies.

Relief requested by Susan Basmaji

[74] Susan Basmaji is a shareholder who asks that I extend the coverage of the release to her. Ms. Basmaji says she motivated a large number of other shareholders to cooperate with the Monitor and the Company to support the Transaction. She says that as a result of those efforts, Mr. Leblanc has commenced a defamation action against her.

[75] I am not inclined to extend the release to Ms. Basmaji. The release was the product of negotiations between various stakeholders. It is not for the court to rewrite the release and bring other parties into the negotiation. I have extremely limited knowledge of the dispute between Mr. Leblanc and Ms. Basmaji and have no basis for concluding whether Ms. Basmaji was essential to the success of the Transaction as Lydian suggests nor do I have enough information about the defamation action to determine whether Ms. Basmaji should benefit from a release. That that said, it strikes me that the litigation between Mr. Leblanc and Ms. Basmaji a dispute to which the exhortation in paragraph 69 above is particularly relevant.

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Disposition

[76] For the reasons set out above, I

a. approve the Transaction;

b. approve the release;

c. will remain seized of all issues concerning the interpretation of the release and the insurance coverage referred to in it;

d. lift the stay of proceedings solely to permit actions to be brought up to and including November 26, 2020 in order to capture the benefit of insurance coverage referred to in the release;

e. reimpose the stay of proceedings effective at 12:01 AM on November 27, 2020; and

f. decline to extend the benefit of the release to Susan Basmaji.

Koehnen J.

Date: November 9, 2020

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CITATION: Tacora Resources Inc. (Re), 2024 ONSC 4436
COURT FILE NO.: CV-23-00707394-00CL
DATE: 20240812

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC.

BEFORE: KIMMEL J.

COUNSEL: *Ashley Taylor/Lee Nicholson/Philip Yang/Natasha Rambaran*, for the Applicant, Tacora Resources Inc.

Robert Chadwick/Caroline Descours/Peter Kolla/Sarah Stothart/Brittni Tee, for Cargill, Incorporated and Cargill International Trading Pte Ltd.

Marc Wasserman/Michael De Lellis, for the Consortium Noteholders Group

Alan Merskey/Jane Dietrich/Ryan Jacobs, for the Monitor, FTI Consulting Canada Inc.

Shaan Tolani, for Computershare Trust Company

Natasha MacParland/Derek Ricci, for Crossing Bridge Advisors

Joe Thorne, for 1128349 BC Ltd.

Gerry Apostolatos, for Quebec North Shore and Labrador Railway Inc.

HEARD: July 26, 2024

ENDORSEMENT
(RVO AND INCLUDED THIRD PARTY RELEASES)

[1] Tacora Resources Inc. ("Tacora") brought a motion for an Approval and Reverse Vesting Order ("RVO") in respect of a July 21, 2024 Subscription Agreement and the transactions contemplated by it (the "Transactions"). The Subscription Agreement was entered into between Tacora and a group of investors comprised of certain noteholders represented by Millstreet Capital Management LLC, as investment manager ("Millstreet"), OSP, LLC, on behalf of certain managed funds ("OSP"), and Cargill, Incorporated ("Cargill") (collectively, the "Investors"). The RVO includes third party releases.

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[2] At the same time, Tacora sought an ancillary order dealing with an extension of the Stay and DIP Financing and approval of fees. Both orders were signed on July 26, 2024 because time was of the essence.

[3] In my July 26, 2024 endorsement, I indicated that I intended to issue further supplementary reasons on two aspects of the AVO. I stated as follows at paragraph 11 of that endorsement:

> For the reasons set out in much greater detail in the factums filed by the Applicant and Cargill, I have determined that it is just and appropriate to grant the proposed Approval and Reverse Vesting Order. Given the scrutiny that the court must apply to consideration of RVOs and third party releases, it is my intention to issue further supplementary reasons at a later date to explain the justification for the court's approval of these aspects of the order signed today.

July 26, 2024 Endorsement Re: RVO and Third Party Releases

[4] For completeness, and given the brevity of my July 26, 2024 endorsement, I have reproduced below the first ten paragraphs of that endorsement in their entirety before providing my supplementary reasons about the approval of the RVO and the third party releases that it provides for. The remainder of that earlier endorsement, dealing with an Ancillary Order and other matters, does not require any further elaboration or justification.

> [1] After a lengthy and sometimes acrimonious CCAA process that involved multiple attempts (pre-and post-filing) to achieve a going concern transaction that deleverages Tacora's capital structure and that amends an onerous offtake agreement with a Cargill affiliate, Tacora has entered into a subscription agreement with certain significant stakeholders (Millstreet Capital Management LLC, as investment manager on behalf of multiple noteholders ("Millstreet"), OSP, LLC, on behalf of certain managed funds ("OSP"), and Cargill, Incorporated, collectively, the "Investors") dated July 21, 2024 (the "Subscription Agreement").
>
> [2] Execution of the Subscription Agreement represents the culmination of extensive solicitation efforts on the part of Tacora which commenced in March 2023 and continued after the commencement of the CCAA proceedings in accordance with a court approved Solicitation Process[1] and court approved Sale Process. Together, these three solicitation and sale processes resulted in a broad and robust canvassing of parties potentially interested in Tacora's business and assets.

[1] Capitalized terms not otherwise defined in this endorsement shall have the meanings ascribed to them in the applicant's factum filed in support of this motion.

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[3] The transactions contemplated by the Subscription Agreement represent the best and only available going concern outcome for Tacora that has come out of these efforts. Among other things, they: (a) preserve Tacora as a going concern for the benefit of its employees, suppliers and other stakeholders; (b) deleverage Tacora and capitalize the Company with committed equity financing; (c) avoid the need to transfer the Company's permits and licenses; and (d) preserve the Company's tax attributes.

[4] No alternative transactions emerged from these processes that would provide full repayment to the Senior Notes or Senior Priority Notes. Despite the compromise of their indebtedness, parties collectively holding 71.5% of the obligations of Tacora's aggregate notes (being 55.3% of the Senior Priority Notes and 73.4% of the Senior Notes) support the approvals sought by Tacora in respect of the Subscription Agreement.

[5] In addition to the support of Cargill (in its various stakeholder capacities, as secured lender, unsecured lender, DIP lender, service provider, etc.) and of the majority of notes, the contemplated preferred transactions under the Subscription Agreement are recommended by the Monitor and not opposed by any of Tacora's remaining stakeholders. The proposed transactions are conditional upon the granting of an Approval and Reverse Vesting Order that includes the following relief:

a. approval of the Subscription Agreement;
b. approval of the Transactions contemplated in the Subscription Agreement, including, *inter alia*, execution of a new offtake agreement, new iron ore onshore purchase agreement, and new margin facility between the Company and Cargill to replace the Offtake Agreement, the Stockpile Agreement, and the Margin Advances available to the Company under the APF, and authorizing and directing Tacora to take such additional steps and execute such additional documents as are necessary or desirable for completion of the Transactions; and
c. granting Releases in favour of the Released Parties from the Released Claims.

[6] An RVO transaction has various benefits, including the preservation of Tacora's permits and licenses and tax attributes, and timely completion to avoid consequences arising as a result of the volatile price of iron ore and the ongoing significant costs of these proceedings.

[7] As a result of the Transactions contemplated by the Subscription Agreement, Tacora will continue operating as a going concern as the second largest employer in the Labrador West region, preserving employment for its approximately 463 employees and providing the opportunity for ongoing business relationships for its

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suppliers of goods and services. The Transactions will also allow Tacora to execute on its long-term plan to upgrade and modernize the Scully Mine.

[8] The Subscription Agreement contemplates a target closing date of August 30, 2024. It has an outside Closing Date of October 10, 2024.

[9] This court and other courts in Canada have been willing to grant reverse vesting orders ("RVOs") in appropriate circumstances, where certain requirements are satisfied. RVOs remain the exception rather than the norm. This is, however, a case in which the requirements for approval of an RVO are met, as prescribed in *Harte Gold (Re)*, 2022 ONSC 653 and s. 36(3) of the CCAA with regard to the factors prescribed in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (Ont CA). See also *Just Energy Group Inc et al v. Morgan Stanley Capital Group Inc et al*, 2022 ONSC 6354 at paras. 30-31.

[10] It has become more common in Canada for third party releases in favour of the parties to a restructuring, their professional advisors, their directors and officers, and the Monitor to be approved outside of a CCAA plan in the context of a transaction, including in the context of RVO transactions. Court ordered third party releases, such as are contemplated in favour of certain of the Released Parties in this case, are carefully scrutinized by the court and not granted as a matter of course. They must satisfy the requirements set out in *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. See also *Harte Gold*, at paras. 78-86. Those requirements have been satisfied in this case. Importantly, the record demonstrates that there is a reasonable connection between the claims being compromised and the restructuring achieved by the RVO. The release language has been tailored to the particular circumstances of this case, including one further change that was made to the form of order after the appearance today.

RVO Approval – Supplementary Reasons

[5] While RVOs remain the exception rather than the norm, I concluded that the requirements for approval of an RVO are met in this case.

[6] The *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") does not expressly provide for RVO transactions. The jurisdiction to approve a transaction implemented through an RVO is found in section 11 of the CCAA, which gives the Court broad powers to make any order it thinks fit. See *Harte Gold (Re)*, 2022 ONSC 653, 97 C.B.R. (6th) 202, at paras. 24 and 36-37.

[7] Tacora points out that courts in Canada have applied this jurisdiction in granting RVOs in over 50 cases. The reverse vesting orders sought in many of those cases (especially the early ones) were not opposed. In appropriate cases, RVOs enable stakeholders to avoid the expense and delay that would be incurred under a plan of arrangement to achieve an equivalent result. RVOs also avoid the expense, delay and uncertainty of an asset sale where there are valuable assets, but some that might be difficult or impossible to transfer to a purchaser (such as licences and tax attributes)

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and there are unwanted liabilities (rendering a share sale undesirable for a purchaser). See *Harte Gold* at para. 71.

[8] While Cargill opposed an RVO structure contemplated by an uncompleted earlier transaction in this case, the RVO approved on July 26, 2024 was not opposed by any of the stakeholders. The lack of opposition is a relevant consideration in the court's exercise of its discretion under s. 11 and s. 36(3) of the CCAA.

[9] Here, a significant majority of Tacora's secured creditors (including Cargill) have achieved common ground through extensive negotiation to arrive at the Transactions that they and the Monitor consider will achieve the best possible outcome in the circumstances. The Transactions are supported by potentially the largest unsecured creditor, Cargill, and secured creditors who would hold deficiency unsecured claims. A significant amount of other unsecured claims are being paid or assumed as part of the Transactions.

[10] However, even when (as in this case) an RVO is not opposed, the court must still be satisfied that it is an appropriate mechanism to implement the proposed Transactions. The jurisprudence establishes certain circumstances in which RVOs may be appropriate, at least two of which apply to Tacora:

a. Tacora operates in the highly regulated mining environment in which its existing eight material permits and licences, six mining claims, leases, and other property rights that are required to maintain its mining operations and allow Tacora to perform exploration work on various parts of the Scully Mine, as well as other forest resource licences and fire permits (the "Licences and Permits") would be difficult or impossible to assign to a purchaser.

b. Maintaining the existing legal entity would preserve $650 million in tax attributes (the "Tax Attributes") that would otherwise be lost in a traditional asset sale.

[11] In *Harte Gold*, Penny J. held (at para. 38) that scrutiny of a proposed reverse vesting transaction may be informed by certain delineated enquiries:

a. Why is the RVO necessary in this case?

b. Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

c. Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

d. Does the consideration being paid for the debtor’s business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

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[12] Those enquiries support the granting of the RVO to implement the Transactions contemplated by the Subscription Agreement in this case:

a. The RVO is necessary:

   i. to preserve Tacora's Permits and Licences so that any prospective purchaser can continue operations at the Scully Mine. The RVO avoids the risks and costs associated with potential delays in attempting to transfer Permits and Licences and seeking associated governmental approvals. This is of heightened importance because the volatile price of iron ore can significantly impact Tacora's liquidity. In fact, an earlier proposed transaction in these CCAA proceedings fell victim to these external market forces.

   ii. to preserve Tacora's Tax Attributes for the prospective purchaser, which have been factored into the purchase price under the Subscription Agreement. Without the RVO, the Tax Attributes would have to be accounted for (at the expense of Tacora and its stakeholders) under the possible (but less economically advantageous) alternative transaction structures.[2]

b. The RVO structure produces an economic result at least as favourable as any other viable alternative. The Subscription Agreement and the Transactions (a) were the best and only actionable transaction available to Tacora, as determined by a broad market canvass conducted through the Pre-Filing Solicitation Process, the Solicitation Process and the Sale Process; and (b) result in significant benefits for the "economic community" consisting of Tacora and its stakeholders. They present a going concern solution that preserves the Company and its business and provides for the ongoing employment of all Tacora's employees. These economics have been thoroughly analyzed by Tacora, its financial advisor and the Monitor, all of whom recommended the approval of the Subscription Agreement and the Transactions under an RVO structure to maximize value for the stakeholders.

c. No stakeholder is worse off under the reverse vesting transaction structure than they would have been under any other viable alternative. The RVO structure does not result in material prejudice or impairment to any of Tacora's creditors' rights that they would not otherwise suffer under a traditional asset sale structure. This is, in part, confirmed by the fact that there was no opposition to the requested RVO. The Subscription Agreement provides that, to the extent the RVO is not granted and the structure of the

[2] The court's approval of a reverse vesting structure is not to be construed as an endorsement of the use or efficacy of that structure for tax purposes. That is a matter for CRA and the parties. However, the prospect of preserving those attributes can nonetheless be ascribed value in a transaction, as it was in this case.

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Transaction is converted into an asset sale, the parties shall amend the structure of the Transactions to ensure the transfer of mining rights and to account for the decrease in value arising from the adverse impact to the Tax Attributes and other increased costs associated with transferring Permits and Licences etc. The stakeholders would receive less value, and be worse off, under that alternative structure.

d. On the flip side, the consideration being paid under the RVO structure reflects the importance and value of the Licenses and Permits (or other intangible assets) being preserved under the RVO transaction structure.

[13] Section 36(3) of the CCAA is also relevant in providing guidance to the court on the factors to be considered in exercising its discretion to approve a transaction (such as those set out in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)) and in granting the court jurisdiction to vest off "other restrictions". See *Just Energy Group Inc et al v. Morgan Stanley Capital Group Inc. et al*, 2022 ONSC 6354, at paras. 30-31.

[14] The following additional factors support this Court's approval of the Subscription Agreement and the Transactions and the granting of the Approval and Reverse Vesting Order:

a. The process leading to the proposed Transactions, beginning with the Pre-Filing Strategic Process and including the Solicitation Process, was reasonable in the circumstances. It was broad, open, fair and transparent with an appropriate level of independent oversight.

b. The Sale Process was recommended by the Monitor and approved by the Court.

c. The Monitor considers the Transactions to be more beneficial to Tacora's creditors than a sale or disposition under a bankruptcy. The Monitor has expressed its support for the court's approval of the Subscription Agreement and the Transactions as requested in the Approval and Reverse Vesting Order.

d. Tacora's major secured creditor groups, Cargill and holders of the Senior Notes and Senior Priority Notes, were involved in the Sale Process and are supportive of the relief sought on this motion. No substantive objections to the terms of the Sale Process have been raised.

e. As described above, the Transactions are of significant benefit to the Applicant and the vast majority of its stakeholders. The Transactions will result in a going concern solution for Tacora's business and represent the best available outcome for Tacora, its creditors, and other stakeholders in the circumstances.

f. The Monitor is of the view that the consideration is reasonable and fair, taking into account Tacora's market value. The results of the Pre-Filing Strategic Process, the Solicitation Process and the Sale Process did not produce a better executable transaction lending further support to this conclusion that the consideration is fair and reasonable.

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[15] This is a situation equally as compelling as in *Harte Gold* (at para. 57) where the court remarked that "it is hard to see how anything would change under a creditor class vote scenario." In that case, all creditors, both secured and unsecured, were expected to be paid in full and none opposed the RVO structure that was approved. Here, under the Subscription Agreement and Transactions not all secured or unsecured creditors will be paid in full, yet none oppose the RVO structure. There is no suggestion that the RVO structure is being used to do an end-run around the creditor class voting that is provided for under a CCAA plan of arrangement. There is no creditor whose vote under a CCAA plan might have impacted its approval that has lost its right to have its vote count by the proposed RVO structure. The interesting legal questions surrounding the limits on the use of RVOs in the face of opposition need not be decided at this time.

[16] It is for these more detailed reasons that the RVO was approved and signed on July 26, 2024.

Approval of Third Party Releases – Supplementary Reasons

[17] Third party releases are carefully scrutinized by the court. As I stated in paragraph 10 of my July 26, 2024 endorsement:

> They must satisfy the requirements set out in *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. See also *Harte Gold*, at paras. 78-86. Those requirements have been satisfied in this case. Importantly, the record demonstrates that there is a reasonable connection between the claims being compromised and the restructuring achieved by the RVO. The release language has been tailored to the particular circumstances of this case, including one further change that was made to the form of order after the appearance today.

[18] The test for third-party releases in CCAA proceedings is well established. The Court must ask: (i) whether the parties being released were necessary and essential to the restructuring of the debtor; (ii) whether the claims to be released are rationally connected to the purpose of the restructuring and necessary for it; (iii) whether the restructuring could succeed without the releases; (iv) whether the parties being released contributed to the restructuring; and (v) whether the releases benefit the debtors as well as the creditors generally: *Lydian*, at para. 54.

[19] The releases granted in this case are not unprecedented in their breadth, but they are broad.

a. They include Released Parties that extend beyond the Company, ResidualCo, and the Monitor (including their respective present and former officers, directors, employees, legal counsel and advisors) to the Notes Trustee, the Investors, and Other New Equity Investors (and their respective present and former officers, directors, employees, legal counsel and advisors).

b. The Released Claims include any and all present and future claims of any nature or kind whatsoever based in whole or in part on any act or omission, transaction or dealing or other occurrence existing or taking place on or prior to delivery of the Monitor's Certificate or undertaken or completed in connection with or pursuant to the terms of

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the Approval and Reverse Vesting Order or these CCAA Proceedings, or arising in connection with or relating to the Subscription Agreement, the closing documents, the Applicant's assets, business or affairs, prior dealings with the Applicant, or any agreement, document, instrument, matter or transaction involving the Applicant arising in connection with or pursuant to any of the foregoing, and/or the consummation of the Transactions, with certain standard exclusions (for claims that are not permitted to be released under s. 5.1(2) of the CCAA or any claim resulting from fraud or wilful misconduct) and certain exceptions tailored to this RVO and the Transactions, including the liabilities that are intended to remain in ResidualCo (and are not being released).

c. They effectively include releases between certain of the Released Parties, including (with one express exception for Crossing Bridge) as between the noteholders and the Note Trustee.

[20] To satisfy the court that this breadth of release language was not unprecedented, the Company provided examples of the release language from the *Just Energy* and *Harte Gold* cases which contained comparably broad release language. I will begin by stating that just because release language has been approved in the past by this court does not mean that it necessarily will be approved in every case that follows.

[21] While it is helpful to consider whether any given release language falls on the spectrum of what has been approved in earlier cases, the third party releases in each case must be individually scrutinized and the circumstances and context in which the approval was provided must be understood. That is in part why I consider it to be important to explain the reason for my approval of the third party releases contained in the Approval and Reverse Vesting Order that was signed on July 26, 2024 in this case. Releases of this breadth would not necessarily be appropriate in every case.

[22] The releases in this case are described by the Company to be "an integral component of the Transactions contemplated by the Subscription Agreement and an important feature allowing Tacora to emerge from these proceedings as a "cleaned company" and a going-concern business". This is a function, in part, of the long history of these proceedings and dealings between the parties, that have been described by some as "exhaustive and exhausting". The first of the three sales processes began months before the CCAA filing. The parties have been negotiating over an extended period of time during which their alliances have shifted. Once litigation commenced, there was no shortage of finger pointing and blame laying. Ultimately, significant compromises were made by the secured creditors (whose pre-filing debt and annual debt service was eliminated in exchange for equity and future funding commitments by some), and by some unsecured creditors (Cargill in particular, whose offtake agreement is being replaced).

[23] When cases are hard fought and the parties emerge with an agreement and compromise that includes releases so that all can move forward with a clean slate, that is a circumstance in which broader releases of the nature provided for in this case may be appropriate.

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[24] There is precedent for the application of the *Lydian* factors to the approval of third party releases in favour of the parties to a restructuring, their professional advisors, and their directors and officers in the context of an RVO or other transaction outside of a plan of arrangement: see *Harte Gold*, at para. 79, and *Green Relief Inc. (Re)*, 2020 ONSC 6837, at para. 76.

[25] In this case, the *Lydian* factors can be readily established for the release in favour of not only the traditional categories of third parties but also the Investors, the New Investors (some of whom are also unsecured creditors) and the Note Trustee, all of whom have come to the table during this lengthy and difficult reorganization process and were integrally involved in the restructuring process. Some of the relevant factors to consider in approving the releases in this case include that:

a. the Released Parties played a role in some or all of the Pre-Filing Strategic Process, the Solicitation Process, the Sale Process, the CCAA Proceedings, and negotiation of the Subscription Agreement and the contemplated Transactions, which provide for a going concern solution for Tacora's business and represents the best outcome available to Tacora;

b. many of the Released Parties will also be involved in the implementation of the Transactions;

c. the Monitor is of the view that each of the Released Parties contributed meaningfully and was necessary to Tacora's efforts to address its financial difficulties;

d. the Released Parties are a necessary part in the successful restructuring of the Company and, in the case of Tacora's directors and officers, continued in their roles or joined Tacora notwithstanding the increase in risk and scrutiny due to these proceedings;

e. some of the released parties, if sued, would have indemnification claims by the Released Parties against the Administration Charge and the Directors' Charge, the elimination of which would help achieve the purpose of maximizing creditor recovery;

f. the releases are a condition of the Subscription Agreement; while that alone would not be a sufficient reason to approve them, they have been demonstrated for reasons outlined earlier to be fair, reasonable and not unreasonably broad (having regard to the exclusions and exceptions noted); and

g. no one opposed the requested releases; a specific carve out was negotiated for one aspect of the release for Crossing Bridge in respect of certain claims it wishes to preserve under the inter-creditor agreement.

[26] It is for these more detailed reasons that the court was prepared to approve and sign the Approval and Reverse Vesting Order on July 26, 2024, which contains the proposed release language that was determined to be reasonably connected to the restructuring to be achieved through the RVO and approved Transactions therein.

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Justice Kimmel

Date: August 12, 2024

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CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
COURT FILE NO.: CV-21-00673304-00CL
DATE: 2022-02-04

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, Applicant

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

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mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

[2] Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

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Background

[3] Harte Gold is a public company incorporated under the *Business Corporations Act* (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.

[4] Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.

[5] It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.

[6] Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated $7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

[7] At the time of its initial application to the court, Harte Gold's assets were valued at $163.8 million. Its liabilities were valued at $166.1 million. On a balance sheet basis, therefore, Heart Gold was insolvent.

[8] Since about 2019, Harte Gold has been pursuing a number of measures to address a growing liquidity problem, a problem only exacerbated by the Covid-19 pandemic. Despite these efforts, in 2020 Harte Gold was obliged to seek agreement from its prime lender, BNPP, to defer debt payments and to seek a forbearance from enforcement of BNPP's security. In May 2021, Harte Gold initiated a strategic review of options to achieve the desired liquidity and to fund the acquisition of new capital. Harte Gold appointed a strategic committee of its board and, shortly thereafter, a special committee of independent directors. The special committee retained FTI as financial advisor (FTI was subsequently appointed Monitor by this Court) and developed a plan to attract new capital through a potential sale.

[9] This prefiling strategic process involved approaching over 250 potential buyers. 31 of these entities executed confidentiality agreements; 28 of those conducted due diligence through Harte Gold's virtual data room. Harte Gold received four nonbinding expressions of interest but, by the bid deadline in September 2021, no binding offers had been received.

[10] In the aftermath of this unsuccessful process, Silver Lake through 833 acquired BNPP's debt and advanced a proposal to acquire Harte Gold's operations by way of a credit bid and to provide interim financing in connection with any proceedings under the CCAA. An initial order under the CCAA issued from this Court on December 7, 2021.

[11] In the midst of this process, Harte Gold received a competing proposal to make a credit bid from Harte Gold's second secured creditor, Appian. As a result of these developments, Harte Gold resolved to conduct a further (albeit brief, given the extensive process that had just been completed) sale and investment solicitation process, this time with a stalking horse bid. Further competing proposals took place between Silver Lake and Appian over who would be the stalking horse bidder. As a result of this process, the stalking horse bid of Silver Lake was significantly improved. Appian was then content to let Silver Lake's credit bid form the basis of the SISP. I approved this process in an order dated December 20, 2021.

[12] The Monitor provided a new solicitation notice to a total of 48 known and previously unknown potential bidders (other than Silver Lake and Appian). None of the potentially interested parties signed a confidentiality agreement or requested access to the data room.

[13] Only one competing bid was received – a further credit bid from Appian with improved conditions over those proposed by Silver Lake. Ultimately, all parties agreed that the responding commitment from Silver Lake which was at least as favourable to stakeholders as the Appian bid would be, in effect, the prevailing and winning bid.

[14] This took the form of a Second Amended and Restated Subscription Agreement (SARSA) with 833, the actual purchaser. The improved terms were: (a) the assumption by the purchaser of Harte Gold's office lease at 161 Bay Street in Toronto; (b)(i) the proviso that

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the $10 million cap on payment of cure costs and pre-filing trade creditors does not apply to the assumption of post-filing trade creditor obligations; and (ii) all amounts owing by Harte Gold to any of the Appian parties are subject to a settlement agreement between 833 Ontario, Silver Lake and Appian and excluded from the prefiling cure costs; and, (c) the undertaking to pay an additional cash deposit of US$1,693,658.72, equivalent to approximately 5% of the Appian indebtedness.

[15] In broad brush terms, the Silver Lake/833 purchase is structured as a reverse vesting order. The transaction will involve:

- the cancellation of all Harte Gold shares and the issue of new shares to the purchaser
- payment by the purchaser of all secured debt
- payment by the purchaser of virtually all prefiling trade amounts (estimated at $7.5 million but with a $10 million cap) and postfiling trade amounts
- certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy. The excluded contacts and liabilities include a number of agreements involving ongoing or future services in respect of which there is little if any money currently owed. They also include a number of contracts with Appian entities and Orion, both of which support approval of the transaction The emplyment contracts of four terminated executives will, however, be excluded liabilities, which will nullify the value of any termination claims. Notably, excluded liabilities does not include regulatory or environmental liabilities to any government authority
- retaining on the payroll all but four employees (the four members of the executive team whose employment contracts will be terminated), and
- releases, including of Harte Gold and its directors and officers, the Monitor and its legal counsel and Silver Lake and its directors and officers.

There is no provision for any break fee. Nor is there a request for any form of sealing order.

[16] I should add that the value of what the purchaser is paying for Harte Gold's business, including the secured debt, the pre and postfiling trade amounts, interim financing and the like, totals well over $160 million.

Issues

[17] There are three principal issues:

(1) Whether the proposed transaction should be approved, including the reverse vesting order transaction structure and the form of the proposed release;

(2) Whether the stay should be extended; and,

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(3) Whether the Monitor's mandate should be extended to included additional companies (newcos) being incorporated for the purposes of executing the proposed transaction.

Analysis

[18] Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances".

[19] Section 36(1) of the CCAA provides:

> A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

[20] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
> (d) the extent to which the creditors were consulted;
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp,* 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

> (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process:

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see *Target Canada Co. (Re),* 2015 ONSC 1487, at paras. 14-17.

[22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

[23] In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:

(a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,

(b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

[24] The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re),* (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found "the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise."

[25] A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.

[26] More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.

[27] In *Arrangement relatif à Nemaska Lithium Inc, 2020 QCCS 3218* at paras. 52 and 71 (leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc,* 2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc,* 2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

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- Whether sufficient efforts to get the best price have been made and whether the parties acted providently
- The efficacy and integrity of the process followed
- The interests of the parties, and
- Whether any unfairness resulted from the process.

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

[28] In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that "the terms 'sell or otherwise dispose of assets outside the ordinary course of business' under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*": *Nemaska* QCCA at para 19.

[29] Similarly, in *Quest University Canada (Re)*, 2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court's authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on CCAA jurisdiction in *9354-9186 Québec Inc. v. Callidus Capital Corp.*, 2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.

[30] In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.

[31] Fitzpatrick J. relied on *Callidus* to the effect that:

- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence". On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only

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by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances"

- the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company"

- Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the CCAA context

- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence

- Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. The supervising judge is best positioned to undertake this inquiry.

[32] The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

[33] Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.

[34] The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not "meritorious", also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. "reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings": *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

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[35] It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.

[36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

[37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

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(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[39] With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

[40] Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

[41] Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

[42] Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

[43] The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.

[44] I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the prefiling strategic process and the SISP.

[45] Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

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Comparison with Sale in Bankruptcy

[46] The Monitor has considered whether the completion of the transaction contemplated by the SARSA would be more beneficial to creditors of the applicant and stakeholders generally than a sale or disposition of the business and assets of Harte Gold under a bankruptcy. The Monitor is unambiguously of the view that the SARSA transaction is the vastly more beneficial option.

[47] The SISP has shown that the SARSA represents the highest and best offer available for Harte Gold's business and assets. The Monitor is satisfied that the approval and completion of the transactions contemplated by the SARSA are in the best interests of the creditors of Harte Gold and its stakeholders generally.

[48] In addition to anything else, a bankruptcy would jeopardize ongoing operations and the permits and licences necessary to maintain such operations. A sale in bankruptcy would delay and, again, jeopardize the approval and closing of the proposed transaction as it would be necessary to first assign Harte Gold into bankruptcy or obtain a bankruptcy order, convene a meeting of creditors, appoint inspectors and obtain the approval of the inspectors for the transaction prior to seeking a more traditional AVO or an RVO. Additional costs would also be incurred in undertaking those steps. Silver Lake would have to continue to advance additional funds to finance ongoing operations during this extended period. There is no indication it would be willing to do so. In any event, requiring such a process would fundamentally change the value proposition the purchaser has relied upon and is willing to accept.

[49] Taking all this into account, a sale or disposition of the business and assets of the applicant in a bankruptcy would almost certainly result in a lower recovery for stakeholders and would not be more beneficial than closing the RVO transaction in the CCAA proceedings.

Consultation with Creditors

[50] Harte Gold's major creditors are Silver Lake, the Appian parties and BNPP. BNPP still has potential claims of approximately $28 million in respect of its hedge agreements. Silver Lake has claims of approximately $95 million in respect of the DIP facility and the first lien credit facilities it acquired from BNPP. The Appian parties have claims of approximately US$34 million in respect of amounts owing under the Appian facility and additional potential claims in respect of obligations under royalty and offtake agreements.

[51] BNPP was consulted throughout the strategic review process and has executed a support agreement with the purchaser. In addition, as previously described, the purchaser and the Appian Parties have been extensively involved in the SISP.

[52] While there is no evidence of consultations with unsecured creditors, I do not regard that as a material deficiency given that virtually all creditors, secured and unsecured alike, are going to be paid in full under the terms of the SARSA.

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[53] The Monitor is of the view that the degree of creditor consultation has been appropriate in the circumstances. The Monitor does not consider that any material change in the outcome of efforts to sell the business and assets of the Applicant would have resulted from additional creditor consultation.

[54] I find, on the evidence, that the Monitor's assessment of this factor is well supported and correct.

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The Effect of the Proposed Sale on Creditors and Other Interested Parties

[55] The proposed transaction affords the following benefits to the creditors and to stakeholders generally:

(a) the retention and payment in full of the claims of almost all creditors of Harte Gold;

(b) continued employment for all except four of the Harte Gold's employees;

(c) ongoing business opportunities for suppliers of goods and services to the Sugar Loaf Mine; and

(d) the continuation of the benefits of the existing Impact Benefits Agreement with Netmizaaggamig Nishnaabeg First Nation.

[56] The Monitor's opinion is that the effect of the proposed transaction is overwhelming positive for the vast majority of Harte Gold's creditors and other stakeholders apart (as discussed below) from the shareholders who have no reasonable economic interest at this point.

[57] Unlike *Quest*, this is not a case in which the RVO is being used to thwart creditor opposition. Indeed, the evidence is that almost all creditors, secured and unsecured, will be paid in full. To the extent there might be concerns that an RVO structure could be used to thwart creditor democracy and voting rights, those concerns are not present here. This is not a traditional "compromise" situation. It is hard to see how anything would change under a creditor class vote scenario because almost all of the creditors are being paid in full.

[58] The evidence is that there is no creditor being placed in a worse position, because of the use of an RVO transaction structure, than they would have been in under a more traditional asset sale and AVO structure (or, for that matter, under any plausible plan of compromise).

[59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

[60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

[61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the *Bankruptcy and Insolvency Act* or an order made under the *Companies Creditors Arrangement Act* approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

[62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

[63] Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While, again, s. 36(1) is concerned with asset sales, the underlying logic of this provision applies to an assessment of cancellation of shares as well. In this case, there is no prospect of shareholder recovery on any realistic scenario.

[64] Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, paras. 23-29. In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: *Stelco Inc. (Re),* 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.

[65] Taking all this into account, I find that the effect of the transaction on creditors and stakeholders is overwhelmingly positive and the best outcome reasonably available in the circumstances.

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Fairness of Consideration

[66] Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable.[1]

[67] A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational – both payments being made to bring about the acquisition of the Mine as a going concern.

[68] It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the prefiling strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".

[69] The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

[70] As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.

[71] The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would

[1] The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

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have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

[72] It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to $10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.

[73] The position of the purchaser is, not unreasonably, that it will not both continue to fund ongoing operations and the CCAA process and undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.

[74] The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.

[75] In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.

[76] For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

Conclusion on RVO/Section 36 Issues

[77] In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's

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assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

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Release

[78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

[79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

[80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

[81] Whether the claims to be released are rationally connected to the purpose of the restructuring: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

[82] Whether the releasees contributed to the restructuring: The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

[83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

[84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

[85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

[86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

[87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

[88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

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[89] No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

[90] For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

[91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

[92] The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

[93] I approve the grant of the requested powers to the Monitor.

Conclusion

[94] For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Penny J.

Date: 2022-02-04

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