Clerk's Stamp

COURT FILE NUMBER	24-2746532
COURT	COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY
JUDICIAL CENTRE	EDMONTON
	IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, OF ALASKA – ALBERTA RAILWAY DEVELOPMENT CORPORATION
DOCUMENT	**BENCH BRIEF**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	LAWSON LUNDELL LLP Barristers and Solicitors Brookfield Place 1100, 225 – 6th Ave SW Calgary, AB T2P 1N2 Telephone: (403) 269-6900 Fax: (403) 269-9494 Email: ateasdale@lawsonlundell.com **Attention: Alexis Teasdale**

Bench Brief of MNP Ltd., in its capacity as Court-appointed Interim Receiver and Trustee Under the Proposal of Alaska-Alberta Railway Development Corporation

---

TABLE OF CONTENTS

I. INTRODUCTION

1. This Bench Brief is filed in support of the Application of MNP Ltd., in its capacity as trustee (in such capacity, the "**Trustee**") under the proposal of Alaska–Alberta Railway Development Corporation ("**A2A**" or the "**Company**") on October 27, 2021 (the "**Proposal**"), for approval by this Honourable Court of the Proposal and the reorganization of share capital contemplated thereunder. Capitalized terms not otherwise defined in this Bench Brief have the meaning given to them in the Proposal.

2. Pursuant to the Amended and Restated Interim Receivership Order granted on October 13, 2021, MNP Ltd., in its capacity as Court-appointed interim receiver of A2A (in such capacity, the "**Interim Receiver**") submitted the Proposal.

3. The Proposal was overwhelmingly approved at the meeting of creditors convened to consider the Proposal (the "**Creditors' Meeting**"). Affected Creditors representing 75% in number and 93% in dollar value of Affected Creditors present and voting in person or by way of voting letter at the Creditors' Meeting, voted in favour of the Proposal.

4. The requirements for approval of the Proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 as amended (the "***BIA***") are met: the Proposal contains the terms required under the *BIA* and is made in good faith, and its terms are reasonable and calculated to benefit the general body of creditors. Certain facts under section 173 of the *BIA* may be engaged; however, even if those facts were proved, a reduction in the percentage of security required by subsection 59(3) of the *BIA* is justified in light of the evidence.

5. Regarding the reorganization of A2A's share capital as described in the Proposal and pursuant to subsection 192(2) of the Alberta *Business Corporations Act*, RSA 2000, c B-9 (the "***ABCA***"), the conditions for approval of the reorganization will be met if this Honourable Court approves the Proposal: A2A will be subject to an "order for reorganization" within the meaning of subsection 192(2), and the proposed amendments are authorized under section 173, of the *ABCA*. Further, A2A, under the Interim Receiver's supervision, has complied with all statutory requirements and has been acting in good faith; and the reorganization is fair and reasonable.

6. For these reasons, the Trustee recommends that this Honourable Court approve the Proposal and the concurrent reorganization under section 192(2) of the *ABCA*.

II. FACTS

A. Background

7. A2A was originally incorporated under the *ABCA* as 1788099 Alberta Ltd. ("**178**"), on February 3, 2017. 178 initially changed its name to "Alberta–Alaska Railway Development Corporation," then changed it again, to "Alaska–Alberta Railway Development Corporation." A2A's operations were undertaken with the purpose of building and operating a railway that would extend from Alberta to Alaska and allow for the transport of resource commodities to global markets via the ports of Southcentral Alaska (the "**Railway Project**").[1]

8. Notable achievements in A2A's development of the Railway Project include obtaining a presidential permit from former U.S. President Trump that grants permission to A2A to construct, connect, operate and maintain railway facilities at the international border between the U.S. and Canada (the "**Presidential Permit**"), and executing a master agreement with Alaska Railroad Corporation ("**ARC**") respecting permitting, right-of-way selection, economic terms, and the extension of, and authorization for A2A to operate on, ARC's track.[2]

B. Procedural Overview

9. These proceedings (the "**NOI Proceedings**") were commenced when A2A filed a Notice of Intention to Make a Proposal (the "**NOI**") pursuant to subsection 50.4(1) of the BIA on June 18, 2021. The NOI was filed in response to a demand and Notice of Intention to Enforce Security issued on behalf of A2A's primary secured lender, Bridging Finance Inc. ("**BFI**") as agent for Bridging Income Fund LP and other related funds (the "**Bridging Lender**"), which was issued by PricewaterhouseCoopers Inc., LIT as Court-appointed receiver (in such capacity, the "**Bridging Receiver**") of BFI and certain related entities (collectively, "**Bridging**").[3]

10. At the time A2A filed the NOI, Mr. Sean McCoshen ("**Mr. McCoshen**") was its sole director and shareholder.[4] From the inception of the NOI Proceedings, Mr. McCoshen has been

---

[1] Form 40 – Report of Trustee on Proposal (the "**Form 40 Report**"), Exhibit E, paras 2-3.
[2] Form 40 Report, Exhibit E, para 3.
[3] Form 40 Report, paras 2.1 and 2.2.
[4] Form 40 Report, paras 11 and 13.

under medical care, not involved in the day-to-day operations of A2A, and not available to the Trustee. No person other than Mr. McCoshen has any authority to act on behalf of A2A.[5]

11. Upon filing the NOI, A2A was subject to a statutory 30-day stay of proceedings under the *BIA* (the "**Stay**") to July 18, 2021.[6] The Bridging Receiver subsequently advised the Trustee it would not support an extension of the Stay unless an interim receiver was appointed in respect of A2A. A2A could not continue the NOI Proceedings, or make a proposal without the Bridging Lender's support, given the size and nature of its claim.[7] Due to, among other things, Mr. McCoshen's absence, the fact there was no other person with authority to direct A2A, and the Bridging Receiver's position, the Trustee issued a material adverse change report for A2A on July 7, 2021.[8]

12. On July 12, 2021, on the application of the Bridging Receiver, MNP was appointed as interim receiver of A2A, and immediately thereafter, applied successfully to this Honourable Court for an extension of the Stay. The Stay was subsequently extended twice more, to and including November 29, 2021.[9]

13. On October 13, 2021, the Interim Receiver obtained an Amended and Restated Receivership Order, expanding the Interim Receiver's powers to include the power to negotiate and file a proposal on behalf of A2A.[10] On October 27, 2021, the Trustee filed the Proposal with the Office of the Superintendent of Bankruptcy Canada (the "**OSB**") on behalf of A2A.[11]

C. Summary of Proposal

14. The key terms of the Proposal are as follows:

(a) Crown Claims and Claims of Preferred Creditors will be paid in full, subject to the levy payable to the OSB, and payment of dividends to proven Ordinary Unsecured Creditors (subject to the OSB levy) will be made based on the lesser of the amount of the Proven Claim of each Ordinary Unsecured Creditor and $1,000;

---

[5] Form 40 Report, Exhibit E, at para 7.2.
[6] Form 40 Report, Exhibit E, at para 6.
[7] Form 40 Report, Exhibit E, at para 7.1.
[8] Form 40 Report, at paras 2.3, 2.5, and Exhibit E, at para 7.
[9] Form 40 Report, at para 2.3.
[10] Form 40 Report, Exhibit E, at para 11.
[11] Form 30 Report, at para 12.

(b) The Bridging Lender will be unaffected by the Proposal with respect to their Unaffected Claim and has agreed to sponsor the Proposal by paying the amounts required to pay Crown Claims, Preferred Creditors, Ordinary Unsecured Creditors, Post-Filing Claims and Administrative Fees and Expenses;

(c) Upon Court Ratification of the Proposal, all Existing Shares of A2A will be cancelled, the New Common Shares will be issued to the Bridging Lender in consideration of it sponsoring the Proposal, and the Bridging Lender, being the only shareholder of A2A, will appoint at least one new director;

(d) Any claims that may be advanced under sections 95-101 of the *BIA* and any provincial statutes related to preferences, fraudulent conveyances, transfers at undervalue, and the like (the "**Section 95–101 Claims**") will be assigned to the Bridging Lender upon Court Ratification. Sections 95 to 101 of the *BIA* will not apply to the Proposal or any payments made thereunder.

D. Meeting of Creditors to Consider the Proposal

15. The Creditors' Meeting to consider and vote on the Proposal was held on November 9, 2021, during which 16 votes were cast by the Affected Creditors present at the meeting or by way of voting letter, with 12 votes in favour of the Proposal, representing 75% in number and 93% in value of the Affected Creditors present at the meeting in person or by voting letter.[12]

E. Financial Position of the Debtor

i. Assets

16. A2A's primary assets are intangible and intellectual property, and confidential, technical and proprietary information related to the Railway Project (collectively, the "**A2A IP**").[13] No sale process was undertaken for the A2A IP in the Interim Receivership or in the NOI Proceedings,[14] and while the Interim Receiver received some preliminary expressions of interest in the A2A IP, its value is highly uncertain.[15] Even if a transaction to purchase the A2A

[12] Form 40 Report, paras 6-8 and Exhibit F.
[13] First Report of the Interim Receiver, dated August 17, 2021, at para 11.
[14] Form 40 Report, Exhibit E, at paras 9-10.
[15] Form 40 Report, at para 14.2.

IP was completed, it is virtually certain the proceeds would be insufficient to fully repay A2A's secured indebtedness to the Bridging Lender.[16]

17. Apart from the A2A IP, A2A has limited assets. The Interim Receiver is holding approximately $140,900 in trust, $113,000 of which was funded by Mr. McCoshen and will have to be remitted back to his personal bankruptcy trustee. The remainder of those funds will be used to fund A2A's operations until Court Ratification. As at the date the NOI was filed, A2A listed a related party receivable and certain pre-paid commissions payable to the former principals of Bridging; the Trustee anticipates there will be no recovery on either amount.[17]

ii. Liabilities

18. A2A is indebted to the Bridging Lender under a non-revolving credit facility advanced pursuant to a loan agreement between certain Bridging entities and funds dated December 15, 2015, as amended from time to time (the "**Bridging Loan**"). The Bridging Receiver has filed a proof of claim on behalf of the Bridging Lender, reflecting a $162.9 million secured claim, and a $50 million unsecured claim, against A2A.[18]

19. In addition to the Bridging Lender, A2A listed creditors with claims totaling approximately $21.1 million, of which $12.9 million is due to related parties. As at December 1, 2021, the Trustee had admitted Ordinary Unsecured Claims totaling approximately $4.4 million, in addition to the $50 million unsecured claim filed on behalf of the Bridging Lender. The Trustee understands the Canada Revenue Agency has a claim for source deductions against A2A of approximately $31,500, of which approximately $23,300 is a deemed trust amount. The Trustee is not aware of any Claims by Preferred Creditors against A2A.[19]

F. Causes of Insolvency and Conduct of the Debtor

20. As noted, the NOI Proceedings were initiated following the Bridging Receiver's demand of A2A's indebtedness under the Bridging Loan. The Bridging Receiver continues to investigate the source and use of funds advanced under the Bridging Loan, and has noted specific concerns, including that some advances under the Bridging Loan were paid to companies related

[16] Form 40 Report, para 14.2.
[17] Form 40 Report, paras 14.1, 14.3, and 14.4.
[18] Form 40 Report, para 15.1.
[19] Form 40 Report, para 15.2.

to A2A. The Bridging Receiver has also expressed concern regarding Mr. McCoshen's activities in relation to the Company prior to the NOI filing. Since the NOI filing, Mr. McCoshen has been under medical care and not available to the Trustee or involved in A2A's day-to-day operations.[20]

21. The Trustee will not be completing an independent review of A2A's records to identify reviewable transactions since any potential recoveries would be for the benefit of the Bridging Lender as A2A's senior secured lender.[21]

22. Finally, to the Trustee's knowledge, certain facts under Section 173(1) of the BIA (the "**173 Facts**") may be engaged. First, as the value of the A2A IP is highly uncertain, it is unknown whether A2A's assets are of a value equal to fifty cents on the dollar of the amount of its unsecured liabilities. It is also unclear to what extent A2A, under Mr. McCoshen's direction, may justly be held responsible for these circumstances. Second, A2A may have failed to account satisfactorily for any loss or deficiency of assets to meet its liabilities.[22]

23. Taking into consideration the foregoing, the Trustee's opinion is that the Proposal is advantageous for A2A's creditors. Due to the quantum of the Bridging Lender's claim, outside of Bridging's sponsorship of the Proposal, there is no opportunity for any distribution to A2A's Ordinary Unsecured Creditors. Further, if A2A is deemed bankrupt, key components of the A2A IP may be compromised, and there will be no funds in A2A's estate to support any future sale of, or investment in, its assets or business, nor to pursue any potential Section 95-101 Claims. Finally, the Proposal will allow A2A to continue as a corporate entity and thereby preserve optionality for dealing with its assets and business in the future, which may see Bridging receive some recovery on its secured claim against A2A.[23]

III. ISSUES

24. The issue on this Application is whether this Honourable Court should grant an Order approving the Proposal, and approving the reorganization of A2A's share capital, as described in the Proposal, upon Court Ratification of the Proposal.

---

[20] Form 40 Report, at para 16.
[21] Form 40 Report, at para 19.
[22] Form 40 Report, at para 17.
[23] Form 40 Report, at para 21.

IV. LAW & ARGUMENT

i. Requirements for Acceptance of the Proposal and Post-Acceptance Steps

25. A proposal under the BIA is deemed to be accepted if all classes of unsecured creditors vote for the acceptance of the proposal by a majority in number and two thirds in value of the unsecured creditors of each class present at the meeting and voting on the resolution for approval, referred to as the "double majority."[24] The Proposal was accepted by 75% in number and 93% in value of the Affected Creditors who were either present at the Creditors' Meeting in person or voted by way of voting letter.[25]

26. The Trustee has complied with the requirements under section 58 of the *BIA*, which were triggered on acceptance of the Proposal by A2A's Affected Creditors. The Trustee:

(a) applied to this Honourable Court for an appointment for a hearing of the Trustee's application for approval of the Proposal in advance of the Creditors' Meeting;

(b) sent a notice of the hearing of this Application, in the prescribed manner, at least 15 days before the date of the hearing, to the Debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the Proposal and to the official receiver;

(c) forwarded a copy of the report referred to in paragraph (d) to the official receiver at least 10 days before the date of the hearing; and

(d) filed with the court, in the prescribed form, a report on the proposal at least 2 days before the date of the hearing.[26]

ii. Test for Approval of a Proposal

27. Before approving a proposal, the court must be satisfied that:

(a) the terms of the proposal are reasonable;

---

[24] *BIA*, s 54(2)(d) [**TAB 1**]
[25] Form 40 Report, at para 7 and Exhibit F, page 6 and attached Voting Summary.
[26] *BIA*, *supra*, s 58 [**TAB 1**];

(b) the terms of the proposal are calculated to benefit the general body of creditors; and

(c) the proposal is made in good faith.[27]

28. The first two factors are set out in section 59(2) of the *BIA*, while the last factor has been implied by the Court as an exercise of its equitable jurisdiction.[28]

29. With respect to the third branch of the above test, courts have generally taken into account the interests of the debtor, the interests of creditors, and the interests of the public at large in the integrity of the bankruptcy system. As the Honourable Madam Justice B.E. Romaine of this Court held in *Re Magnus One Energy Corp*.,

> [t]he Court must consider, not only the wishes and interests of creditors, but also the conduct and interests of the debtor, the interests of the public and future creditors and the requirements of commercial morality. [The Court is] not bound to approve [a proposal] even though [it has] been recommended by the Trustee and given the overwhelming support of creditors, but substantial defence [*sic*] should be afforded to these views [citations omitted].[29]

30. In addition to these matters, certain other provisions of the *BIA* must be considered:

(a) under section 59(3) of the *BIA*, if any facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct; and

(b) certain statutory terms must be included in the proposal, as outlined in section 60 of the *BIA*.

31. The Trustee will address each of these factors in turn.

---

[27] *BIA*, *supra*, s 59(2) [**TAB 1**]; *Magnus One Energy Corp, Re*, 2009 ABQB 200 [***Magnus One***], at para 10 [**TAB 2**]; *Re Kitchener Frame Ltd*, 2012 ONSC 234 [***Kitchener Frame***], at para 19 [**TAB 3**].
[28] *Kitchener Frame*, *supra*, at para 20 [**TAB 3**].
[29] *Magnus One*, *supra*, at para 11 [**TAB 2**].

The Proposal is reasonable

32. "Reasonable" in the context of section 59(2) of the *BIA* has been held to mean that there is a reasonable possibility the proposal will be successfully completed in accordance with its terms, and that the proposal meets the requirements of commercial morality and maintains the integrity of the bankruptcy system.[30]

33. Given that the Bridging Lender has agreed to sponsor the Proposal, and will pay all amounts needed to fund the payment of Crown Claims and any Preferred Claims, as well as the Dividend Fund and all Administrative Fees and Expenses, upon Court Ratification, there is a very strong probability the Proposal will be successfully completed.

34. The Proposal also meets the requirements of commercial morality and will maintain the integrity of the bankruptcy system. This factor relates to whether the payments to be made under the Proposal are adequate enough to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system.[31]

35. A2A's primary assets are of highly uncertain value, and some of those assets, such as the Presidential Permit, are likely to be compromised if A2A were to become bankrupt. Given the quantum of the Bridging Lender's secured claim, the Trustee anticipates unsecured creditors would recover nothing on A2A's bankruptcy. Similarly, regarding the potential Section 95-101 Claims, in the event of a bankruptcy, there would be no funding in A2A's estate to support any investigation or pursuit of such claims, which, even if found to have merit, would likely only benefit the Bridging Lender, given the size of its claim.

36. In light of these facts, the payments to be made under the Proposal are adequate to meet the requirements of commercial morality, and maintain the integrity of the bankruptcy system, as they offer some recovery to A2A's Ordinary Unsecured Creditors, and the hope of some recovery to the Bridging Lender as A2A's senior secured lender.

37. Finally, substantial deference ought to be given to the majority vote of A2A's creditors in favour of the Proposal, as well as the Proposal Trustee's recommendation that the

---

[30] *Abou-Rached, Re*, 2002 BCSC 1022 [***Abou-Rached***], at para 68 [**TAB 4**].
[31] *Farrell, Re*, 2003 CarswellOnt 1015 [***Farrell***], at para 18 [**TAB 5**].

Proposal ought to be approved.[32] Courts have held that this factor is more persuasive where a large majority of creditors representing a significant dollar value of claims accepts a proposal.[33]

The Proposal is calculated to benefit the general body of creditors

38. In *Abou-Rached, Re*, Ross J. of the British Columbia Supreme Court held that

> Courts have refused to approve proposals on [the basis that they are not calculated to benefit the general body of creditors] where, for example, the proposal serves the interests of persons other than the creditors; where there has not been full disclosure of the assets of the debtor and the encumbrances against those assets; where the proposal, by it terms, is bound to fail; or where the Trustee is able to delegate his duties to a group of the creditors […].[34]

39. The Proposal does not serve the interests of persons other than A2A's creditors. The Proposal delivers value to the Ordinary Unsecured Creditors, pays Crown Claims in full, and provides for payment in full of Post-Filing Claims, Administrative Fees and Expenses, and any Preferred Claims. Furthermore, the Proposal will result in the cancellation of Mr. McCoshen's shares in A2A, and put the entity under the control of the Bridging Receiver, which serves the interests of A2A's largest secured and unsecured creditor.

40. The Trustee made full and frank disclosure of what it understands to be A2A's assets and the significant encumbrances against those assets in the Trustee's Report on Proposal dated October 27, 2021 and delivered to A2A's creditors in accordance with the *BIA*. Finally, the Proposal is not, by its terms, bound to fail. As noted above, there is a very high probability the Proposal will be completed successfully, in accordance with its terms.

41. Courts have also found proposals were not calculated to benefit the general body of creditors where bankruptcy would yield significantly more return to creditors than the proposal.[35] The Trustee has opined that A2A's Ordinary Unsecured Creditors would stand to receive nothing in a bankruptcy, and that, outside the Bridging Lender's sponsorship, there is no opportunity for any distribution to those creditors.[36]

---

[32] *Magnus One, supra*, at para 11 [**TAB 2**]
[33] *Rennie, Re*, 2010 CarswellOnt 1047 [***Rennie***], at para 7 [**TAB 6**], citing *Abou-Rached, supra* [**TAB 4**].
[34] *Abou-Rached, supra*, at para 78 [**TAB 4**].
[35] *Rennie, supra*, at para 44 [**TAB 6**].
[36] Form 40 Report, paras 21.1 and 21.2.

The Proposal is made in good faith

42. The principal purpose of the NOI Proceedings was to preserve the value of A2A's assets, and to provide optionality for the future monetization of A2A's assets, for the benefit of its creditors.[37] The Proposal, once implemented, will preserve A2A's assets and create optionality for dealing with those assets in a way that may provide the Bridging Lender with recovery,[38] and potentially, might provide A2A's former consultants with an opportunity to continue to work with A2A in the future, should the Railway Project be advanced at a later date. The Proposal is therefore made in good faith.

If section 173 facts are proved, this Court should exercise its discretion to approve the Proposal

43. Under subsection 59(3) of the *BIA*, the Court must refuse a proposal if facts under section 173 of the *BIA* are proven against the debtor, unless the proposal provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate;[39] however, courts have discretion to reduce the percentage of security required, provided there is some evidence to justify the exercise of that discretion.[40]

44. The subsection 59(3) requirement for "performance security" is designed to further the interests of creditors and the public, and applies only where the debtor's situation or past conduct is blameworthy, thus protecting both the interests of creditors and the public's interest in commercial morality, by fostering moral conduct on the part of debtors.[41]

45. As reported by the Trustee, certain facts under section 173 *may* be engaged, namely those under section 173(1)(a) and 173(1)(d):

> (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's

---

[37] Preliminary Report of the Proposed Interim Receiver dated July 7, 2021 [**Preliminary IR Report**], at paras 18.2 and 18.3; First Report of the Interim Receiver dated August 17, 2021 [**First IR Report**], at para 21.1; Second Report of the Interim Receiver dated October 7, 2021 [**Second IR Report**], at para 24.2.
[38] Form 40 Report, para 21.3.
[39] *BIA*, *supra*, s 59(3) [**TAB** 1].
[40] *Wandler, Re*, 2007 ABQB 153 [***Wandler***], at para 36 [**TAB 7**]
[41] *Ibid*, at paras 26 and 29-32.

unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

(d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

46. It is not clear these facts can be proven against A2A. Regarding section 173(1)(a), as the value of the A2A IP is highly uncertain, it is unknown if A2A's assets are of a value equal to fifty cents on the dollar of its unsecured liabilities. It is also unclear if A2A can justly be held responsible for these circumstances. With respect to section 173(1)(d), the Trustee does not have enough information at this time to conclude A2A has failed to account satisfactorily for any loss or deficiency of assets to meet its liabilities. The Bridging Receiver is conducting a forensic investigation of Bridging's affairs, including a detailed review of A2A's records, which may provide further information in relation to this fact.

47. Even if these facts are proved against A2A, a reduction in the percentage of security required under the *BIA* is justified in light of the evidence. The Proposal made on behalf of A2A is unique, being made by A2A's interim receiver with the purpose of preserving A2A as a corporate entity in order to conserve value for the benefit of the Bridging Lender, which is almost certainly the sole economic stakeholder of A2A. The reasonableness of the Proposal is further supported by the fact that, if A2A were bankrupt, there would be no funds available to the Trustee to market of A2A's assets, or investigate and prosecute any Section 95-101 Claims.

48. In light of these facts, the Proposal serves the interests of A2A's ordinary unsecured creditors, who would likely receive nothing on bankruptcy; the interests of the Bridging Lender, by preserving the potential for future recovery of its secured claim from A2A; and the interest of the public in commercial morality, given the preservation of the Section 95-101 Claims and the maintenance of the Bridging Lender's secured claim against A2A. Further, the Proposal preserves the opportunity for consultants to continue to work with A2A in the future, should the Railway Project be advanced at a later date.

49. In *Abou-Rached*, Justice Ross of the British Columbia Supreme Court considered approval of two proposals where a fact under section 173 was proved.[42] Ross J. observed that the proposals did not provide reasonable performance security as required under subsection 59(3)

[42] *Abou-Rached, supra*, at paras 101-102 [**TAB 4**].

of the *BIA*, but exercised his discretion to approve the proposals because they were "viable and secured," and "given the paucity of assets of the debtors otherwise available to the creditors."[43]

50. Similar facts justify the exercise of this Court's discretion under subsection 59(3). A2A's assets consist principally of the A2A IP, the value of which is highly uncertain, and key components of which are likely to be compromised if A2A becomes bankrupt. If the A2A IP were sold, it is virtually certain the proceeds would be insufficient to fully repay the Bridging Loan. Thus, A2A has a paucity of assets otherwise available to its creditors, whereas the Proposal provides reasonable security for a payment to Ordinary Unsecured Creditors that is greater than what they would be anticipated to receive in a bankruptcy.

The Proposal includes all terms required by the BIA

51. The Proposal provides:

(a) for the payment of preferred claims in priority to claims of ordinary creditors and of all proper fees and expenses of the Trustee associated with the NOI Proceedings and the Proposal, as required under subsection 60(1) of the *BIA*;[44]

(b) for payment in full of Crown Claims[45] after Court Ratification, as required by subsection 60(1.1) of the *BIA*;[46] and

(c) that all amounts payable under the Proposal shall be paid to the Trustee, as required by subsection 60(2) of the *BIA*.[47]

52. As A2A had no employees when the NOI was filed, paragraph 60(1.3)(a) of the *BIA* does not apply.[48] Finally, while the Proposal indicates that New Common Shares will be issued to the Bridging Lender upon Court Ratification, it does not contemplate the creation or delivery

---

[43] *Ibid*, at paras 134-135.
[44] *BIA*, *supra*, s 60(1) **[TAB 1**].
[45] Defined in the Proposal as "claims under subsection 224(1.2) of the *Income Tax Act* or any similar claims under provincial legislation or any provision of the Canada Pension Plan or the *Employment Insurance Act* that refers to subsection 244(1.2) of the *Income Tax Act* or similar provincial legislation.
[46] *BIA*, *supra*, s 60(1.1) [**TAB 1**].
[47] *Ibid*, s 60(2).
[48] *Ibid*, s 60(1.3)(a).

of share certificates, only the delivery and filing of the Articles of Reorganization. As there are no share certificates to be delivered to the Trustee, subsection 60(3) of the *BIA* is not engaged.[49]

iii. Jurisdiction to Order the Amendment of Articles of Incorporation

53. Upon Court Ratification of the Proposal, the Articles of Reorganization will become effective "to provide for the effective redemption or cancellation of A2A's Existing Shares."[50] The Proposal stipulates that on the Implementation Date, all issued and outstanding Equity Interests in and Equity Claims against A2A will be extinguished, without the consent of A2A's creditors or other Person holding an Equity Claim.[51]

54. The reorganization of a proposal debtor's share structure is permitted in connection with the approval of a proposal under section 59 of the *BIA*. Subsection 59(4) gives the court jurisdiction to "order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law."[52]

55. The provincial law relevant to the Proposal is section 192(2) of the *ABCA*, which provides that a corporation is subject to a court order approving a proposal under the *BIA*, its articles may be amended by the order to effect any change that might lawfully be made by an amendment under section 173 of the *ABCA*.[53] In turn, section 173 of the *ABCA* provides that the articles of a corporation may be amended to, among other things:

(a) create new classes of shares;[54]

(b) 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;[55] and

(c) cancel a class or series of shares where there are no issued or outstanding shares of that class or series.[56]

---

[49] *Ibid*, s 60(3).
[50] Form 40 Report, Exhibit B, section 2.1(c).
[51] Form 40 Report, Exhibit B, section 4.8.
[52] *BIA*, *supra*, s 59(4) [**TAB 1**].
[53] *ABCA*, *supra*, s 192(2) [**TAB 8**].
[54] *Ibid*, s 173(1)(d).
[55] *Ibid*, s 173(1)(e).

56. The conditions for a reorganization under section 192 of the *ABCA* are that the corporation be "subject to an order for reorganization," and that the proposed amendments be authorized under section 173 of the *ABCA*.[57] If this Honourable Court grants the relief sought, A2A will be "subject to an order for reorganization," specifically an order approving a proposal under the *BIA*. As outlined below, the proposed amendments are authorized under section 173 of the *ABCA*.

57. A2A's articles of incorporation authorize it to issue an unlimited number of shares designated in four different classes: Class "A" Common, Class "B" Common Shares, Class "C" Common, and Class "D" Preferred. A2A's minute book shows it has only issued 10 Class "A" Common Shares, which are held by Mr. McCoshen. The Articles of Reorganization attached to the Proposal will amend A2A's articles to:

(a) cancel all Class "A" Common, Class "B" Common, Class "C" Common, and Class "D" Preferred Shares, and remove all rights, privileges, restrictions and conditions attaching thereto; and

(b) create a new class of shares, being the New Common Shares, and confer on those shares the rights, privileges, restrictions and conditions outlined in the Articles of Reorganization.

58. The cancellation of the Class "B" Common, Class "C" Common, and Class "D" Preferred Shares is authorized under paragraph 173(1)(h) of the *ABCA*, as there are no issued shares in any of these classes. The removal of all rights, privileges, restrictions and conditions attaching to, and the cancellation of, the Class "A" Common Shares is authorized by paragraphs 173(1)(e) and 173(1)(n) of the *ABCA*, the latter provision being supported by paragraph 176(1)(c) of the *ABCA*, as follows.

59. In *Beatrice Foods Inc., Re*, Houlden J.A. considered an application to approve a plan of arrangement under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "***CCAA***") and for an order under section 191 of the *Canada Business Corporations Act*, RSC 1985, c C-44 (the "***CBCA***") to effect a concurrent reorganization of share capital. Section 191 of

---

[56] *Ibid*, s 173(1)(h).
[57] *Canadian Airlines Corp., Re*, 2000 ABQB 442 [***Canadian Airlines***], at para 69 [**TAB 9**].

the *CBCA* is identical in substance to section 192 of the *ABCA*. The reorganization proposed in *Beatrice Foods* involved, in part, the cancellation of all issued and outstanding common shares of the debtor company and the issuance to the holders of such shares rights to purchase new shares in the restructured company.[58]

60. The Court in *Beatrice Foods* confirmed that subsection 191(2) authorizes the court to amend a corporation's articles to effect any change that might lawfully be made by an amendment under section 173 of the *CBCA*, and observed that subsection 173(1)(o) provides, subject to sections 176 and 177, that the articles may be amended to add, change or remove any other provision that is permitted by this Act to be set out therein.[59]

61. Houlden J.A. went on to find that section 173 was supported by section 176(1)(b) of the *CBCA*, which provides, *inter alia*, that holders of shares of a class are entitled to vote to amend the articles to cancel of all or part of the shares of such class.[60] Subsections 173(1)(n) and 176(1)(c) of the *ABCA* are identical to subsections 173(1)(o) of the *CBCA*.

62. Further, the proposed reorganization, including the cancellation of the issued Class "A" Common Shares, accords with the legislature's intent to permit a reorganization of share capital in an insolvency context, including the cancellation of issued shares, as expressed by this Honourable Court in *Re Canadian Airlines Corp*, and by the Ontario Superior Court of Justice in *Re Beatrice Foods Ltd.*[61]

63. In *Canadian Airlines*, certain minority shareholders of Canadian Airlines Corp. ("**CAC**") opposed the reorganization of Canadian Airlines International Ltd.'s ("**CAIL**") share capital, which was held by CAC. CAIL relied on subsection 185(2) (now subsection 192(2)) of the *ABCA* as authority for the reorganization, which formed part of CAIL's plan of arrangement under the *CCAA* on which the minority shareholders of CAC were not given an opportunity to vote.

64. The reorganization involved, among other things, CAIL's shares being consolidated into a single common share and its common shares being designated as retractable. CAIL's plan

---

[58] *Beatrice Foods*, *supra*, at para 5 [**TAB 10**].
[59] *Ibid*, at para 16.
[60] *Ibid*, at para 17.
[61] *Beatrice Foods Inc., Re*, 1996 CarswellOnt 5598 [***Beatrice Foods***] [**TAB 10**].

of arrangement contemplated that CAIL would, among other things, retract this single common share for $1.00.[62] The minority shareholders argued that this would effectively cancel their CAC shares in violation of section 167 (now section 173) of the *ABCA*, which does not expressly permit cancellation of issued shares.[63]

65. Paperny J. (as she then was) held that the consolidation, alteration, and retraction of the CAIL shares contemplated under CAIL's plan of arrangement did not violate section 167 of the *ABCA*, and further, that

> [t]he 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 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. […]. [64]

66. The Court in *Canadian Airlines* also referenced the Dickerson Report,[65] which describes the section identical to section 192 "…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'."[66]

67. The Court in *Canadian Airlines* observed that section 185 of the *ABCA* did not require a meeting or vote of shareholders and removed dissent and appraisal rights, and held that

> [t]o 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 […] To require a vote suggests the shares have value. They do not.[67]

---

[62] *Canadian Airlines*, *supra*, at paras 67-68 [**TAB 9**].
[63] *Ibid*, at para 73.
[64] *Ibid*, at paras 75-76.
[65] R. Dickerson et al, Proposals for a New Business Corporation Law for Canada, Vol.1: Commentary.
[66] *Ibid*, at para 74.
[67] *Ibid*, paras 78-79.

68. The Trustee notes that *Beatrice Foods* and *Canadian Airlines* were distinguished by the Quebec Superior Court in *Shermag Inc., Re*.[68] *Shermag* involved a *CCAA* plan of arrangement, which provided for the cancellation of all its common and preferred shares, and the issuance of new equity in favour of only one existing shareholder.[69] Mongeon J. distinguished *Beatrice Foods* and *Canadian Airlines* (and other similar cases) because the capital restructuring in those cases did not involve the unequal treatment of the existing shareholders, finding that "…none of these cases present a factual situation where *existing* shareholders are treated unequally vis-à-vis other *existing* shareholders of the same class."[70]

69. The Court in *Shermag* also distingused the case before it from *Canadian Airlines* because it was asked to approve the proposed reorganization without the benefit of having the debtor's proposed plan of arrangement before it – the plan had not been drafted when the motion to approve the reorganization came before it.[71] Mongeon J. further distinguished various cases decided under the *CBCA* and *ABCA* from the case before it because the debtor in *Shermag* was incorporated under the Quebec *Companies Act*, RSQ, c C-38, as amended,[72] which, unlike the *ABCA* and *CBCA*, does not expressly permit a reorganization of share capital without the shareholders' approval in the insolvency context.[73]

70. *Shermag* is distinguishable from the present case, as the proposed reorganization of A2A's share capital does not involve existing shareholders of the same class being treated unequally, and further, is authorized under subsections 192(2), and paragraphs 173(1)(e), (h), and (n), and 176(1)(c) of the *ABCA*.

71. As confirmed by the Court in *Beatrice Foods*, the cancellation of A2A's issued Class "A" Common Shares is a change that may lawfully be made by an amendment under section 173 of the *ABCA*, specifically subsection 173(1)(n), and by reference, section 176(1)(c).

---

[68] *Shermag Inc., Re*, 2009 QCCS 537 [**TAB 11**].
[69] *Ibid*, at paras 1 and 3.
[70] *Ibid*, at paras 60-62, 64, and 67-68.
[71] *Ibid*, at paras 35, 37, and 39-40.
[72] *Ibid*, at para 20.
[73] *Ibid*, at paras 72-74, and 84-85.

72. If this Honourable Court approves the Proposal, the conditions for a reorganization under section 192 of the *ABCA* are therefore met: A2A will be "subject to an order for reorganization," and the proposed amendments are authorized under section 173 of the *ABCA*.[74]

73. Some Canadian courts have held that 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.[75]

74. As outlined above, the proposed reorganization complies with subsection 192(2), and A2A, under the oversight of the Interim Receiver, has been acting in good faith throughout the NOI Proceedings and is so acting in making the Proposal.

75. The reorganization of A2A's share capital is also fair and reasonable. The issuance of the New Common Shares is made in consideration of the Bridging Lender sponsoring the Proposal, and the Bridging Lender is accepting the cost and risk of holding and monetizing A2A's assets, and of investigating and pursuing the Section 95-101 Claims. Further, as A2A is insolvent, its sole shareholder has no economic interest to protect. There is nothing unfair or unreasonable in this Court approving the reorganization in the present circumstances.

---

[74] *Canadian Airlines*, *supra*, at para 69 [**TAB 9**].
[75] *AbitibiBowater Inc., Re*, 2010 QCCS 4450, at para 92 [**TAB 12**].

V. CONCLUSION

76. For the reasons set out above, the Trustee respectfully requests that this Honourable Court approve the Proposal and the concurrent reorganization of A2A's share structure, and grant the Order set out at Schedule "A" to the Notice of Application filed on December 3, 2021.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of December, 2021.

LAWSON LUNDELL LLP

Per: Alexis Teasdale
Counsel for MNP Ltd., in its capacity as Trustee under the Proposal of Alaska-Alberta Railway Development Corporation

VI. AUTHORITIES

TAB

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended.
2. *Magnus One Energy Corp, Re*, 2009 ABQB 200.
3. *Re Kitchener Frame Ltd*, 2012 ONSC 234.
4. *Abou-Rached, Re*, 2002 BCSC 1022.
5. *Farrell, Re*, 2003 CarswellOnt 1015.
6. *Rennie, Re*, 2010 CarswellOnt 1047.
7. *Wandler, Re*, 2007 ABQB 153.
8. *Business Corporations Act*, RSA 2000, c B-9.
9. *Canadian Airlines Corp, Re*, 2000 ABQB 442.
10. *Beatrice Foods Inc, Re*, 1996 CarswellOnt 5598.
11. *Shermag Inc, Re*, 2009 QCCS 537.
12. *AbitibiBowater Inc, Re*, 2010 QCCS 4450.

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to October 20, 2021

Last amended on November 1, 2019

À jour au 20 octobre 2021

Dernière modification le 1 novembre 2019

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

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 October 20, 2021. The last amendments came into force on November 1, 2019. Any amendments that were not in force as of October 20, 2021 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 20 octobre 2021. Les dernières modifications sont entrées en vigueur le 1 novembre 2019. Toutes modifications qui n'étaient pas en vigueur au 20 octobre 2021 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall either

(i) forthwith call a meeting of creditors present at that time, which meeting shall be deemed to be a meeting called under section 102, or

(ii) if no quorum exists for the purpose of subparagraph (i), send notice, within five days after the day the certificate mentioned in paragraph (b.1) is issued, of the meeting of creditors under section 102,

and at either meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.

R.S., 1985, c. B-3, s. 57; 1992, c. 27, s. 23; 1997, c. 12, s. 33; 2005, c. 47, s. 38; 2017, c. 26, s. 7.

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic est tenu :

(i) de convoquer aussitôt une assemblée des créanciers présents à ce moment-là, assemblée qui est réputée convoquée aux termes de l'article 102,

(ii) faute de quorum pour l'application du sous-alinéa (i), de convoquer, dans les cinq jours suivant la délivrance du certificat visé à l'alinéa b.1), une assemblée des créanciers aux termes de l'article 102.

À cette assemblée, les créanciers peuvent, par résolution ordinaire, nonobstant l'article 14, confirmer la nomination du syndic ou lui substituer un autre syndic autorisé.

L.R. (1985), ch. B-3, art. 57; 1992, ch. 27, art. 23; 1997, ch. 12, art. 33; 2005, ch. 47, art. 38; 2017, ch. 26, art. 7.

Appointment of new trustee

57.1 Where a declaration has been made under subsection 50(12) or 50.4(11), the court may, if it is satisfied that it would be in the best interests of the creditors to do so, appoint a trustee in lieu of the trustee appointed under the notice of intention or proposal that was filed.

1997, c. 12, s. 34.

Nomination par le tribunal

57.1 Dans les cas prévus aux paragraphes 50(12) ou 50.4(11), le tribunal peut substituer au syndic nommé dans l'avis d'intention ou la proposition un autre syndic s'il est convaincu que cette mesure est dans l'intérêt des créanciers.

1997, ch. 12, art. 34.

Application for court approval

58 On acceptance of a proposal by the creditors, the trustee shall

(a) within five days after the acceptance, apply to the court for an appointment for a hearing of the application for the court's approval of the proposal;

(b) send a notice of the hearing of the application, in the prescribed manner and at least fifteen days before the date of the hearing, to the debtor, to every creditor who has proved a claim, whether secured or unsecured, to the person making the proposal and to the official receiver;

(c) forward a copy of the report referred to in paragraph (d) to the official receiver at least ten days before the date of the hearing; and

Demande d'approbation

58 En cas d'acceptation de la proposition par les créanciers, le syndic :

a) dans les cinq jours suivants, demande au tribunal de fixer la date d'audition de la demande d'approbation de la proposition par celui-ci;

b) adresse, selon les modalités prescrites, un préavis d'audition d'au moins quinze jours au débiteur, à l'auteur de la proposition, à chaque créancier qui a prouvé une réclamation, garantie ou non, et au séquestre officiel;

c) adresse au séquestre officiel, au moins dix jours avant la date de l'audition, une copie du rapport visé à l'alinéa d);

d) au moins deux jours avant la date de l'audition, dépose devant le tribunal, en la forme prescrite, un rapport sur la proposition.

L.R. (1985), ch. B-3, art. 58; 1992, ch. 1, art. 20, ch. 27, art. 23; 1997, ch. 12, art. 35.

(d) at least two days before the date of the hearing, file with the court, in the prescribed form, a report on the proposal.

R.S., 1985, c. B-3, s. 58; 1992, c. 1, s. 20, c. 27, s. 23; 1997, c. 12, s. 35.

Court to hear report of trustee, etc.

59 (1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.

Court may refuse to approve the proposal

(2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

Reasonable security

(3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

Court may order amendment

(4) If a court approves a proposal, it may order that the debtor's constating instrument be amended in accordance with the proposal to reflect any change that may lawfully be made under federal or provincial law.

R.S., 1985, c. B-3, s. 59; 1997, c. 12, s. 36; 2000, c. 12, s. 10; 2007, c. 36, s. 21.

Priority of claims

60 (1) No proposal shall be approved by the court that does not provide for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of a debtor and for the payment of all proper fees and expenses of the trustee on and incidental to the proceedings arising out of the proposal or in the bankruptcy.

Audition préalable

59 (1) Avant d'approuver la proposition, le tribunal entend le rapport du syndic dans la forme prescrite quant aux conditions de la proposition et à la conduite du débiteur; en outre, il entend le syndic, le débiteur, l'auteur de la proposition, tout créancier adverse, opposé ou dissident, ainsi que tout témoignage supplémentaire qu'il peut exiger.

Le tribunal peut refuser d'approuver la proposition

(2) Lorsqu'il est d'avis que les conditions de la proposition ne sont pas raisonnables ou qu'elles ne sont pas destinées à avantager l'ensemble des créanciers, le tribunal refuse d'approuver la proposition; et il peut refuser d'approuver la proposition lorsqu'il est établi que le débiteur a commis l'une des infractions mentionnées aux articles 198 à 200.

Garantie raisonnable

(3) Lorsque l'un des faits mentionnés à l'article 173 est établi contre le débiteur, le tribunal refuse d'approuver la proposition, à moins qu'elle ne comporte des garanties raisonnables pour le paiement d'au moins cinquante cents par dollar sur toutes les réclamations non garanties prouvables contre l'actif du débiteur ou pour le paiement de tel pourcentage en l'espèce que le tribunal peut déterminer.

Modification des statuts constitutifs

(4) Le tribunal qui approuve une proposition peut ordonner la modification des statuts constitutifs du débiteur conformément à ce qui est prévu dans la proposition, pourvu que la modification soit légale au regard du droit fédéral ou provincial.

L.R. (1985), ch. B-3, art. 59; 1997, ch. 12, art. 36; 2000, ch. 12, art. 10; 2007, ch. 36, art. 21.

Priorité des réclamations

60 (1) Le tribunal ne peut approuver aucune proposition qui ne prescrive pas le paiement, en priorité sur les autres réclamations, de toutes les réclamations dont le paiement est ainsi ordonné dans la distribution des biens d'un débiteur, et le paiement de tous les honoraires et dépenses convenables du syndic relatifs et connexes aux procédures découlant de la proposition ou survenant dans la faillite.

Certain Crown claims

(1.1) Unless Her Majesty consents, no proposal shall be approved by the court that does not provide for the payment in full to Her Majesty in right of Canada or a province, within six months after court approval of the proposal, of all amounts that were outstanding at the time of the filing of the notice of intention or of the proposal, if no notice of intention was filed, and 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 similar purpose 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, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Idem

(1.2) No proposal shall be approved by the court if, at the time the court hears the application for approval, Her Majesty in right of Canada or a province satisfies the court that the debtor is in default on any remittance of an amount referred to in subsection (1.1) that became due after the filing

(a) of the notice of intention; or

(b) of the proposal, if no notice of intention was filed.

Certaines réclamations de la Couronne

(1.1) Le tribunal ne peut, sans le consentement de Sa Majesté, approuver une proposition qui ne prévoit pas le paiement intégral à Sa Majesté du chef du Canada ou d'une province, dans les six mois suivant l'approbation, de tous les montants qui étaient dus lors du dépôt de l'avis d'intention ou, à défaut, de la proposition et qui sont de nature à 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 et des intérêts, pénalités ou autres montants y 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, dans la mesure où elle prévoit la perception d'une somme, et des intérêts, pénalités ou autres montants y afférents, qui :

(i) soit a été retenue par une personne sur un paiement effectué à une autre personne, ou déduite d'un tel paiement, et se rapporte à un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*,

(ii) soit est de même nature qu'une cotisation prévue par le *Régime de pensions du Canada*, si la province est « une province instituant un régime général de pensions » au sens du paragraphe 3(1) de cette loi et si la loi provinciale institue un « régime provincial de pensions » au sens de ce paragraphe.

Idem

(1.2) Le tribunal ne peut approuver la proposition si, lors de l'audition de la demande d'approbation, Sa Majesté du chef du Canada ou d'une province le convainc du défaut du débiteur d'effectuer un versement portant sur un montant visé au paragraphe (1.1) et qui est devenu exigible après le dépôt de l'avis d'intention ou, à défaut d'avis d'intention, après le dépôt de la proposition.

Proposals by employers

(1.3) No proposal in respect of an employer shall be approved by the court unless

(a) it provides for payment to the employees and former employees, immediately after court approval of the proposal, of amounts at least equal to the amounts that they would be qualified to receive under paragraph 136(1)(d) if the employer became bankrupt on the date of the filing of the notice of intention, or proposal if no notice of intention was filed, as well as wages, salaries, commissions or compensation for services rendered after that date and before the court approval of the proposal, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the bankrupt's business during the same period; and

(b) the court is satisfied that the employer can and will make the payments as required under paragraph (a).

Voting on proposal

(1.4) For the purpose of voting on any question relating to a proposal in respect of an employer, no person has a claim for an amount referred to in paragraph (1.3)(a).

Proposals by employers — prescribed pension plans

(1.5) No proposal in respect of an employer who participates in a prescribed pension plan for the benefit of its employees shall be approved by the court unless

(a) the proposal provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*,

Propositions d'employeurs

(1.3) Le tribunal ne peut approuver la proposition visant un employeur que si, à la fois :

a) celle-ci prévoit que sera effectué le paiement aux employés — actuels et anciens —, dès son approbation, de sommes égales ou supérieures, d'une part, à celles qu'ils seraient en droit de recevoir en application de l'alinéa 136(1)d) si l'employeur avait fait faillite à la date du dépôt de l'avis d'intention ou, à défaut, de la proposition et, d'autre part, au montant des gages, salaires, commissions ou rémunérations pour services fournis entre cette date et celle de son approbation, y compris les sommes que le voyageur de commerce a régulièrement déboursées dans l'entreprise du failli ou relativement à celle-ci entre ces dates;

b) il est convaincu que l'employeur est en mesure d'effectuer, et effectuera, les paiements prévus à l'alinéa a).

Vote sur la proposition

(1.4) Aux fins du vote sur toute question relative à la proposition visant un employeur, personne n'a de réclamation à faire valoir pour les montants mentionnés à l'alinéa (1.3)a).

Propositions d'employeurs — régime de pension

(1.5) Le tribunal ne peut approuver la proposition visant un employeur qui participe à un régime de pension prescrit institué pour ses employés que si, à la fois :

a) la proposition prévoit que seront effectués des paiements correspondant au total des sommes ci-après qui n'ont pas été versées au fonds établi dans le cadre du régime de pension :

(i) les sommes qui ont été déduites de la rémunération des employés pour versement au fonds,

(ii) dans le cas d'un régime de pension prescrit régi par une loi fédérale :

(A) les coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur est tenu de verser au fonds,

(B) les sommes que l'employeur est tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension*,

(C) an amount equal to the sum of all amounts that were required to be paid by the employer to the administrator of a pooled registered pension plan, as defined in subsection 2(1) of the *Pooled Registered Pension Plans Act*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament,

(C) an amount equal to the sum of all amounts that would have been required to be paid by the employer in respect of a prescribed plan, if it were regulated by the *Pooled Registered Pension Plans Act*; and

(b) the court is satisfied that the employer can and will make the payments as required under paragraph (a).

(C) les sommes que l'employeur est tenu de verser à l'administrateur d'un régime de pension agréé collectif au sens du paragraphe 2(1) de la *Loi sur les régimes de pension agréés collectifs*,

(iii) dans le cas de tout autre régime de pension prescrit :

(A) la somme égale aux coûts normaux, au sens du paragraphe 2(1) du *Règlement de 1985 sur les normes de prestation de pension*, que l'employeur serait tenu de verser au fonds si le régime était régi par une loi fédérale,

(B) la somme égale au total des sommes que l'employeur serait tenu de verser au fonds au titre de toute disposition à cotisations déterminées au sens du paragraphe 2(1) de la *Loi de 1985 sur les normes de prestation de pension* si le régime était régi par une loi fédérale,

(C) la somme égale au total des sommes que l'employeur serait tenu de verser à l'égard du régime s'il était régi par la *Loi sur les régimes de pension agréés collectifs*;

b) il est convaincu que l'employeur est en mesure d'effectuer, et effectuera, les paiements prévus à l'alinéa a).

Non-application of subsection (1.5)

(1.6) Despite subsection (1.5), the court may approve a proposal that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(1.7) No proposal that provides for the payment of an equity claim is to be approved by the court unless the proposal provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

Non-application du paragraphe (1.5)

(1.6) Par dérogation au paragraphe (1.5), le tribunal peut approuver la proposition qui ne prévoit pas le versement des sommes mentionnées à ce paragraphe s'il est convaincu que les parties en cause ont conclu un accord sur les sommes à verser et que l'autorité administrative responsable du régime de pension a consenti à l'accord.

Paiement d'une réclamation relative à des capitaux propres

(1.7) Le tribunal ne peut approuver la proposition qui prévoit le paiement d'une réclamation relative à des capitaux propres que si, selon les termes de celle-ci, le paiement intégral de toutes les autres réclamations sera effectué avant le paiement de la réclamation relative à des capitaux propres.

Payment to trustee

(2) All moneys payable under the proposal shall be paid to the trustee and, after payment of all proper fees and expenses mentioned in subsection (1), shall be distributed by him to the creditors.

Distribution of promissory notes, stock, etc., of debtor

(3) Where the proposal provides for the distribution of property in the nature of promissory notes or other evidence of obligations by or on behalf of the debtor or, when the debtor is a corporation, shares in the capital stock of the corporation, the property shall be dealt with in the manner prescribed in subsection (2) as nearly as may be.

Section 147 applies

(4) Section 147 applies to all distributions made to the creditors by the trustee pursuant to subsection (2) or (3).

Power of court

(5) Subject to subsections (1) to (1.7), the court may either approve or refuse to approve the proposal.

R.S., 1985, c. B-3, s. 60; 1992, c. 27, s. 24; 1997, c. 12, s. 37; 2000, c. 30, s. 144; 2005, c. 47, s. 39; 2007, c. 36, ss. 22, 99; 2009, c. 33, s. 22; 2012, c. 16, s. 79.

Annulment of bankruptcy

61 (1) The approval by the court of a proposal made after bankruptcy operates to annul the bankruptcy and to revest in the debtor, or in such other person as the court may approve, all the right, title and interest of the trustee in the property of the debtor, unless the terms of the proposal otherwise provide.

Non-approval of proposal by court

(2) Where the court refuses to approve a proposal in respect of an insolvent person a copy of which has been filed under section 62,

(a) the insolvent person is deemed to have thereupon made an assignment;

(b) the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;

(b.1) the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and

(c) the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued,

Paiement au syndic

(2) Tout montant payable aux termes de la proposition est payé au syndic et, après le paiement de tous les honoraires et dépenses convenables mentionnés au paragraphe (1), distribué par lui aux créanciers.

Distribution de billets à ordre, d'actions, etc. du débiteur

(3) Lorsque la proposition prévoit la distribution des biens sous forme de billets à ordre ou d'autres titres d'obligations souscrites par le débiteur ou en son nom ou, si le débiteur est une personne morale, sous forme d'actions du capital social de la personne morale, ces biens sont traités dans la mesure du possible conformément au paragraphe (2).

L'art. 147 s'applique

(4) L'article 147 s'applique à toutes les distributions faites aux créanciers par le syndic conformément au paragraphe (2) ou (3).

Pouvoirs du tribunal

(5) Sous réserve des paragraphes (1) à (1.7), le tribunal peut approuver ou refuser la proposition.

L.R. (1985), ch. B-3, art. 60; 1992, ch. 27, art. 24; 1997, ch. 12, art. 37; 2000, ch. 30, art. 144; 2005, ch. 47, art. 39; 2007, ch. 36, art. 22 et 99; 2009, ch. 33, art. 22; 2012, ch. 16, art. 79.

Annulation de faillite

61 (1) L'approbation par le tribunal d'une proposition faite après la faillite a pour effet d'annuler la faillite et de réattribuer au débiteur, ou à toute autre personne que le tribunal peut approuver, le droit, le titre et l'intérêt complets du syndic aux biens du débiteur, à moins que les conditions de la proposition n'en stipulent autrement.

Refus d'approuver une proposition

(2) Lorsque le tribunal refuse d'approuver une proposition visant une personne insolvable, proposition dont une copie a été déposée aux termes de l'article 62 :

a) celle-ci est réputée avoir fait dès lors une cession;

b) le syndic en fait immédiatement rapport, en la forme prescrite, au séquestre officiel;

b.1) le séquestre officiel délivre, en la forme prescrite, un certificat de cession ayant, pour l'application de la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49;

c) le syndic convoque, dans les cinq jours suivant la délivrance du certificat de cession, une assemblée des créanciers aux termes de l'article 102, assemblée à laquelle les créanciers peuvent, par résolution ordinaire,

Requirements if discharge suspended

(5) If the court makes an order suspending the discharge, the court shall, in the order, require the bankrupt to file income and expense statements with the trustee each month and to file all returns of income required by law to be filed.

Court may modify after year

(6) If, at any time after the expiry of one year after the day on which any order is made under this section, the bankrupt satisfies the court that there is no reasonable probability that he or she will be in a position to comply with the terms of the order, the court may modify the terms of the order or of any substituted order, in any manner and on any conditions that it thinks fit.

Power to suspend

(7) The powers of suspending and of attaching conditions to the discharge of a bankrupt may be exercised concurrently.

Meaning of *personal income tax debt*

(8) For the purpose of this section, ***personal income tax debt*** means the amount payable, within the meaning of subsection 223(1) of the *Income Tax Act* without reference to paragraphs (b) to (c), by an individual and the amount payable by an individual under any provincial legislation that imposes a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, including, for greater certainty, the amount of any interest, penalties or fines imposed under the *Income Tax Act* or the provincial legislation. It does not include an amount payable by the individual if the individual is or was a director of a corporation and the amount relates to an obligation of the corporation for which the director is liable in their capacity as director.

2005, c. 47, s. 105; 2007, c. 36, s. 53.

Facts for which discharge may be refused, suspended or granted conditionally

173 (1) The facts referred to in section 172 are:

(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

(b) the bankrupt has omitted to keep such books of account as are usual and proper in the business

Obligation en cas de suspension de la libération

(5) S'il ordonne la suspension de la libération du failli, le tribunal précise dans l'ordonnance que celui-ci est tenu, en plus de fournir mensuellement au syndic un état de ses revenus et dépenses, de produire toute déclaration de revenu exigée par la loi.

Le tribunal peut, après un an, modifier les conditions

(6) Lorsque, après l'expiration d'une année à compter de la date où une ordonnance est rendue en vertu du présent article, le failli prouve au tribunal qu'il n'existe pas de probabilité raisonnable qu'il soit en état de se conformer aux conditions de cette ordonnance, le tribunal peut modifier ces conditions, ou celles de toute ordonnance qui lui est substituée, de la manière et aux conditions qu'il estime utiles.

Pouvoir de suspendre

(7) Le pouvoir d'assujettir la libération du failli à des conditions ou de la suspendre peuvent être exercés concurremment.

Définition de *dette fiscale*

(8) Au présent article, ***dette fiscale*** s'entend du montant payable, au sens du paragraphe 223(1) de la *Loi de l'impôt sur le revenu*, compte non tenu des alinéas b) à c), par un particulier et de la somme à payer par un particulier au titre d'une loi provinciale qui prévoit un impôt semblable, de par sa nature, à l'impôt sur le revenu auquel les particuliers sont assujettis en vertu de la *Loi de l'impôt sur le revenu*, y compris le montant des intérêts, sanctions et amendes imposés sous le régime de cette loi et de la loi provinciale. N'est cependant pas visée la somme relative aux obligations d'une personne morale dont un particulier peut être responsable en qualité d'administrateur ou d'ancien administrateur de celle-ci.

2005, ch. 47, art. 105; 2007, ch. 36, art. 53.

Faits motivant le refus, la suspension ou l'octroi de la libération sous conditions

173 (1) Les faits visés à l'article 172 sont les suivants :

a) la valeur des avoirs du failli n'est pas égale à cinquante cents par dollar de ses obligations non garanties, à moins que celui-ci ne prouve au tribunal que ce fait provient de circonstances dont il ne peut à bon droit être tenu responsable;

b) le failli a omis de tenir les livres de comptes qui sont ordinairement et régulièrement tenus dans l'exercice de son commerce et qui révèlent suffisamment ses opérations commerciales et sa situation financière au cours de la période allant du premier jour de la

carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;

(c) the bankrupt has continued to trade after becoming aware of being insolvent;

(d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

(e) the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs;

(f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;

(g) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred unjustifiable expense by bringing a frivolous or vexatious action;

(h) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to any of the bankrupt's creditors;

(i) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred liabilities in order to make the bankrupt's assets equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities;

(j) the bankrupt has on any previous occasion been bankrupt or made a proposal to creditors;

(k) the bankrupt has been guilty of any fraud or fraudulent breach of trust;

(l) the bankrupt has committed any offence under this Act or any other statute in connection with the bankrupt's property, the bankruptcy or the proceedings thereunder;

troisième année précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement;

c) le failli a continué son commerce après avoir pris connaissance de son insolvabilité;

d) le failli n'a pas tenu un compte satisfaisant des pertes d'avoirs ou de toute insuffisance d'avoirs pour faire face à ses obligations;

e) le failli a occasionné sa faillite, ou y a contribué, par des spéculations téméraires et hasardeuses, par une extravagance injustifiable dans son mode de vie, par le jeu ou par négligence coupable à l'égard de ses affaires commerciales;

f) le failli a occasionné à l'un de ses créanciers des frais inutiles en présentant une défense futile ou vexatoire dans toute action régulièrement intentée contre lui;

g) le failli a, au cours de la période allant du premier jour du troisième mois précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement, subi des frais injustifiables en intentant une action futile ou vexatoire;

h) le failli a, au cours de la période allant du premier jour du troisième mois précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement, alors qu'il ne pouvait pas acquitter ses dettes à leur échéance, accordé une préférence injuste à l'un de ses créanciers;

i) le failli a, au cours de la période allant du premier jour du troisième mois précédant l'ouverture de la faillite jusqu'à la date de la faillite inclusivement, contracté des obligations en vue de porter ses avoirs à cinquante cents par dollar du montant de ses obligations non garanties;

j) le failli a, dans une occasion antérieure, été en faillite, ou a fait une proposition à ses créanciers;

k) le failli s'est rendu coupable de fraude ou d'abus frauduleux de confiance;

l) le failli a commis une infraction aux termes de la présente loi ou de toute autre loi à l'égard de ses biens, de sa faillite ou des procédures en l'espèce;

m) le failli n'a pas fait les versements établis en application de l'article 68;

n) le failli a choisi la faillite et non la proposition comme solution à son endettement, dans le cas où il aurait pu faire une proposition viable;

(m) the bankrupt has failed to comply with a requirement to pay imposed under section 68;

(n) the bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness; and

(o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

o) le failli n'a pas rempli les autres obligations qui lui sont imposées au titre de la présente loi ou n'a pas observé une ordonnance du tribunal.

Application to farmers

(2) Paragraphs (1)(b) and (c) do not apply in the case of an application for discharge by a bankrupt whose principal occupation and means of livelihood on the date of the initial bankruptcy event was farming or the tillage of the soil.

R.S., 1985, c. B-3, s. 173; 1997, c. 12, s. 103.

Demande de libération faite par un cultivateur

(2) Les alinéas (1)b) et c) ne s'appliquent pas à une demande de libération présentée par un failli dont la principale activité — et la principale source de revenu — était, à l'ouverture de la faillite, l'agriculture ou la culture du sol.

L.R. (1985), ch. B-3, art. 173; 1997, ch. 12, art. 103.

Assets of bankrupt when deemed equal to fifty cents in dollar

174 For the purposes of section 173, the assets of a bankrupt shall be deemed of a value equal to fifty cents on the dollar on the amount of his unsecured liabilities when the court is satisfied that the property of the bankrupt has realized, is likely to realize or, with due care in realization, might have realized an amount equal to fifty cents on the dollar on his unsecured liabilities.

R.S., c. B-3, s. 144.

Avoirs d'un failli réputés équivaloir à cinquante cents par dollar

174 Pour l'application de l'article 173, les avoirs du failli sont réputés être d'une valeur égale à cinquante cents par dollar de la somme de ses obligations non garanties, lorsque le tribunal est convaincu que les biens du failli ont réalisé, réaliseront vraisemblablement ou auraient pu réaliser, si avait été exercée la prudence voulue, un chiffre égal à cinquante cents par dollar de ses obligations non garanties.

S.R., ch. B-3, art. 144.

Court may grant certificates

175 (1) A statutory disqualification on account of bankruptcy ceases when the bankrupt obtains from the court his discharge with a certificate to the effect that the bankruptcy was caused by misfortune without any misconduct on his part.

Le tribunal peut accorder certificat

175 (1) Une incapacité établie par un texte de loi quelconque, en raison de faillite, cesse lorsque le failli obtient du tribunal sa libération, ainsi qu'un certificat attestant que la faillite provient d'un malheur, sans mauvaise conduite de la part du failli.

Appeal

(2) The court may, if it thinks fit, grant a certificate mentioned in subsection (1), and a refusal to grant such a certificate is subject to appeal.

R.S., c. B-3, s. 145.

Appel

(2) Le tribunal peut, s'il le juge à propos, accorder le certificat mentionné au paragraphe (1), et appel peut être interjeté du refus d'accorder ce certificat.

S.R., ch. B-3, art. 145.

Duty of bankrupt on conditional discharge

176 (1) Where an order is granted on terms or conditions or on the bankrupt consenting to judgment, the bankrupt shall, until the terms, conditions or judgment is satisfied,

(a) give the trustee such information as he may require with respect to his earnings and after-acquired property and income, and

Obligation du failli dans le cas de libération sous conditions

176 (1) Lorsqu'une ordonnance est accordée subordonnément à des conditions, ou sur le consentement du failli à un jugement, le failli doit, jusqu'à ce qu'il ait rempli ces conditions ou satisfait à ce jugement :

a) fournir au syndic les renseignements que ce dernier peut exiger à l'égard de ses gains et de ses biens et revenus subséquemment acquis;

TAB 2

2009 ABQB 200
Alberta Court of Queen's Bench

Magnus One Energy Corp., Re

2009 CarswellAlta 488, 2009 ABQB 200, [2009] A.W.L.D. 2130, 176 A.C.W.S. (3d) 334, 53 C.B.R. (5th) 243

In the Matter of the Proposal of Magnus One Energy Corp.

And In the Matter of the Proposal of Magnus Energy Inc.

B.E. Romaine J.

Heard: January 27, 2009
Judgment: April 2, 2009
Docket: Calgary BE01-080637, BE01-080668

Counsel: John L. Ircandia for Applicant
James R. Farrington for Pedro's Services Ltd., Taber Water Disposal Inc.

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.iii Interests of creditors
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — Interests of creditors
ME Inc. and MO Corp. were oil and gas exploration and development companies — MO Corp. was wholly-owned subsidiary of ME Inc. — Each ME Inc. and MO Corp. filed notice of intention to make proposal under Bankruptcy and Insolvency Act — Proposals were accepted by 91.7 percent of creditors of ME Inc. and 92.3 percent of creditors of MO Corp. — Only creditors who voted against were P and T who claimed as unsecured creditors — Parent company of ME Inc. held security over all assets of ME Inc. and MO Corp. — Secured indebtedness owing to parent company was $4.3 million — ME Inc. and MO Corp. brought application for approval by court of their proposals — Under proposals, parent company agreed to be treated as unsecured creditors for purpose of most of its claim — Unsecured creditors would receive lesser of $2,500 and full amount of their claim plus pro rata amount of remaining funds — P and T opposed application on basis that ME Inc. and MO Corp. did not act in good faith and that s. 173 of Bankruptcy and Insolvency Act factors could be established against them — Application granted — There was no lack of good faith or proof of facts under s. 173 of Act to preclude approval of proposals — Terms of proposals were reasonable, they were calculated to benefit general body of creditors, and no creditors were being unduly prejudiced — Nothing in evidence called into question integrity of process or requirements of commercial morality — Situation was substantially better for unsecured creditors than it would be under general bankruptcy.
Table of Authorities
Cases considered by *B.E. Romaine J.*:
Abou-Rached, Re (2002), 2002 BCSC 1022, 2002 CarswellBC 1642, 35 C.B.R. (4th) 165 (B.C. S.C.) — referred to
Gardner, Re (1921), 1921 CarswellOnt 3, 1 C.B.R. 424, 49 O.L.R. 252, 59 D.L.R. 555 (Ont. S.C.) — referred to
Garritty, Re (2006), 2006 CarswellAlta 950, 2006 ABQB 545, 62 Alta. L.R. (4th) 96, 25 C.B.R. (5th) 95, [2006] 11 W.W.R. 459, (sub nom. *Garritty (Bankrupt), Re)* 398 A.R. 123 (Alta. Q.B.) — referred to
Man With Axe Ltd. (No. 2), Re (1961), 1961 CarswellMan 4, 2 C.B.R. (N.S.) 12 (Man. Q.B.) — referred to
National Fruit Exchange Inc., Re (1948), 1948 CarswellQue 21, 29 C.B.R. 125 (C.S. Que.) — referred to

Stone, Re (1976), 22 C.B.R. (N.S.) 152, 1976 CarswellOnt 56 (Ont. S.C.) — referred to
Sumner Co. (1984), Re (1987), 79 N.B.R. (2d) 191, 201 A.P.R. 191, 1987 CarswellNB 26, 64 C.B.R. (N.S.) 218 (N.B. Q.B.) — referred to

Statutes considered:

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

s. 173 — referred to

s. 173(1)(a) — referred to

Business Corporations Act, R.S.A. 2000, c. B-9
Generally — referred to

Civil Enforcement Act, R.S.A. 2000, c. C-15
s. 57(4) — considered

s. 57.1 [en. 2006 c. S-4.5 s. 107] — referred to

APPLICATION by two companies for approval of proposals filed under *Bankruptcy and Insolvency Act*.

***B.E. Romaine J.*:**

Introduction

1 Magnus Energy Inc. ("Magnus Energy") and Magnus One Energy Corp. ("Magnus One") apply for approval by the Court of their proposals filed pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 and accepted by the required majority of their creditors. Two creditors, Pedro's Services Ltd. ("Pedro") and Taber Water Disposals Inc. ("Taber"), oppose the application on the basis that Magnus Energy and Magnus One have not acted in good faith and that factors set out under section 173 of the *Bankruptcy and Insolvency Act* can be established against them.

Facts

2 Magnus Energy and Magnus One were oil and gas exploration and development companies engaged in operations primarily in Alberta and Saskatchewan. Magnus One is a wholly-owned subsidiary of Magnus Energy. They each filed a Notice of Intention to make a Proposal under the *Bankruptcy and Insolvency Act* on June 18, 2008, naming RSM Richter Inc. as Trustee.

3 The Magnus companies are no longer operating. Their assets available for distribution to creditors consist of cash on hand and minor accounts receivable. No value has been attributed to any of their undeveloped oil and gas properties.

4 The parent company of Magnus Energy, Questerre Energy Corporation, holds security over all of the assets of Magnus Energy and Magnus One. As of August 31, 2008, the secured indebtedness owing to Questerre was approximately $4.3 million.

5 Magnus Energy and Magnus One each filed a Proposal with the Official Receiver on September 5, 2008, and these Proposals were accepted by 91.7% of the creditors of Magnus Energy (22 out of 24 creditors) and 92.3% of the creditors of Magnus One (24 out of 26 creditors). The only creditors who voted against the Proposals were Pedro and Taber, who are controlled by the same principal. Pedro and Taber claim as unsecured creditors of both Magnus Energy and Magnus One pursuant to a default judgment obtained on November 14, 2007 in the amount of $50,557.32.

6 Under the Proposals, Questerre agrees to be treated as an unsecured creditor for the purpose of most of its claim. Unsecured creditors would receive the lesser of $2,500 and the full amount of their claim plus a pro rata amount of remaining funds.

7 At the meetings of creditors, the Trustee advised of ongoing discussions with the Energy Resources Conservation Board over abandonment liabilities relating to the wells drilled by the debtors and the priority of such contingent claims over other

debts, and advised that Questerre had agreed to deal with such abandonment costs so that any claim by the ERCB would not impact the amount available for distribution under the Proposals. Counsel for Pedro raised the following matters at the meetings:

> a) that the Trustee had not obtained a legal opinion on the validity of Questerre's security over the assets of the debtor companies, pointing out that litigation relating to the enforceability and priority of that security as against execution creditors was stayed as a result of the filing of the Notices of Intention. The Trustee responded that a legal opinion on the validity of the security had been obtained by Brookfield and K2, the previous secured creditors that had subsequently been bought out by Questerre, that he was satisfied with such opinion and did not believe that the expense of obtaining a further opinion was justifiable;
>
> b) that the Trustee should closely scrutinize and segregate the debtors' legal costs and Questerre's legal costs as they had the same counsel. The Trustee noted that he did not believe this to be an issue, but agreed to do so; and
>
> c) that counsel understood that more than $3 million of the unsecured debt of the debtors (excluding debt owed to Questerre) had been paid in full since February, 2008. The Trustee explained that the $3 million paid to creditors was incurred subsequent to Questerre's acquisition of Magnus Energy's debt, was paid by Questerre and went to the funding of flow-through share obligations. The Trustee was thus satisfied that no creditor had been preferred.

8 Pedro and Taber's counsel also alleged at the meeting that at the time Magnus One's assets were transferred to Questerre, all of Magnus One's shares were under seizure, and it was their position that a sale could not be authorized and that the transaction was reviewable. The Trustee responded that he was of the view that the seizure of shares would not have prevented the transaction from occurring as Questerre as secured creditor could have affected the transfer of assets through the appointment of a receiver or by seizing the assets.

9 The Trustee in its report to the Court on this approval application gives the opinion that the Proposals are advantageous for the creditors because they result in a greater distribution to the unsecured creditors, as there would be no distribution to unsecured creditors in a bankruptcy scenario.

Analysis

10 Prior to approving a Proposal, the Court must be satisfied that:

> i) the terms of the Proposal are reasonable,
>
> ii) the terms of the Proposal are calculated to benefit the general body of creditors, and
>
> iii) the Proposal is made in good faith.

11 The Court must consider, not only the wishes and interests of creditors, but also the conduct and interests of the debtor, the interests of the public and future creditors and the requirements of commercial morality. I am not bound to approve the Proposals even though they have been recommended by the Trustee and given the overwhelming support of creditors, but substantial defence should be afforded to these views: The 2009 *Annotated Bankruptcy and Insolvency Act*, Houlden, Morawetz and Sarra, at page 264, citing *Gardner, Re* (1921), 1 C.B.R. 424 (Ont. S.C.); *Sumner Co. (1984), Re* (1987), 64 C.B.R. (N.S.) 218 (N.B. Q.B.) ; *Stone, Re* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); *National Fruit Exchange Inc., Re* (1948), 29 C.B.R. 125 (C.S. Que.); *Man With Axe Ltd. (No. 2), Re* (1961), 2 C.B.R. (N.S.) 12 (Man. Q.B.); *Abou-Rached, Re* (2002), 35 C.B.R. (4th) 165, 2002 CarswellBC 1642 (B.C. S.C.); *Garritty, Re*, [2006] A.J. No. 890 (Alta. Q.B.).

12 It is not suggested that the formalities of the *Bankruptcy and Insolvency Act*. have not been complied with nor that the Proposals do not have a reasonable possibility of being successfully completed in accordance with their terms.

13 Pedro and Taber submit that the Proposals should not be approved because the debtor companies have not acted in good faith and that there are facts as set out under section 173 of the *Bankruptcy and Insolvency Act* that can be established against them.

14 Firstly, these creditors allege that they were not given proper notice of a plan of arrangement involving Magnus Energy and Questerre that received final approval of the Court on October 31, 2007. Pursuant to that plan of arrangement, Magnus Energy shares were transferred to Questerre in return for Questerre shares. The final order provides that the Court is satisfied that service of the application was effected in accordance with the interim order, which required that the application, meeting materials and the interim order be served on Magnus Energy shareholders, its directors and auditors. There was no requirement to serve creditors. The affidavit of the President of Magnus Energy that supported the application for an initial order states that no creditors of Magnus Energy would be adversely affected by the arrangement, as they would continue to hold rights as creditors, and that neither Magnus nor Questerre had entered into the arrangement for the purpose of hindering, delaying or defrauding creditors. Pedro and Taber were thus not entitled to notice of the arrangement, although it appears from comments of their counsel that they were aware of it in any event.

15 With respect to the arrangement, Pedro and Taber suggest that a press release that gave specific details of the plan of arrangement and the Court approval process was somehow flawed because it referred to the arrangement as a "merger". This complaint is unfounded, as the press release is quite specific with respect to the arrangement details.

16 Pedro and Taber also allege that no proper disclosure of the insolvent situation of the Magnus entities was made to the Court at the time the arrangement was approved. However, it is clear from the record that the Court had before it at both the interim and final order stage the Information Circular that was sent to Magnus shareholders that would have included disclosure as mandated by securities regulation, including reference to financial statements that would disclose the details of secured debt.

17 The principal of Pedro and Taber also states that he is "not aware" if Magnus or Questerre disclosed to the Court the fact that "Questerre intended to assert in due course a security position over other creditors." It is, however, also clear from the record that it was a condition of the arrangement that all secured debt of Magnus would be paid or satisfied.

18 The gist of the objection by Pedro and Taber appears to be that Questerre took an assignment of Magnus Energy's secured debt on October 16, 2007, which they allege resulted in abuse. The specifics of that alleged abuse are as follows:

19 A. Following the plan of arrangement and assignment of secured debt, in January, 2008, Pedro and Taber registered writs of enforcement against Magnus Energy and Magnus One, and served various garnishee summons from January 17, 2008 to February 21, 2008. On February 12, 2008 Questerre demanded payment of its secured debt and issued a Notice of Intention to Enforce Security to Magnus Energy and Magnus One in the amount of indebtedness then outstanding, roughly $17 million. Questerre as secured creditor claimed priority over any funds realized by Pedro and Taber through their garnishee summons on the basis that Questerre's security interest had been registered in the Personal Property Registry on December 19, 2007, before Pedro and Taber's writ of enforcement.

20 Pedro and Taber complain that the question of who was entitled to funds paid into Court pursuant to the garnishees was stayed by the debtors' Notices of Intention. A decision by the debtor companies to exercise their legitimate rights to attempt to resolve their debts through the proposal mechanisms of the *Bankruptcy and Insolvency Act* cannot be considered bad faith.

21 B. On March 19, 2008, Magnus Energy and Magnus One transferred oil and gas assets to Questerre in partial satisfaction of the roughly $22 million of secured debt that was at that time owed to Questerre. The transfer satisfied debt to the extent of $19.5 million, leaving $2,226.618 owing to Questerre. An independent valuation of the assets was obtained, and the Trustee advised that the property transferred was valued at about $17.5 million by such report. To be conservative, the secured debt was debited at the higher amount of $19.5 million.

22 On March 18, 2008, as instructed by Pedro and Taber, a bailiff attended at the registered office of the Magnus companies and the offices of counsel for Questerre and left a Notice of Seizure of the shares of Magnus One "pursuant to Section 51 of the [*Securities Transfer Act*] and Section 57 (2) [of an unspecified Act]". Section 57(2) of the *Civil Enforcement Act* provides that an agency may seize "the interest of an enforcement debtor" in a security issued by a private company by serving a notice of seizure on the issuer at its chief executive office. Section 57(4) provides that the interest of an enforcement debtor in a security seized is subject to a prior security interest, the seizure does not affect the prior security interest, and the ability of the agency

to deal with the security is limited to those rights and powers that the enforcement debtor would have had but for the seizure. The security held by Questerre over the assets of Magnus Energy appears to extend to all of the property of Magnus Energy, including the shares of Magnus One.

23 The attempted seizure thus gives rise to a number of issues relating to validity and priority that were not addressed in the submissions made at the hearing before me, but nevertheless, Pedro and Taber submit that the assignment of properties to Questerre can and should be attacked by the Trustee because no approval by the shareholders of Magnus One to a sale of substantially all of the property of the corporation was obtained as required by the *Business Corporation Act*, as Magnus Energy was not in a position to consent to a special resolution authorizing the sale because the shares were under seizure. Even if I was satisfied that the seizure had been validly executed and was unaffected by s. 57(4) of the *Civil Enforcement Act*, the party who would be entitled to raise an objection to the conveyance of assets would be the bailiff, pursuant to section 57.1 of the *Civil Enforcement Act*, and no such objection is in evidence.

C. Pedro and Taber also submit, as they did at the creditor meetings, that the debtors paid roughly 3.5 million to various creditors when other payables were left unpaid, giving rise to undue preferences. A press release issued by Questerre on November 2, 2007 after the arrangement had been completed indicates that Questerre would be using proceeds of a private placement of securities to fund the flow-through commitments of Magnus, including Magnus' share of drilling costs committed with respect to a particular well.

24 The Trustee explains that Questerre loaned the money in question to the Magnus companies so that they could meet their flow-through share obligations. He is satisfied that the payments were made in order to preserve an asset of the companies and that only creditors providing new work were paid. He is therefore satisfied that there was no significant undue preference of creditors.

25 Pedro and Taber submit that the disclosure relating to the Proposals is deficient because they speculate that the reason Questerre is willing to give up its secured creditors status in order to benefit the unsecured creditors is that there must be significant undisclosed tax losses that are of great benefit to Questerre and that the extent of that benefit should be disclosed. The Trustee agrees that there may be some tax losses totalling roughly $2 million, but submits that it is sheer speculation at this time as to whether these losses may be available to Questerre for use in the future. I am satisfied that the issue of the possible use of tax losses is not information so material that it makes the disclosure to creditors or the Court in these applications deficient.

26 Pedro and Taber also submit that it is obvious that the remaining assets of the Magnus companies are not of a value equal to fifty cents on the dollar on the amount of their unsecured liabilities as set out in s. 173(1)(a) of the *Bankruptcy and Insolvency Act* and that I must thus refuse to approve the Proposals without reasonable security. I am satisfied by the evidence of the conveyance of assets to Questerre to reduce secured debt that this state of affairs has arisen from circumstances for which the Magnus companies cannot justly be held responsible, and therefore, section 173.(1)(a) does not require me to order security. In coming to this determination, I take into account Questerre's agreement to be treated as an unsecured creditor for the remainder of its debt.

27 I therefore do not find either lack of good faith or proof of facts under section 173 that would preclude the approval of these Proposals. I am satisfied that the terms of the Proposals are reasonable, that they are calculated to benefit the general body of creditors, and that no creditors are being unduly prejudiced. There is nothing in the evidence before me that calls into question the integrity of the process or the requirements of commercial morality. It is persuasive that Questerre is willing to forego the remainder of its secured position and to take on the potentially material contingent claim for reclamation and abondment liabilities in order to allow Proposals with some recovery to the unsecured creditors, and I am persuaded that the situation is substantially better for unsecured creditors than it would be under a general bankruptcy. I therefore approve the Proposals. If the parties wish to make representation with respect to costs, they may do so.

Application granted.

End of Document

TAB 3

2012 ONSC 234
Ontario Superior Court of Justice [Commercial List]

Kitchener Frame Ltd., Re

2012 CarswellOnt 1347, 2012 ONSC 234, 212 A.C.W.S. (3d) 631, 86 C.B.R. (5th) 274

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as Amended

In the Matter of the Consolidated Proposal of Kitchener Frame Limited and Thyssenkrupp Budd Canada, Inc. (Applicants)

Morawetz J.

Judgment: February 3, 2012
Docket: CV-11-9298-00CL

Counsel: Edward A. Sellers, Jeremy E. Dacks for Applicants
Hugh O'Reilly — Non-Union Representative Counsel
L.N. Gottheil — Union Representative Counsel
John Porter for Proposal Trustee, Ernst & Young Inc.
Michael McGraw for CIBC Mellon Trust Company
Deborah McPhail for Financial Services Commission of Ontario

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.i General principles
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — General principles
Applicants KFL and BC were inactive entities with no operating assets and no material liquid assets — Applicants had significant and mounting obligations including pension and other non-pension post-employment benefit (OPEB) obligations to their former employees and surviving spouses of such former employees or others entitled to claim through such persons — Affiliates of BC provided up to date funding for pension and OPEB obligations, however, given that KFL and BC had no active operations status quo was unsustainable — KFL and BC brought motion to sanction amended consolidated proposal — Motion was granted — Proposal was reasonable — Proposal was calculated to benefit general body of creditors — Proposal was made in good faith — Proposal contained broad release in favour of applicants and certain third parties — Release of third-parties was permitted — Release covered all affected claims, pension claims, and existing escrow fund claims — Release did not cover criminal or wilful misconduct with respect to any matters set out in s. 50(14) of Bankruptcy and Insolvency Act — Unaffected claims were specifically carved out of release — No creditors or stakeholders objected to scope of release which was fully disclosed in negotiations — There was no express prohibition in BIA against including third-party releases in proposal — Any provision of BIA which purported to limit ability of debtor to contract with its creditors had to be clear and explicit — Third-party releases were permissible under Companies' Creditors Arrangement Act (CCAA) and court should strive, where language of both statutes supported it, to give both statutes harmonious interpretation — There was no principled basis on which analysis and treatment of third-party release in BIA proposal proceeding should differ from CCAA proceeding — Released parties contributed in tangle and realistic way to proposal — Without inclusion of releases it was unlikely that certain parties would

have supported proposal — Releases benefited applicants and creditors generally — Applicants provided full and adequate disclosure of releases and their effect.

Table of Authorities

Cases considered by *Morawetz J.*:

A. & F. Baillargeon Express Inc., Re (1993), 27 C.B.R. (3d) 36, 1993 CarswellQue 49 (C.S. Que.) — referred to

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

Allen-Vanguard Corp., Re (2011), 2011 CarswellOnt 1279, 2011 ONSC 733 (Ont. S.C.J.) — referred to

Angiotech Pharmaceuticals Inc., Re (2011), 2011 BCSC 450, 2011 CarswellBC 841, 76 C.B.R. (5th) 210 (B.C. S.C. [In Chambers]) — referred to

Ashley v. Marlow Group Private Portfolio Management Inc. (2006), 2006 CarswellOnt 3449, 22 C.B.R. (5th) 126, 270 D.L.R. (4th) 744 (Ont. S.C.J. [Commercial List]) — referred to

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

C.F.G. Construction inc., Re (2010), [2010] R.J.Q. 2360, 2010 CarswellQue 10226, 2010 QCCS 4643 (C.S. Que.) — considered

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

Cosmic Adventures Halifax Inc., Re (1999), 13 C.B.R. (4th) 22, 1999 CarswellNS 320 (N.S. S.C.) — considered

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

Farrell, Re (2003), 2003 CarswellOnt 1015, 40 C.B.R. (4th) 53 (Ont. S.C.J. [Commercial List]) — referred to

Kern Agencies Ltd., (No. 2), Re (1931), 1931 CarswellSask 3, [1931] 2 W.W.R. 633, 13 C.B.R. 11 (Sask. C.A.) — considered

Lofchik, Re (1998), 1998 CarswellOnt 194, 1 C.B.R. (4th) 245 (Ont. Bktcy.) — referred to

Magnus One Energy Corp., Re (2009), 2009 CarswellAlta 488, 2009 ABQB 200, 53 C.B.R. (5th) 243 (Alta. Q.B.) — referred to

Mayer, Re (1994), 25 C.B.R. (3d) 113, 1994 CarswellOnt 268 (Ont. Bktcy.) — referred to

Mister C's Ltd., Re (1995), 1995 CarswellOnt 372, 32 C.B.R. (3d) 242 (Ont. Bktcy.) — considered

N.T.W. Management Group Ltd., Re (1994), 29 C.B.R. (3d) 139, 1994 CarswellOnt 325 (Ont. Bktcy.) — referred to

NAV Canada c. Wilmington Trust Co. (2006), 2006 CarswellQue 4890, 2006 CarswellQue 4891, 2006 SCC 24, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.)* 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc., (Bankrupt), Re)* 349 N.R. 1, (sub nom. *Canada 3000 Inc., Re)* [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc. (Bankrupt), Re)* 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re)* 269 D.L.R. (4th) 79 (S.C.C.) — referred to

Olympia & York Developments Ltd., Re (1995), 34 C.B.R. (3d) 93, 1995 CarswellOnt 340 (Ont. Gen. Div. [Commercial List]) — referred to

Olympia & York Developments Ltd., Re (1997), 45 C.B.R. (3d) 85, 143 D.L.R. (4th) 536, 1997 CarswellOnt 657 (Ont. Bktcy.) — referred to

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

Steeves, Re (2001), 25 C.B.R. (4th) 317, 208 Sask. R. 84, 2001 SKQB 265, 2001 CarswellSask 392 (Sask. Q.B.) — referred to

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC

3420, 409 N.R. 201, *(*sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Pt. III — referred to

s. 50(14) — considered

s. 54(2)(d) — considered

s. 59(2) — considered

s. 62(3) — considered

s. 136(1) — referred to

s. 178(2) — referred to

s. 179 — considered

s. 183 — referred to

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

Generally — referred to

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

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

MOTION by applicants for court sanction of proposal under Bankruptcy and Insolvency Act which contained third-party release.

***Morawetz J.*:**

1 At the conclusion of this unopposed motion, the requested relief was granted. Counsel indicated that it would be helpful if the court could provide reasons in due course, specifically on the issue of a third-party release in the context of a proposal under Part III of the *Bankruptcy and Insolvency Act* ("*BIA*").

2 Kitchener Frame Limited ("KFL") and Thyssenkrupp Budd Canada Inc. ("Budd Canada"), and together with KFL, (the "Applicants"), brought this motion for an order (the "Sanction Order") to sanction the amended consolidated proposal involving the Applicants dated August 31, 2011 (the "Consolidated Proposal") pursuant to the provisions of the *BIA*. Relief was also sought authorizing the Applicants and Ernst & Young Inc., in its capacity as proposal trustee of each of the Applicants (the "Proposal Trustee") to take all steps necessary to implement the Consolidated Proposal in accordance with its terms.

3 The Applicants submit that the requested relief is reasonable, that it benefits the general body of the Applicants' creditors and meets all other statutory requirements. Further, the Applicants submit that the court should also consider that the voting affected creditors (the "Affected Creditors") unanimously supported the Consolidated Proposal. As such, the Applicants submit that they have met the test as set out in s. 59(2) of the *BIA* with respect to approval of the Consolidated Proposal.

4 The motion of the Applicants was supported by the Proposal Trustee. The Proposal Trustee filed its report recommending approval of the Consolidated Proposal and indicated that the Consolidated Proposal was in the best interests of the Affected Creditors.

5 KFL and Budd Canada are inactive entities with no operating assets and no material liquid assets (other than the Escrow Funds). They do have significant and mounting obligations including pension and other non-pension post-employment benefit ("OPEB") obligations to the Applicants' former employees and certain former employees of Budcan Holdings Inc. or the surviving spouses of such former employees or others who may be entitled to claim through such persons in the *BIA* proceedings, including the OPEB creditors.

6 The background facts with respect to this motion are fully set out in the affidavit of Mr. William E. Aziz, sworn on September 13, 2011.

7 Affiliates of Budd Canada have provided up to date funding to Budd Canada to enable Budd Canada to fund, on behalf of KFL, such pension and OPEB obligations. However, given that KFL and Budd Canada have no active operations, the *status quo* is unsustainable.

8 The Applicants have acknowledged that they are insolvent and, in connection with the *BIA* proposal, proceedings were commenced on July 4, 2011.

9 On July 7, 2011, Wilton-Siegel J. granted Procedural Consolidation Orders in respect of KFL and Budd Canada which authorized the procedural consolidation of the Applicants and permitted them to file a single consolidated proposal to their creditors.

10 The Orders of Wilton-Siegel J. also appointed separate representative counsel to represent the interests of the Union and Non-Union OPEB creditors and further authorized the Applicants to continue making payments to Blue Cross in respect of the OPEB Claims during the *BIA* proposal proceedings.

11 On August 2, 2011, an order was granted extending the time to file a proposal to August 19, 2011.

12 The parties proceeded to negotiate the terms of the Consolidated Proposal, which meetings involved the Applicants, the Proposal Trustee, senior members of the CAW, Union Representative Counsel and Non-Union Representative Counsel.

13 An agreement in principle was reached which essentially provided for the monetization and compromise of the OPEB claims of the OPEB creditors resulting in a one-time, lump-sum payment to each OPEB creditor term upon implementation of the Consolidated Proposal. The Consolidated Proposal also provides that the Applicants and their affiliates will forego any recoveries on account of their secured and unsecured inter-company claims, which total approximately $120 million. A condition precedent was the payment of sufficient funds to the Pension Fund Trustee such that when such funds are combined with the value of the assets held in the Pension Plans, the Pension Fund Trustee will be able to fully annuitize the Applicants' pension obligations and pay the commuted values to those creditors with pension claims who so elected so as to provide for the satisfaction of the Applicants' pension obligations in full.

14 On August 19, 2011, the Applicants filed the Consolidated Proposal. Subsequent amendments were made on August 31, 2011 in advance of the creditors' meeting to reflect certain amendments to the proposal.

15 The creditors' meeting was held on September 1, 2011 and, at the meeting, the Consolidated Proposal, as amended, was accepted by the required majority of creditors. Over 99.9% in number and over 99.8% in dollar value of the Affected Creditors' Class voted to accept the Consolidated Proposal. The Proposal Trustee noted that all creditors voted in favour of the Consolidated Proposal, with the exception of one creditor, Canada Revenue Agency (with 0.1% of the number of votes representing 0.2% of the value of the vote) who attended the meeting but abstained from voting. Therefore, the Consolidated Proposal was unanimously approved by the Affected Creditors. The Applicants thus satisfied the required "double majority" voting threshold required by the *BIA*.

16 The issue on the motion was whether the court should sanction the Consolidated Proposal, including the substantive consolidation and releases contained therein.

17 Pursuant to s. 54(2)(d) of the *BIA*, a proposal is deemed to be accepted by the creditors if it has achieved the requisite "double majority" voting threshold at a duly constituted meeting of creditors.

18 The *BIA* requires the proposal trustee to apply to court to sanction the proposal. At such hearing, s. 59(2) of the *BIA* requires that the court refuse to approve the proposal where its terms are not reasonable or not calculated to benefit the general body of creditors.

19 In order to satisfy s. 59(2) test, the courts have held that the following three-pronged test must be satisfied:

(a) the proposal is reasonable;

(b) the proposal is calculated to benefit the general body of creditors; and

(c) the proposal is made in good faith.

See *Mayer, Re* (1994), 25 C.B.R. (3d) 113 (Ont. Bktcy.); *Steeves, Re* (2001), 25 C.B.R. (4th) 317 (Sask. Q.B.); *Magnus One Energy Corp., Re* (2009), 53 C.B.R. (5th) 243 (Alta. Q.B.).

20 The first two factors are set out in s. 59(2) of the *BIA* while the last factor has been implied by the court as an exercise of its equitable jurisdiction. The courts have generally taken into account the interests of the debtor, the interests of the creditors and the interests of the public at large in the integrity of the bankruptcy system. See *Farrell, Re* (2003), 40 C.B.R. (4th) 53 (Ont. S.C.J. [Commercial List]).

21 The courts have also accorded substantial deference to the majority vote of creditors at a meeting of creditors; see *Lofchik, Re*, [1998] O.J. No. 332 (Ont. Bktcy.). Similarly, the courts have also accorded deference to the recommendation of the proposal trustee. See *Magnus One*, *supra*.

22 With respect to the first branch of the test for sanctioning a proposal, the debtor must satisfy the court that the proposal is reasonable. The court is authorized to only approve proposals which are reasonable and calculated to benefit the general body of creditors. The court should also consider the payment terms of the proposal and whether the distributions provided for are adequate to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. For a discussion on this point, see *Lofchik*, *supra*, and *Farrell* , *supra*.

23 In this case, the Applicants submit that, if the Consolidated Proposal is sanctioned, they would be in a position to satisfy all other conditions precedent to closing on or prior to the date of the proposal ("Proposal Implementation Date").

24 With respect to the treatment of the Collective Bargaining Agreements, the Applicants and the CAW brought a joint application before the Ontario Labour Relations Board ("OLRB") on an expedited basis seeking the OLRB's consent to an early termination of the Collective Bargaining Agreements. Further, the CAW has agreed to abandon its collective bargaining rights in connection with the Collective Bargaining Agreements.

25 With respect to the terms and conditions of a Senior Secured Loan Agreement between Budd Canada and TK Finance dated as of December 22, 2010, TK Finance provided a secured creditor facility to the Applicants to fund certain working capital requirements before and during the *BIA* proposal proceedings. As a result of the approval of the Consolidated Proposal at the meeting of creditors, TK Finance agreed to provide additional credit facilities to Budd Canada such that the Applicants would be in a position to pay all amounts required to be paid by or on behalf of the Applicants in connection with the Consolidated Proposal.

26 On the issue as to whether creditors will receive greater recovery under the Consolidated Proposal than they would receive in the bankruptcy, it is noted that creditors with Pension Claims are unaffected by the Consolidated Proposal. The Consolidated Proposal provides for the satisfaction of Pension Claims in full as a condition precedent to implementation.

27 With respect to Affected Creditors, the Applicants submit that they will receive far greater recovery from distributions under the Consolidated Proposal than the Affected Creditors would receive in the event of the bankruptcies of the Applicants. (See Sanction Affidavit of Mr. Aziz at para. 61.)

28 The Proposal Trustee has stated that the Consolidated Proposal is advantageous to creditors for the reasons outlined in its Report and, in particular:

> (a) the recoveries to creditors with claims in respect of OPEBs are considerably greater under the Amended Proposal than in a bankruptcy;
>
> (b) payments under the Amended Proposal are expected in a timely manner shortly after the implementation of the Amended Proposal;
>
> (c) the timing and quantum of distributions pursuant to the Amended Proposal are certain while distributions under a bankruptcy are dependent on the results of litigation, which cannot be predicted with certainty; and
>
> (d) the Pension Plans (as described in the Proposal Trustee's Report) will be fully funded with funds from the Pension Escrow (as described in the Proposal Trustee's Report) and, if necessary, additional funding from an affiliate of the Companies if the funds in the Pension Escrow are not sufficient. In a bankruptcy, the Pension Plans may not be fully funded.

29 The Applicants take the position that the Consolidated Proposal meets the requirements of commercial morality and maintains the integrity of the bankruptcy system, in light of the superior coverage to be afforded to the Applicants' creditors under the Consolidated Proposal than in the event of bankruptcy.

30 The Applicants also submit that substantive consolidation inherent in the proposal will not prejudice any of the Affected Creditors and is appropriate in the circumstances. Although not expressly contemplated under the *BIA*, the Applicants submit that the court may look to its incidental, ancillary and auxiliary jurisdiction under s. 183 of the *BIA* and its equitable jurisdiction to grant an order for substantive consolidation. See *Ashley v. Marlow Group Private Portfolio Management Inc.* (2006), 22 C.B.R. (5th) 126 (Ont. S.C.J. [Commercial List]). In deciding whether to grant substantive consolidation, courts have held that it should not be done at the expense of, or possible prejudice of, any particular creditor. See *Ashley* , *supra*. However, counsel submits that this court should take into account practical business considerations in applying the *BIA*. See *A. & F. Baillargeon Express Inc., Re* (1993), 27 C.B.R. (3d) 36 (C.S. Que.).

31 In this case, the Applicants submit that substantive consolidation inherent in the Consolidated Proposal is appropriate in the circumstances due to, among other things, the intertwined nature of the Applicants' assets and liabilities. Each Applicant had substantially the same creditor base and known liabilities (other than certain Excluded Claims). In addition, KFL had no cash or cash equivalents and the Applicants are each dependant on the Escrow Funds and borrowings under the Restated Senior Secured Loan Agreement to fund the same underlying pension and OPEB obligations and costs relating to the Proposal Proceedings.

32 The Applicants submit that creditors in neither estate will be materially prejudiced by substantive consolidation and based on the fact that no creditor objected to the substantial consolidation, counsel submits the Consolidated Proposal ought to be approved.

33 With respect to whether the Consolidated Proposal is calculated to benefit the general body of creditors, TK Finance would be entitled to priority distributions out of the estate in a bankruptcy scenario. However, the Applicants and their affiliates have agreed to forego recoveries under the Consolidated Proposal on account of their secured and unsecured intercompany claims in the amount of approximately $120 million, thus enhancing the level of recovery for the Affected Creditors, virtually all of whom are OPEB creditors. It is also noted that TK Finance will be contributing over $35 million to fund the Consolidated Proposal.

34 On this basis, the Applicants submit that the Consolidated Proposal is calculated to benefit the general body of creditors.

35 With respect to the requirement of the proposal being made in good faith, the debtor must satisfy the court that it has provided full disclosure to its creditors of its assets and encumbrances against such assets.

36 In this case, the Applicants and the Proposal Trustee have involved the creditors pursuant to the Representative Counsel Order, and through negotiations with the Union Representative Counsel and Non-Union Representative Counsel.

37 There is also evidence that the Applicants have widely disseminated information regarding their *BIA* proposal proceedings through the media and through postings on the Proposal Trustee's website. Information packages have also prepared by the Proposal Trustee for the creditors.

38 Finally, the Proposal Trustee has noted that the Applicants' conduct, both prior to and subsequent to the commencement of the *BIA* proposal proceedings, is not subject to censure in any respect and that the Applicants' have acted in good faith.

39 There is also evidence that the Consolidated Proposal continues requisite statutory terms. The Consolidated Proposal provides for the payment of preferred claims under s. 136(1) of the *BIA*.

40 Section 7.1 of the Consolidated Proposal contains a broad release in favour of the Applicants and in favour of certain third parties (the "Release"). In particular, the Release benefits the Proposal Trustee, Martinrea, the CAW, Union Representative Counsel, Non-Union Representative Counsel, Blue Cross, the Escrow Agent, the present and former shareholders and affiliates of the Applicants (including Thyssenkrupp USA, Inc. ("TK USA"), TK Finance, Thyssenkrupp Canada Inc. ("TK Canada") and Thyssenkrupp Budd Company), as well as their subsidiaries, directors, officers, members, partners, employees, auditors, financial advisors, legal counsel and agents of any of these parties and any person liable jointly or derivatively through any or all of the beneficiaries of the of the release (referred to individually as a "Released Party").

41 The Release covers all Affected Claims, Pension Claims and Escrow Fund Claims existing on or prior to the later of the Proposal Implementation Date and the date on which actions are taken to implement the Consolidated Proposal.

42 The Release provides that all such claims are released and waived (other than the right to enforce the Applicants' or Proposal Trustee's obligations under the Consolidated Proposal) to the full extent permitted by applicable law. However, nothing in the Consolidated Proposal releases or discharges any Released Party for any criminal or other wilful misconduct or any present or former directors of the Applicants with respect to any matters set out in s. 50(14) of the *BIA*. Unaffected Claims are specifically carved out of the Release.

43 The Applicants submit that the Release is both permissible under the *BIA* and appropriately granted in the context of the *BIA* proposal proceedings. Further, counsel submits, to the extent that the Release benefits third parties other than the Applicants, the Release is not prohibited by the *BIA* and it satisfies the criteria that has been established in granting third-party releases under the *Companies' Creditors Arrangement Act* ("*CCAA*"). Moreover, counsel submits that the scope of the Release is no broader than necessary to give effect to the purpose of the Consolidated Proposal and the contributions made by the third parties to the success of the Consolidated Proposal.

44 No creditors or stakeholders objected to the scope of the Release which was fully disclosed in the negotiations, including the fact that the inclusion of the third-party releases was required to be part of the Consolidated Proposal. Counsel advises that the scope of the Release was referred to in the materials sent by the Proposal Trustee to the Affected Creditors prior to the meeting, specifically discussed at the meeting and adopted by the unanimous vote of the voting Affected Creditors.

45 Counsel also submits that there is no provision in the *BIA* that clearly and expressly precludes the Applicants from including the Release in the Consolidated Proposal as long as the court is satisfied that the Consolidated Proposal is reasonable and for the general benefit of creditors.

46 In this respect, it seems to me, that the governing statutes should not be technically or stringently interpreted in the insolvency context but, rather, should be interpreted in a manner that is flexible rather than technical and literal, in order to deal with the numerous situations and variations which arise from time to time. Further, taking a technical approach to the

of quantum and timing, with the Applicants' funding of OPEB Claims terminating on bankruptcy, but distributions to the OPEB Creditors and other Creditors delayed for at least a year or two but perhaps much longer.

89 The Applicants and their affiliates also benefit from the Release as an affiliate of the Applicants may become enabled to use the net operating losses (NOL) following a series of transactions that are expected to occur immediately following the Proposal Implementation Date.

90 I am also satisfied that the Applicants have provided full and adequate disclosure of the Releases and their effect. Full disclosure was made in the proposal term sheet circulated to both Representative Counsel in early August 2011. The Release was negotiated as part of the Consolidated Proposal and the scope of the Release was disclosed by the Proposal Trustee in its Report to the creditors on the terms of the Consolidated Proposal, which Report was circulated by the Proposal Trustee to the Applicants' known creditors in advance of the creditors' meeting.

91 I am satisfied that the Applicants, with the assistance of the Proposal Trustee, took appropriate steps to ensure that the Affected Creditors were aware of the existence of the release provisions prior to the creditors' meeting.

92 For the foregoing reasons, I have concluded that the Release contained in the Consolidated Proposal meets the *Metcalfe* criteria and should be approved.

93 In the result, I am satisfied that the section 59(2) *BIA* test has been met and that it is appropriate to grant the Sanction Order in the form of the draft order attached to the Motion Record. An order has been signed to give effect to the foregoing.

Motion granted.

End of Document

TAB 4

2002 BCSC 1022
British Columbia Supreme Court

Abou-Rached, Re

2002 CarswellBC 1642, 2002 BCSC 1022, [2002] B.C.W.L.D. 861,
[2002] B.C.J. No. 1588, 114 A.C.W.S. (3d) 991, 35 C.B.R. (4th) 165

In the Matter of the Proposal of Roger Georges Abou-Rached

In the Matter of the Proposal of R.A.R. Investments Ltd.

Ross J.

Heard: April 9-11, 24-26, 2002
Judgment: July 8, 2002
Docket: Vancouver 219307VA01, 219301VA01

Counsel: *David A. Gray*, *M. Nielsen*, for Trustee, Campbell Saunders Ltd.
Bruce E. McLeod, for Genesee Enterprises Ltd.
Alan E. Keats, for Jean de Grasse, Robert de Grasse, Andre de Grasse, Claire de Grasse, Frank de Grasse, Eric Boulton, D'Arcy Boulton, Gurdrun Kate Parkes, Kenneth James Parkes, Michael A. Parkes, Greg Findlay, Susan Findlay, Phil Argue, Glenn Morris and Four Weal Ventures Ltd.
Andrew G. Sandilands, for Roger Abou-Rached, R.A.R. Investments Ltd.
Jennifer L. Harry, for Stanley Rodham Investments Ltd., Randers International Ltd., Rosebar Enterprises Limited, Sirmac International Ltd., Veda Consult S.A., Yarold Trading Ltd.
Heather M. Ferris, for Georges Abou-Rached, Hilda Abou-Rached, RAR Consulting Ltd., Garmeco Canada International Consulting Engineers Ltd.

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.ii Reasonable terms
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.iii Interests of creditors
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.c Bankrupt offering less than 50¢ on dollar
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.d Misconduct of bankrupt
Bankruptcy and insolvency

XII Meeting of creditors
XII.4 Voting
XII.4.b Who may vote
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.6 Discovery and examinations
XVII.6.b By creditor

Headnote

Bankruptcy --- Proposal — Approval by court — Conditions — Reasonable terms

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — First proposal estimated creditors would receive 15 cents on dollar — Second proposal offered creditors right to elect potential recovery of all claims — Eighty-five per cent of creditors voted in favour of proposals — Debtors brought application for approval of proposals — Application granted — In event of bankruptcy, no unencumbered assets existed that could be available to unsecured creditors — Amount of excess income was minimal — Guaranteed payment existed for some recovery by unsecured creditors — Proposals had reasonable prospect of succeeding according to terms — Proposals were not filed solely to avoid judgment — Recovery would be greater under proposals than in bankruptcy — Proposals were in interests of creditors.

Bankruptcy --- Proposal — Approval by court — Conditions — Interests of creditors

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — First proposal estimated creditors would receive 15 cents on dollar — Second proposal offered creditors right to elect potential recovery of all claims — Eighty-five per cent of creditors voted in favour of proposals — Debtors brought application for approval of proposals — Application granted — In event of bankruptcy, no unencumbered assets existed that could be available to unsecured creditors — Amount of excess income was minimal — Guaranteed payment existed for some recovery by unsecured creditors — Proposals had reasonable prospect of succeeding according to terms — Proposals were not filed solely to avoid judgment — Recovery would be greater under proposals than in bankruptcy — Proposals were in interests of creditors.

Bankruptcy --- Proposal — Approval by court — Bankrupt offering less than 50¢ on dollar

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — First proposal estimated creditors would receive 15 cents on dollar — Second proposal offered creditors right to elect potential recovery of all claims — Majority of creditors voted in favour of proposals — Debtors brought application for approval of proposals — Application granted — Debtors' assets were less than 50 cents on dollar for unsecured liabilities — Individual debtor had assets to support guarantees at time guarantees were given — Debtors were not responsible for shortfall in value of assets — Shortfall was attributed to circumstances for which debtors could not be held responsible — Debtors gave satisfactory account for loss of assets or deficiency of assets.

Bankruptcy --- Proposal — Approval by court — Misconduct of bankrupt

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees

and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — First proposal estimated creditors would receive 15 cents on dollar — Second proposal offered creditors right to elect potential recovery of all claims — Majority of creditors voted in favour of proposals — Debtors brought application for approval of proposals — Application granted — Debtors' conduct during litigation was reprehensible — Dissenting creditors established pursuant to s. 173(1)(f) of Bankruptcy and Insolvency Act that debtors' defence was frivolous and vexatious — Trustee examined transactions conducted prior to litigation and concluded further investigation was necessary to determine whether transactions were settlement or fraudulent preference — Since no conviction or finding of fraud existed against debtors from judgment in criminal or civil court, finding of fraud could not be made on allegations — More than mere suspicion required to find proposals were not reasonable by virtue of debtors' conduct — Proposals were still reasonable within meaning of s. 59 of Act — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 59, 173(1)(f).

Bankruptcy --- Meeting of creditors — Voting — Who may vote

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — Majority of creditors voted in favour of proposals — Dissenting creditors appealed trustee's decision to allow certain creditors to vote at meeting of creditors — Appeal dismissed — Trustee found creditors' claims were sufficient and that promissory notes held by creditors were evidence of debt — Creditors showed they had claims provable in proposal — No evidence existed that corporate creditor's debts were not bona fide — Corporate creditor was not related person to either individual or corporate bankrupt pursuant to s. 4 of Bankruptcy and Insolvency Act — No evidence of bonds of dependence, control, influence or moral pressure existed to indicate debtors and corporate creditor were not dealing at arms' length — No evidence existed that transactions entered by individual debtor after commencement of litigation with dissenting creditors were directed to collusive end so as to prevent dissenting creditors from collecting award from litigation — Transactions in dispute were of investments in development of technology — No evidence existed that investment funds were diverted or used for other purposes — No basis existed to disallow creditors in question from voting on proposal — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 4.

Bankruptcy --- Practice and procedure in courts — Discovery and examinations — By creditor

Individual debtor developed new construction technology — Debtor purchased rights to technology from employer — Debtor incorporated four companies, in which he held 100 per cent interest, to license technology — Debtor executed guarantees and pledged shares to companies' investors — Investors' repeated requests for conversion of shares were refused — Investors commenced action against individual and corporate debtors for oppression and conflict of interest — As result of litigation, investors were awarded $982,746 in damages — Debtors' major creditor issued demand — Trustee in bankruptcy recommended two proposals put forward by debtors — Majority of creditors voted in favour of proposals — Dissenting creditors brought application for order for cross-examination of individuals — Application dismissed — Dissenting creditors did not meet threshold of sufficient cause so as to order examinations.

Table of Authorities

Cases considered by *Ross J.*:

DeGrasse v. Stephenson (June 9, 1995), Doc. Vancouver A943129 (B.C. S.C.) — considered

Forsberg, Re, 26 C.B.R. (4th) 204, 2001 SKQB 289, 2001 CarswellSask 445, *(*sub nom. *Forsberg (Bankrupt), Re)* 209 Sask. R. 196 (Sask. Q.B.) — referred to

Genesee Enterprises Ltd. v. Abou-Rached, 2001 BCSC 59, 2001 CarswellBC 84, 84 B.C.L.R. (3d) 277 (B.C. S.C.) — referred to

Gingras, Robitaille, Marcoux Ltée v. Beaudry, [1980] C.S. 468, *(*sub nom. *Tremblay, Re)* 36 C.B.R. (N.S.) 111, 1980 CarswellQue 59 (C.S. Que.) — followed

Grobstein v. Brock Mills Ltd., *(*sub nom. *Orchid Fashions Inc., Re)* 2 C.B.R. (N.S.) 103, 1961 CarswellQue 29 (C.S. Que.) — referred to

Gustafson Pontiac Buick Cadillac GMC Ltd., Re, 30 C.B.R. (3d) 280, *(*sub nom. *Gustafson Pontiac Buick Cadillac GMC Ltd. (Bankrupt), Re)* 129 Sask. R. 293, 1995 CarswellSask 4 (Sask. Q.B.) — considered

Hartland Pipeline Services Ltd. (Trustee of) v. Bennett Jones, 2000 CarswellAlta 592, 18 C.B.R. (4th) 28, *(*sub nom. *Hartland Pipeline Services Ltd. (Bankrupt) v. Bennett Jones)* 272 A.R. 319 (Alta. Q.B.) — considered

Herd, Re, 77 C.B.R. (N.S.) 209, 1989 CarswellBC 377 (B.C. C.A.) — distinguished

Lofchik, Re, 1998 CarswellOnt 194, 1 C.B.R. (4th) 245 (Ont. Bktcy.) — considered

McNamara v. McNamara, 53 C.B.R. (N.S.) 240, 1984 CarswellOnt 186 (Ont. Bktcy.) — referred to

NsC Diesel Power Inc., Re, 1997 CarswellNS 406, 49 C.B.R. (3d) 213 (N.S. S.C. [In Chambers]) — referred to

NsC Diesel Power Inc., Re, 1998 CarswellNS 331, *(*sub nom. *NsC Diesel Power Inc. (Bankrupt), Re)* 170 N.S.R. (2d) 236, *(*sub nom. *NsC Diesel Power Inc. (Bankrupt), Re)* 515 A.P.R. 236, 6 C.B.R. (4th) 96 (N.S. C.A.) — referred to

Paskauskas, Re, 36 C.B.R. (3d) 288, 1995 CarswellOnt 948 (Ont. Bktcy.) — referred to

R.L. Coolsaet of Canada Ltd., Re, 45 C.B.R. (3d) 30, 1996 CarswellOnt 5202 (Ont. Bktcy.) — considered

Touhey v. Barnabe, 1995 CarswellOnt 3495 (Ont. Bktcy.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — considered

s. 3 — considered

s. 4 — considered

s. 4(1) "related group" — considered

s. 4(1) "unrelated group" — considered

s. 59 — considered

s. 59(2) — considered

s. 59(3) — considered

s. 91(1) — referred to

s. 109(6) — considered

s. 111 — considered

s. 172 — considered

s. 163(1) — referred to

s. 163(2) — considered

s. 173 — considered

s. 173(1)(a) — considered

s. 173(1)(d) — considered

s. 173(1)(f) — considered

s. 173(1)(g) — considered

s. 173(1)(k) — considered

Bills of Exchange Act, R.S.C. 1985, c. B-4
s. 179(2) — considered

APPLICATION by debtors to approve proposal; APPEAL by dissenting creditors of trustee in bankruptcy's decision to allow certain creditors to vote at meeting of creditors; CROSS-APPLICATION by dissenting creditors for order to cross-examination of individuals.

***Ross J.*:**

I Introduction

1 This was a hearing to deal with several matters in relation to two proposals filed under the *Bankruptcy and Insolvency Act*, RSC 1985 c. B-3 (the "*Act*").

2 The parties are:

(a) the Trustee, Campbell Saunders Ltd.;

(b) Mr. Abou-Rached and RAR Investments Ltd. ("RAR") who each filed a proposal;

(c) two groups of creditors supporting the proposals:

(i) Stanley Rodham Investments ("SRI"), Randers International Ltd., Rosebar Enterprises Ltd., Sirmac International Ltd., Veda Consult S.A., and Yarold Trading Ltd.; and

(ii) RAR Consulting Ltd. ("RARC"), Garmeco Canada International Consulting Engineers Ltd., Georges Abou-Rached, and Hilda Abou-Rached;

(d) two creditors who are in opposition to the proposal:

(i) Genesee Enterprises Ltd., a judgment creditor ("Genesee"); and

(ii) Jean de Grasse, Robert de Grasse, Andre de Grasse, Claire de Grasse, Frank de Grasse, Eric Boulton, D'Arcy Boulton, Gurdrun Kate Parkes, Kenneth James Parkes, Michael A. Parkes, Greg Findlay, Susan Findlay, Phil Argue, Glenn Morris and Four Weal Ventures Ltd., defendants by counterclaim in litigation involving Genesee as plaintiff (the "Defendants by Counterclaim")

(collectively the "dissenting creditors".)

3 The matters are:

(a) appeals by the dissenting creditors from the decision of the Trustee to permit certain creditors to vote at the meeting of creditors;

(b) applications for court approval of the Proposals. These are opposed by the dissenting creditors on the grounds that the Proposals do not meet the criteria under s. 59 of the *Act* and that facts under s. 173 of the *Act* are present;

(c) an application by the dissenting creditors for orders for the cross-examination of several individuals.

4 On the basis of the reasons that follow, I have approved the Proposals and dismissed the balance of the relief sought.

II BACKGROUND

5 Mr. Roger Abou-Rached was born in Beirut, Lebanon in 1951. He is an engineer who received his training at the American University in Beirut and at Stanford University in California.

6 Mr. Abou-Rached's father, George Abou-Rached, is a prominent engineer. He held the position of Dean and Professor of Engineering at the American University in Beirut. In addition, he was involved in engineering projects in the Middle East, Asia and Africa through his company Garmeco International Consultants Ltd. ("Garmeco").

7 Garmeco employed Roger Abou-Rached as an engineer, at first, in Lebanon. His employment later continued in Canada when the family fled the Lebanese civil war in 1989 and immigrated to this country.

8 During the time that he was employed by Garmeco, Roger Abou-Rached developed a new construction technology (the "Technology"). The Technology is said to employ "a special reinforced concrete/pre-formed rigid insulation/cold formed metals method of construction" that utilized built-in, rectangular, hollow, metal section tubing as panel framing members. The system is said to be extremely flexible with respect to the type and quality of interior and exterior finish. It provides greater safety, energy efficiency, sound insulation and resistance to insect infestation. The system is also said to provide an environmentally sound building method potentially using recycled ferrous, plastics and organic fibers.

9 Mr. Abou-Rached acquired the rights to the Technology from Garmeco. Over the next several years a number of corporate entities became involved in the development. There were, in addition, a series of transactions, which are characterized by Mr. Abou-Rached and the creditors supporting the Proposals as being in relation to continuing efforts to raise funds in pursuit of that development. These transactions were primarily with SRI, an investment group in Europe, several private investors, as well as members of Mr. Abou-Rached's family and related companies.

10 Mr. Abou-Rached has stated that in excess of $20,000,000 has been invested in the development of the Technology, primarily by SRI, his family and related companies. He stated that in order to obtain these funds, he executed guarantees and transferred and pledged shares in his companies to the investors.

11 The transactions are characterized by the dissenting creditors as collusive efforts to prejudice them. In the background and at the root of the issue is litigation between Mr. Abou-Rached and these dissenting creditors, the judgment of which is reported at *Genesee Enterprises Ltd. v. Abou-Rached*, 2001 BCSC 59 (B.C. S.C.) (the "Litigation").

12 The principal entities in respect of the development of the Technology are described in the Trustee's Report and the reasons of Justice Levine in the Litigation. Mr. Abou-Rached incorporated four companies, holding 100% of the shares of each at the outset. These companies were:

(a) RARC,

(b) R.A.R. International Assets Inc. ("RARI"),

(c) Canadian High-Tech Manufacturing Ltd ("CHT"), and

(d) RAR.

13 Roger Abou-Rached obtained the rights to the Technology from Garmeco pursuant to an Assignment of Technology effective September 11, 1990 and executed on August 31, 1993. The purchase price was $5,000,000 US. There was a written and executed promissory note from Mr. Abou-Rached in the amount of $5,000,000 US in favour of Garmeco dated September 12, 1990. In addition, there was an agreement that provided that the debt was to be repaid on a pro-rated basis from net cash flow from dividends paid by CHT to Roger Abou-Rached.

14 Effective April 1991, by agreement executed August 31, 1993, Mr. Abou-Rached assigned the absolute rights in the Technology to RARC. RARC granted a licence to CHT for the use of the Technology in Canada and a right of first refusal for its use in any other territory in the world.

15 In May 1993, Roger Abou-Rached transferred 65% of his shares in CHT to a publicly traded company, International Hi-Tech Industries Ltd. ("IHI") and acquired control of IHI in a "reverse take over" on the Vancouver Stock Exchange. CHT transferred the rights to the Technology in Canada to IHI. IHI is currently developing and marketing the Technology.

16 In 1990 and 1991, a number of individuals had made investments in various instruments related to CHT. These individuals were either members of the de Grasse family or introduced to Mr. Abou-Rached by the de Grasse family. In late 1991, Jean de Grasse, Robert de Grasse and Mr. Abou-Rached discussed a mechanism by which these investors could convert their investments into equity in CHT. It was substantially agreed that one entity, Genesee, would hold in trust all of the CHT shares issued to these investors. RAR had an option to buy, on notice given by CHT before November 1, 1996, any or all of the CHT shares held by Genesee for a purchase price calculated according to a formula, payable at Genesee's option, in cash or shares in IHI. This agreement was finally executed in mid-1992 (the "Genesee Agreement").

17 In late 1993 several individuals who were parties to the Genesee Agreement requested conversion of their shares of CHT pursuant to that agreement. They were informed that the requests could not be honoured because the requests, pursuant to the Agreement, had to be made by Genesee.

18 Jean de Grasse, as President of Genesee, then gave notice of conversion on their behalf. That notice in turn was refused because it had not been approved by Genesee's Board of Directors.

19 The Board met, but the requests for conversion were not approved because of a deadlock on the Board. One director, Michael Stephenson, a director of both Genesee and IHI, and on behalf of Hang Guong, the fourth director, refused to approve the conversions.

20 In the result, an action was commenced in which a claim of oppression and conflict of interest was advanced. In *De Grasse v. Stephenson* (June 9, 1995), Doc. Vancouver A943129 (B.C. S.C.) (the "Petition"), Mr. Stephenson was found to be in a conflict of interest. Genesee was ordered to give notice of the requests for conversion. The requests were issued on July 7, 1995.

21 The requests were not honoured. Mr. Abou-Rached and RAR claimed that the Genesee Agreement did not provide for the conversion right claimed. The Litigation was commenced. In addition to raising several defences with respect to the Genesee Agreement, the defendants claimed that the Agreement should be rescinded on the basis of fraudulent misrepresentation. Claims of conspiracy and breach of fiduciary duty were also raised by the defendants.

22 The individuals who had sought conversion through Genesee, the Defendants by Counterclaim, were named in a counterclaim which repeated the allegations raised in the defence.

23 In June 1995, RARC granted a licence agreement for the international rights to the Technology, excluding Canada, to IHI International Holdings Ltd. ("IHIL"). IHIL is owned 51% by IHI and 49% by Mr. Abou-Rached's family.

24 Judgment in the Litigation was pronounced January 9, 2001. The plaintiff, Genesee, was awarded damages of $982,746.94 plus interest. The counterclaim was dismissed. In supplementary reasons for judgment, reported at 2001 BCSC 1172 (B.C. S.C.), Justice Levine awarded the plaintiff and the Defendants by Counterclaim special costs.

25 Following the pronouncement of the reasons for judgment SRI, one of the major creditors of Mr. Abou-Rached and RAR, issued a demand. Mr. Abou-Rached and RAR each then filed a Notice of Intention to File a Proposal, as they were unable to meet their financial obligations as they became due. Mr. Abou-Rached and RAR, after obtaining two extensions from the court, ultimately filed the Proposals on January 7, 2002.

26 Campbell Saunders Ltd. is the Trustee under the Proposals.

27 The Proposals were summarized by the Trustee as follows

Option A

a) An amount totaling $150,000 CDN, to be provided by SRI ($75,000) and the Debtor's parents or other family members ("the family") ($75,000);

b) Common shares in the capital of IHI having a market value of $150,000 as at the date of the initial bankruptcy event, to be provided by SRI ($75,000) and the family ($75,000); and

c) (a) and (b) above are to be delivered to the Trustee no later than 31 days following Court approval.

The shares will be issued in or transferred in the name of the Creditor(s), to be held and distributed by an Authorized Representative agreed upon by the Creditor(s).

The Debtor also agrees that for a period of two years from the date of Court Approval, he shall deliver to the Trustee:

- 5% of any common shares, warrants, options or escrow shares he may receive from or in the capital of IHI; or
- anytime after 120 days following Court approval of the Proposal, provide $100,000 CDN in cash; or
- that number of common shares in the capital of IHI equal to $100,000 CDN.

The future shares delivered to the Trustee shall be issued in the name of the Authorized Representative in trust for the Creditors.

The Authorized Representative shall not sell the common shares and/or future shares at a rate exceeding 2% of the original total number of common shares and/or future shares each day.

Option B

The claim of the Creditors who elect this Option will survive for seven (7) years (or as agreed to by the Debtor and the Creditors).

The Creditors will be entitled to accrue or charge a maximum of 2% interest per annum to the amount of their claim.

With the exception of 2,600,000 stock options in the capital of IHI and 21,684,958 common shares held in escrow in the capital of IHI that are held in the name of Mira Mar Overseas Ltd. and all rights or entitlement accruing in relation thereto (the "Existing Encumbered Shares"), the Debtor shall for a period not exceeding seven years (or such other period of time as may hereafter be agreed to by the Debtor and the Creditors who elect to Option B of the Proposal) from the date of filing of the initial bankruptcy event, pledge and deliver to the Trustee 30% of any options, warrants, common or preferred shares whether held in escrow or not that the Debtor may receive or be entitled to receive in the capital of IHI from and after the date of the initial bankruptcy event (hereinafter any future right to receive options, warrants, common or preferred shares, whether held in escrow or not shall collectively be referred to as the "Option B Future Shares"). For greater certainty, the Option B Future Shares do not include the existing encumbered shares.

The Option B Future Shares shall be issued in the name of the Authorized Representative in trust for the Creditors and delivered to the Trustee within 30 days of receipt or soon thereafter as may be reasonable.

The Trustee shall forward to the Authorized Representative and the Authorized Representative shall not sell the shares at a rate greater than 2,000 common shares each trading day.

The Authorized Representative shall sell the shares upon receipt of written instructions delivered to it by the Creditors.

If the Creditors' claims are not paid by the last day of the seventh year (or such other period of time as may be agreed to by the Debtor and Creditors), such claim shall be released and shall not be recoverable.

Prior to the Creditors' Meeting, the Debtor will obtain from SRI and the Family irrevocable direction agreeing that they will elect to participate in Option B and waive or release any right or entitlement of the Option A Future Shares that they may have pursuant to any security given by the Debtor prior to the initial bankruptcy event.

The Debtor will only be obligated to deliver the Option B Future Shares to the Trustee to the extent necessary to repay in full the claims of those creditors who elect Option B.

The Debtor can at any time deliver to the Trustee the sum of money or number of shares in the capital of IHI necessary to repay in full the claims of the Creditors.

Upon delivery the Debtor shall be released and proved discharges.

28 In the course of these proceedings the Proposals were amended as follows:

- All creditors, except credit cards, banks, Canada Customs and Revenue Agency, and contingent creditors, have agreed to accept Proposal Option B;

- Within 30 days of Court Approval, the Proposal will provide that the Trustee will receive $150,000 cash;

- Within 30 days of Court Approval, the Proposal will provide that the Trustee will receive the shares as stated in Paragraph 15 of the Proposal. Should the Trustee be unable to realize a total of $150,000 within 90 days of Court Approval, the Proposal will provide that the Trustee will receive the additional funds in cash;

- Within 90 days of Court Approval, the Proposal will provide that the Trustee will receive shares to a value of $100,000 and should the Trustee be unable to realize a total of $100,000 within 150 days of Court Approval, the Proposal will provide that the Trustee will receive the additional funds in cash;

- The retainer held by the Trustee in the amount of $27,500, will be applied to the Trustee's fees and Mr. Rached's parents, who provided the retainer, will have no claim in the estate for that amount.

29 The Trustee estimates that, with the amendment, the creditors in Option A will realize at least 15 cents on the dollar for their claims.

30 The Trustee recommended the Proposals, stating:

According to the Statement of Affairs, there are no unencumbered assets that would be available to the unsecured creditors in a Bankruptcy scenario. The amount of excess income that would be available is minimal and, in all likelihood, would be less than the Trustee's fees and disbursements.

The only potential recovery available to the Estate would require the voiding of the various transfers, sales and pledges described herein. As indicated in this report, this would require further investigation and, in all likelihood, expensive litigation. The cost of this process would be great and beyond the availability of funds from tangible assets. Any effort in this regard would therefore require funding by the Creditors and there is no certainty that the required funding would be forthcoming. Finally, the conclusion of further investigation may be that all of the transactions are bona fide and for fair consideration.

Accordingly, at this time we are unable to estimate with any degree of certainty the estimated realization in a Bankruptcy scenario. The terms of the Proposal, on the other hand, offer the creditors certainty as to recovery with the right to elect the potential recovery of all of their claims (under Option B) or a portion of their claims (under Option A).

In fact, the situation at the outset of the hearing and prior to the amendment was that recovery under the Proposals would have been in the order of 4 or 5 cents on the dollar.

31 The meeting of creditors was held on January 28, 2002. In the Proposal of Roger Georges Abou-Rached, the following was the result of the creditors' vote:

For: 48	$13,198,794.64	87.78%
Against: 2	$ 1,837,369.98	12.22%
	$15,036,164.62	

In the Proposal of R.A.R. Investments Ltd., the following was the result of the creditors' vote:

For: 48	$11,542,876.46	86.26%
Against: 2	$ 1,837,369.98	13.74%
	$13,380,846.44	

32 Creditors Genesee and the Defendants by Counterclaim voted against the Proposals. Their claims were with respect to the judgment arising from the litigation and the award of special costs.

33 Following the meeting of creditors, a series of appeals were brought. Registrar Sainty, in reasons dated April 3, 2002, with respect to one appeal, allowed the unsecured claim of the Defendants by Counterclaim at 70% rather than the 50% allowed by the Trustee in the RAR proposal. Accordingly, the dollars voted against that Proposal were increased, but not by enough to change the outcome of the vote.

III. APPEAL FROM THE TRUSTEE'S DECISION TO ALLOW CERTAIN CREDITORS TO VOTE ON THE PROPOSALS

34 The dissenting creditors appealed against the Trustee's decision to permit certain creditors to vote on the Proposals. First, the dissenting creditors submit that the Trustee erred in allowing the claims of Ka Po Cheung, Larry Coston, and the Five Small Creditors; namely, Han Hoang, IACS Technologies Inc., Thinh Le, Nhan Thi Le and Hong Dinh Le.

35 Han Hoang is a former director of Genesee. The dissenting creditors asserted that, following the ruling of Justice Henderson in the Petition, Ms. Hoang avoided attending the directors meeting of Genesee, which was required in order to permit Genesee to formally request conversion of the shares, and thereby assisted Mr. Abou-Rached and RAR in their opposition to the conversion requests.

36 Ms. Hoang submitted three proofs of claim in Mr. Abou-Rached's Proposal, for $1,000, $1,500 and $300,000. The $1,000 claim arises from a cheque of Ms. Hoang in the amount of $5,000, said to represent five $1,000 loans from the Five Small Creditors. She was only permitted to vote with respect to the first two claims as the Trustee concluded that the large claim was a contingent claim. In the RAR Proposal, Ms. Hoang claims $1,000 and $300,000. The Trustee's decision with respect to voting was the same with respect to that Proposal.

37 Ko Po Cheung filed a proof of claim in the Proposal of Mr. Abou-Rached in the amount of $2,159.12, Larry Coston filed a proof of claim in the amount of $1,500, The Five Small Creditors filed proofs of claim in the amount of $1,000 each.

38 The dissenting creditors' complaints with respect to these claims are that:

- There is no evidence that any consideration was given for the promissory notes provided by Mr. Abou-Rached and RAR.
- There is no evidence that Ms. Hoang received $1,000 each from IACS Technologies Inc., Thinh Le, Nhan Thi Le and Hong Dinh Le in relation to the $5,000 cheque.

which the dissenting creditors allege these collusive transactions occurred covers effectively the entire period during which investors were being sought to develop the Technology. Again there is no evidence before me that the impugned transactions were other than what they purport to be.

54 In short, I am unable to conclude that the transactions criticized by the dissenting creditors are other than *bona fide*.

55 Finally, the dissenting creditors rely upon s. 111 of the *Act*. That section provides:

> 111. **Creditor secured by bill or note** — A creditor shall not vote in respect of any claim on or secured by a current bill of exchange or promissory note held by him, unless he is willing to treat the liability to him thereon of every person who is liable thereon antecedently to the debtor, and who is not a bankrupt, as a security in his hands and to estimate the value thereof and for the purposes of voting, but not for the purposes of dividend, to deduct it from his claim.

56 The submission with respect to s. 111 was that, with respect to the claim of the Five Small Creditors, IHI was primarily liable for the debt and the debtor was a guarantor, secondarily liable. Since IHI is not a bankrupt or filing a proposal, when the IHI amount is deducted, the value of the claim is reduced to zero.

57 A similar argument was made with respect to all but the first $1.5 million of the SRI claim. The loan was made, it was submitted, to RARC, which is neither a party to the Proposals nor a bankrupt. It is the primary debtor and RAR was merely the guarantor. The amount to which the non-bankrupt party, RARC, is liable should therefore be subtracted from the claim for voting purposes.

58 Counsel were not able to provide any authorities commenting upon the interpretation of this provision of the *Act*.

59 Counsel for SRI and the Group of Five submitted that, pursuant to s. 179(2) of the *Bills of Exchange Act*, the relevant promissory notes are, in fact, joint and several promissory notes in that the notes bear the words "I promise to pay" and are signed by two or more people.

60 Second, SRI submitted that s. 111 does not require the reduction of any claim by reason of cross guarantees. Where there is a guarantee, the guaranteed amount can be claimed in full. The Trustee also submitted that, in his experience, this represents the practice.

61 Finally, counsel notes that SRI did in fact estimate the value of its security and subtract it from the amount of its claim. Its full claim was $18,812,876.46 from which it deducted $7,425,000 representing the security it holds.

62 I have concluded that the disputed claims are evidenced by loan agreements and promissory notes. The promissory notes are joint and several notes. The value of security held by the creditor has been deducted from the claims. There is no basis on which to disallow these claims from voting with respect to the proposal.

63 Accordingly, the appeals from the Trustee's decision to permit these creditors to vote with respect to the Proposals is dismissed.

IV. REVIEW OF THE PROPOSALS PURSUANT TO SECTION 59 OF THE *ACT*

64 The process with respect to court approval of a proposal is set out in s. 59 of the *Act* which provides in part:

> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

65 The court is not bound to approve a proposal even if it has an unqualified recommendation of the Trustee and the overwhelming support of creditors, see *Grobstein v. Brock Mills Ltd.* (1961), 2 C.B.R. (N.S.) 103 (C.S. Que.). However, where,

as here, a proposal has been approved by a large majority of creditors and recommended by the Trustee, substantial deference will be given to their views.

66 For example, the Court in *Gustafson Pontiac Buick Cadillac GMC Ltd., Re* (1995), 30 C.B.R. (3d) 280 (Sask. Q.B.) cited the following passage from Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3rd ed., (Toronto: Carswell, 1993) in refusing to reject a proposal approved by a majority of creditors: "If, however, a large majority of creditors, i.e., substantially in excess of the statutory majority, have voted for acceptance of a proposal, it will take strong reasons for the court to substitute its judgment for that of the creditors".

67 In determining whether to approve a proposal, the court must consider the wishes and interests of the creditors, the conduct and interest of the debtor, the interests of the public and future creditors and the requirements of commercial morality, see *Lofchik, Re* (1998), 1 C.B.R. (4th) 245 (Ont. Bktcy.).

A. Are the Terms of the Proposal Reasonable?

68 The first question to be addressed is whether the terms of the proposal are reasonable. Reasonable in this context has been determined to mean that the proposal must have a reasonable possibility of being successfully completed in accordance with its terms. In addition, the proposal must meet the requirements of commercial morality and must maintain the integrity of the bankruptcy system, see *Lofchik, Re*, *supra*.

69 The onus is on the Trustee and the creditors who support the proposal to establish that the proposal is reasonable, see *McNamara v. McNamara* (1984), 53 C.B.R. (N.S.) 240 (Ont. Bktcy.).

70 The Trustee in this case concluded that there were no unencumbered assets of any value which could be ascertained that would be available to unsecured creditors in the event of a bankruptcy. The amount of excess income was minimal and likely less than the Trustee's fees and disbursements.

71 The Proposals provide for certain recovery for the unsecured creditors. There is a guaranteed payment by means of an infusion of cash.

72 The dissenting creditors submit that the Proposals are simply another attempt by the debtors to avoid honouring the judgment debt owed to Genesee and the costs awarded to the Defendants by Counterclaim in the Litigation. They submit that the proposals are not reasonable. The factors on which they rely include: the past conduct of the debtor, the reviewable transactions, the limited recovery provided by the proposal, and the fact that the proposals would preclude full investigation of the reviewable transactions. They add to this the fact that the proposal requires them to release the debtors with respect to any claims under the *Act* and any claims of fraudulent preferences, conveyance, settlement or trust.

73 It is clear that the proposal has a reasonable prospect of succeeding according to its terms. For the reasons cited by the Trustee, it is in the interests of the creditors.

74 The debtors have minimal assets. The Proposals contemplate an injection of cash and shares at a guaranteed value such that payments under the Proposals will be secured.

75 The assets which are the subjects of the allegedly fraudulent dispositions are, in any event, encumbered beyond their market value in favor of secured creditors.

76 Reprehensible conduct on the part of the debtor has been considered a basis for concluding that a discharge or proposal is not reasonable. In *Touhey v. Barnabe*, [1995] O.J. No. 2337 (Ont. Bktcy.), one such case, a discharge was refused. The grounds for refusal were summarized in the headnote as follows:

> . . . At the date of bankruptcy the bankrupt was not insolvent, and the evidence established that he declared bankruptcy solely to avoid the $100,000 debt resulting from the judgment. The bankrupt never made any payment to the creditors, nor did he ever attempt to settle with them. With the income available to him over such a long period of time it was

inconceivable that the bankrupt actually had no personal assets. He had inappropriate expenses in light of his obligations. The bankrupt attempted to flaunt the system and his behaviour was reprehensible. He did not merit a discharge.

77 In the present case, Justice Levine found Mr. Abou-Rached's conduct in the Litigation to be worthy of rebuke. I have concluded that that conduct fell within the scope of s. 173(f) of the *Act*. However, I have not concluded, nor did the Trustee, that the Proposals were filed solely to avoid the judgment; that other s. 173 facts have been made out; or that there has been other reprehensible conduct such as dissipation or diversion of assets. Without for a moment condoning Mr. Abou-Rached's conduct in the course of the Litigation, I have nonetheless concluded that the requirements of commercial morality do not necessitate a refusal to approve the Proposals. I find the Proposals to be reasonable.

B. Are the Proposals Calculated to Benefit the General Body of Creditors?

78 Courts have refused to approve proposals on this basis where, for example, the proposal serves the interests of persons other than the creditors; where there has not been full disclosure of the assets of the debtor and the encumbrances against those assets; where the proposal, by it terms, is bound to fail; or where the Trustee is able to delegate his duties to a group of the creditors, see *Houlden & Morawetz, 2001 Annotated, Bankruptcy & Insolvency Act* at para. E15(10)(c); *Lofchik, Re*, *supra*.

79 In the case of these Proposals, the Trustee and supporting creditors note that the Proposals provide for an evenhanded distribution. The claims of the family have not been included; nor have claims of related parties. There has been, it is submitted, full disclosure of assets and encumbrances. Moreover, it is submitted that the recovery is greater under the Proposals than it would be in the event of a bankruptcy.

80 The dissenting creditors submit that the Proposals are not in the interests of the creditors. They rely upon the arguments advanced in connection with the reasonableness of the proposal.

81 In addition, they submit that there has not been proper disclosure of the debtors' assets. Two matters in particular are raised in this connection:

(a) the disposition of personal assets valued by Mr. Abou-Rached in 1995 at $700,000;

(b) certain payments or income of the debtor;

82 With respect to the latter, the Trustee notes that he was aware of the payments or income. The Proposals are not dependent upon the cash flow of the debtors. They are funded by an infusion of cash from third parties. Hence the income has no effect upon the viability of the Proposals. In addition, the amounts at issue are modest.

83 With respect to the personal assets, the Trustee was aware of the issue and considered it in coming to his opinion. He was of the view, first, that the assets had been accounted for, and second, that their realizable value was not anywhere near $700,000.

84 For the reasons enumerated by the Trustee and in the earlier discussion with respect to reasonableness, I have concluded that the Proposals are in the interests of the creditors.

V. ARE ANY OF THE FACTS ENUMERATED IN SECTION 172 MADE OUT AGAINST THE DEBTORS?

85 Section 59(3) of the *Act* provides:

Where any of the facts mentioned in s. 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payments of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.

86 In this case, the dissenting creditors submit that the Proposals should not be approved because s. 173 facts are present and the Proposals do not provide for recovery of fifty cents on the dollar.

87 The following provisions of s. 173 of the *Act* are at issue in these proceedings:

173.(1) The facts referred to in section 172 are:

(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

. . . . .

(d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;

. . . . .

(f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;

. . . . .

(k) the bankrupt has been guilty of any fraud or fraudulent breach of trust;

A. Value less than fifty cents on the dollar

88 It is common ground that the debtors' assets are less than fifty cents on the dollar of the unsecured liabilities. The question, therefore, is whether this shortfall has arisen from circumstances for which the bankrupt cannot justly be held responsible.

89 The Trustee concluded that the debtors were not responsible for the shortfall of the assets. His report states:

1. In order to raise money to finance the operations of IHI and to develop the technology licensed to IHI, the Debtor was required to pledge all of his interest in IHI as well as guarantee (directly and indirectly) various investments made by others in IHI;

2. A downturn in the stock market, and a decrease in the trading price of shares in IHI in the stock market made it more difficult to raise funds for the ongoing operations of IHI and the Debtor continued to incur further financial obligations;

3. A Judgment was pronounced and a legal action commenced against the Debtor, R.A.R. Investments Ltd. ("RAR") and CHT. The legal action that led to the Judgment was ongoing for approximately four and one-half years and throughout that time, the Debtor steadfastly believed the Plaintiff's claim would be dismissed in its entirety. A significant portion of that claim resulted in a Judgment being pronounced against the Debtor and RAR. The Debtor had not expected any part of the Plaintiff's claim to be successful. The amount of that Judgement was approximately $975,000 (excluding costs);

4. One of the Debtor's major Creditors made demand upon learning of the said Judgment; and

5. Although an appeal of the Judgment has been filed, the Debtor concluded that it would be in the best interest of his Creditors and himself if his remaining sources of funds and energy were directed to payment of all of his Creditors rather than to prosecuting the appeal.

90 The dissenting creditors, relying on *Forsberg, Re* (2001), 26 C.B.R. (4th) 204 (Sask. Q.B.), submit that Mr. Abou-Rached is responsible for the shortfall in assets because he provided guarantees in circumstances in which he knew that he did not have sufficient assets to satisfy the guarantees.

91 Counsel for Mr. Abou-Rached disputes this claim noting that, although the majority of the shares had not yet been released from escrow, Mr. Abou-Rached held some 25,000,000 shares in IHI. Between 1995 and 1999, the median share price was $2.41

(see *Genesee Enterprises Ltd.*, *supra*, at p. 337). Thus, at the time he provided the guarantees, he had assets to support the guarantees given.

92 I have concluded that the dissenting creditors have not established that the debtors are responsible for the shortfall in the value of their assets.

B. Has the debtor failed to account satisfactorily for any loss of assets or for any deficiency of assets?

93 The submissions with respect to this allegation have been dealt with above. In order for the dissenting creditors to make out this allegation, they must rely upon the values set out by Mr. Abou-Rached in earlier statements of net worth that he prepared. Mr. Abou-Rached deposed that these values were overstated. I put little weight on this assertion; however, the Trustee was of the same opinion, in other words, that the net worth statements upon which the dissenting creditors rely, do not reflect the realizable value of the assets.

94 I have concluded that the dissenting creditors have not established that the debtor has not given a satisfactory account for loss of assets or deficiency of assets.

C. Has the debtor put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him?

95 The dissenting creditors submit that the reasons of Justice Levine in the Litigation establish that this fact has been made out. That the action was properly brought is established by the fact that the plaintiff enjoyed substantial success, being awarded damages of $982,746.94 plus court order interest. However, it must also be noted that the plaintiff's success was not complete; the recovery was substantially less than the amount claimed.

96 Justice Levine made extensive findings with respect to Mr. Abou-Rached's credibility and conduct in the Litigation. First, with respect to credibility:

> Mr. Abou-Rached accuses Robert de Grasse in particular of fabricating evidence, including documents, and stealing documents relevant to the proof of the defendants' case. He claims that Jean de Grasse and the other defendants by counterclaim either misstated the facts or failed to accurately recall them.
>
> . . . . .
>
> In general, however, I find myself skeptical about the credibility of the evidence of Mr. Abou-Rached with respect to many of the details of events, documents or transactions.

97 After a second hearing to deal with costs, Justice Levine ordered special costs to the plaintiff of its claim for 45 of the 49 days of trial, special costs to the plaintiff and the Defendants by Counterclaims of defending the counterclaim . Her reasons state:

> [6] This litigation is almost a case-study on the factors that the courts have considered in awarding special costs. I have no trouble finding that the conduct of the defendants was "reprehensible, deserving of reproof or rebuke", and in some cases, "scandalous and outrageous" (*Garcia v. Crestbrook Forest Industries Ltd.* (1997), 9 B.C.L.R. (3d) 242 at 249 (C.A.)).
>
> [7] The conduct of the defendants that I find justifies an order of special costs includes improper allegations of fraud, unlawful conspiracy, breach of fiduciary duty and criminal conduct; improper conduct during the proceedings; and improper motive for bringing the proceedings.
>
> **(a) Improper allegations of fraud, unlawful conspiracy, breach of fiduciary duty and criminal conduct**
>
> [8] The allegations of criminal conduct included a claim that the plaintiff was claiming interest in excess of the criminal rate set by the ***Criminal Code***. This allegation was withdrawn on the eve of trial.
>
> [9] At examination for discovery and during his testimony at trial, Mr. Abou-Rached accused Robert de Grasse of forging Mr. Abou-Rached's signature on documents, preparing false documents and stealing documents from the defendants. He

accused plaintiff's counsel of obstruction of justice, including witness tampering. There was no evidence to support any of these claims.

[10] The defendants' claims of fraudulent misrepresentation, unlawful conspiracy and breach of fiduciary duty were all dismissed. The evidence simply did not support them. The defendants repeatedly failed to give the plaintiff and defendants by counterclaim particulars of the alleged fraud, conspiracy, breach of fiduciary duty, or damages, and failed to provide any particulars of damages in their closing submissions at trial.

. . . . .

[13] The defendants conducted themselves improperly during the proceedings in a number of ways.

[14] Firstly, the defendants did not disclose documents in the manner required by the ***Rules of Court***, standards of practice, or in response to court orders. In *Clayburn Industries v. Piper* (1998), 62 B.C.L.R. (3d) 24 at 51 (S.C.), the failure to produce documents was a significant factor in determining that special costs were appropriate.

. . . . .

[16] Some documents were produced in part only (for example, one page of several of a memorandum) and documents which would have been in the defendants' possession and control were never produced (such as the executed Genesee Agreement for each investor, letters sent to prospective investors in CHT and employment records of Robert de Grasse). The defendants produced documents that supported their case (such as the "Fadel Agreement" and a document with handwritten notes purporting to confirm Mr. Abou-Rached's conversations with Robert de Grasse concerning this agreement), but did not produce those which contradicted it (such as the "Gougassian agreement").

[17] Secondly, Mr. Abou-Rached, the key witness for the defendants, was deliberately non-responsive during both examination for discovery and at trial. I commented on Mr. Abou-Rached's testimony in my reasons for judgment at paras. 31 through 38, and need not repeat those comments here.

[18] Thirdly, some of Mr. Abou-Rached's testimony was obviously fabricated. These include his claim that he discussed the terms of the "Fadel Agreement" with Robert de Grasse and the document containing the handwritten notes purporting to record that conversation; his continual denial that he signed or read documents that were supportive of the plaintiff and DCCs; and his reference to a chart setting out the value of an investment in Genesee which he purportedly discussed with Jean de Grasse and Robert de Grasse. The testimony of Sandy Lucas and Robert de Grasse regarding documents purportedly signed by Sheik Fadel must lead to the conclusion that at least some of those were signed by Mr. Abou-Rached, which he denied.

[19] I am prepared to accept that some of Mr. Abou-Rached's fabrications were not deliberate or dishonest lies, but resulted from his belief in the strength of his case. On the other hand, some of his testimony was too contrived, particularly with respect to his relationship (personal and business) with Sheik Fadel, to accept as anything other than calculated to deceive the court.

[20] Fourthly, Mr. Abou-Rached's behavior during examination for discovery and at trial was often inappropriate to the point of accurately being described as "outrageous" or "scandalous". Mr. Abou-Rached insulted the DCCs, who were also witnesses for the plaintiff, and counsel. As already noted, he accused plaintiff's counsel of obstruction of justice and witness tampering, and questioned the competence of counsel for the plaintiff and DCCs.

(c) Improper motive

[21] The defendants' conduct throughout these proceedings indicates that they sought to delay and hinder the plaintiff from recovering its claim under the Genesee Agreement and to harass the DCCs.

[22] The defendants' claims that the parties had entered into a collateral "Investment Agreement", in addition to the claims of fraudulent misrepresentation, conspiracy and breach of fiduciary duty, had the direct effect of prolonging the trial so that the entire history of the parties' relationship, in particular that of Mr. Abou-Rached, Jean de Grasse and Robert de Grasse, could be explored in great detail. All of these claims were dismissed.

[23] The claims against the 13 DCCs other than Jean de Grasse and Robert de Grasse were particularly without merit, and were all but abandoned halfway through the trial. These DCCs had attempted to have their cases resolved by an aborted Rule 18A application, but the defendants refused to cooperate. They then sought to have their evidence admitted by affidavit, which the defendants again resisted. In ordering the 13 DCCs to attend the trial to be cross-examined, I noted that if their evidence proved not to be controversial or did not materially add to the information in the affidavits, costs could be ordered to remedy the situation (see Rules 40(50) and (51)). The 13 DCCs, other than Jean de Grasse and Robert de Grasse, are entitled to their costs of attending the trial, which their counsel has advised total $8,548.47.

[24] As I pointed out in my reasons for judgment, most of the evidence about Shiek Fadel, his existence and role in the Genesee Agreement, was interesting but unnecessary. The only issue (other than Mr. Abou-Rached's credibility) that related to Shiek Fadel was whether the Fadel Agreement amended the Genesee Agreement. I found no legal basis for that part of the defendants' claim. The pre-trial applications, evidence and argument on this issue unduly prolonged the trial in support of a clearly unmeritorious claim.

[25] The defendants delayed and hindered these proceedings by refusing to comply with the rules relating to document disclosure, as outlined above. Mr. Abou-Rached's non-responsiveness on examination for discovery and at trial prolonged both pre-trial proceedings and the trial, increasing the expense for all parties.

. . . . .

[28] Mr. Abou-Rached took an interest in the ability of the plaintiff and DCCs to afford this litigation. He admitted at trial that he commented at his examination for discovery that he wondered how the DCCs were financing the litigation and that someone must be paying their legal expenses. At trial, he said that the plaintiff and DCCs could not afford to litigate.

[29] Some of the factors described above could support, on their own, an award of special costs. Taken together, I find that this is an appropriate case to exercise my discretion and order that the plaintiff and DCCs recover special costs.

98 The Trustee relied upon Mr. Abou-Rached's professed conviction in the merits of his defence in support of his conclusion that the facts in s. 173(f) were not made out.

99 Counsel for Mr. Abou-Rached and RAR submits that the defence cannot be said to have been frivolous or vexatious because it was substantially successful in that the plaintiff obtained judgment, but for significantly less than the original claim.

100 Counsel conceded that the claim against the Defendants by Counterclaim was frivolous and vexatious, but submits that since the counterclaim was a claim advanced by the debtors, it fell under s. 173 (g) of the *Act* and not 173(f). Section 173(g) has a three month time limitation period from the original bankruptcy event. In this case, the original bankruptcy event was October 1, 2001. Accordingly, the counterclaim falls outside the limitation period and s. 173(g) therefore also does not apply.

101 I have concluded that the dissenting creditors have established the s. 173(f) facts in that the conduct of the defence was frivolous and vexatious. It is clear from Justice Levine's reasons and disposition with respect to costs, and from a review of the pleadings in the action, that the distinction between the defence and the prosecution of the counterclaim urged upon me cannot be supported.

102 Moreover, the scope of the section embraces the conduct of the litigation, hence neither the debtor's belief in the merits of his position, nor the fact that he enjoyed a measure of success in the outcome is a complete answer, see *Paskauskas, Re* (1995), 36 C.B.R. (3d) 288 (Ont. Bktcy.) and *Touhey*, *supra*. Here there is reprehensible conduct including deliberate deceit and delay, and a finding of improper motive. This is, in my view, clearly sufficient evidence to support a finding of a frivolous or vexatious defence under the section.

D. Have the debtors been guilty of fraud or fraudulent breach of trust?

103 The dissenting creditors alleged that the following transactions were fraudulent dispositions of property:

(a) in late 1999 and early 2000, Roger Abou-Rached transferred 2,733,333 IHI shares to Garmeco (Lebanon) at a value of $0.75 per share.

(b) In mid 2001, Roger Abou-Rached transferred to his parents for no, or alternatively inadequate consideration, all his interests in Lebanese real estate that he had variously valued in the past at $1.8 million or in excess of $4 million (USD).

(c) In August, 2000, R.A.R. transferred its interests in commercial property on West 10th Avenue, Vancouver, B.C. to a numbered company wholly owned by Roger Abou-Rached's mother.

(d) In late 1999 and 2000 Roger Abou-Rached transferred or pledged all his interests in R.A.R. and in R.A.R. Consulting Ltd. to his parents' companies or to a group of foreign corporations represented by Marco Becker.

(e) Roger Abou-Rached has not accounted for the transfer of personal property estimated by him to be worth $700,000 in 1995. (This claim is dealt with earlier in these reasons).

1. IHI Shares

104 The essence of this claim is that Mr. Abou-Rached, on the eve of the trial of the Litigation, transferred 2 million IHI shares to Garmeco Lebanon. In February 2000, a further 733,333 shares were transferred. Mr. Abou-Rached testified that these transfers went to repay the $5 million debt owed to Garmeco Lebanon incurred from the purchase of the Technology. However, counsel submits that the money was to be repaid only from cash flow or dividends.

105 The documents in relation to the agreement to transfer the Technology are as follows:

(a) Assignment of Technology signed August 31, 1993, effective September 11, 1990;

(b) Letter dated September 12, 1990 from Garmeco to Wild Horse Industries Ltd (later IHI). This document states in part:

> As well, Garmeco and Garmeco Int'l acknowledge the transfer of the technology of the building system developed by Roger Abou-Rached while employed by Garmeco Int'l which will be utilized by Canadian HI-TECH Manufacturing Ltd.. In return for the transfer of this technology to Mr. Roger Abou-Rached, he will provide remuneration for the direct expenses incurred by Garmeco Int'l (i.e. employee wages, materials, purchase of equipment and computers, purchase of software, software development, consultation, etc.) during the research and development of the technology. The remuneration from Mr. Roger Abou-Rached to Garmeco Int'l will comprise of $5,000,000 US Dollars and will be paid on a prorata basis based on the following formula: $100,000 of every $1,000,000 of net cash flow from Canadian Hi-Tech Manufacturing Ltd. dividends to Roger Abou-Rached.

(c) a promissory note dated September 12, 1990 which provides in part:

> FOR VALUE RECEIVED THE UNDERSIGNED HEREBY ACKNOWLEDGES ITSELF INDEBTED AND PROMISES TO PAY THE ABOVE PRINCIPAL SUM, ON DEMAND, TO OR TO THE ORDER OF GARMECO INTERNATIONAL CONS. (LEB) (THE "HOLDER") AND/OR ANY OF ITS NOMINEE AND/OR ANY ASSOCIATES AND/OR ANY AFFILIATED PERSONS OR ENTITIES THE HOLDER MAY DIRECT IN WRITING.
>
> THE UNDERSIGNED MAY PAY THIS NOTE IN WHOLE OR IN PART WITHOUT NOTICE WITH 10% DISCOUNT TO BE CALCULATED AFTER THE WHOLE PRINCIPAL SUM IS PAID & PRIOR TO THE HOLDER SENDING ANY DEMAND NOTICE FOR PAYMENT OF THE ABOVE PRINCIPAL SUM IN FULL OR IN PART.

106 In response, counsel submit that there is no remedy under the *Act* with respect to this transaction because:

(a) it is not a settlement pursuant to s. 91(1) of the *Act* as it was not a gift, nor was any beneficial interest retained and it was to repay a debt;

(b) the initial bankruptcy event for both debtors was October 1, 2001 when the Notices of Intention to File Proposals were filed. The transactions fall outside the relevant limitation periods for review under the Act.

107 It is further submitted that the transactions are not reviewable under the Provincial legislation because there is no evidence that the transfers were made to delay or hinder creditors, or that they were made when the debtor was in insolvent circumstances. Moreover, it is submitted that the transfers were made for valuable consideration.

2. Lebanon Properties

108 Mr. Abou-Rached held interests in Lebanese real estate. The dissenting creditors assert that this real estate, valued in 1992 by Mr. Abou-Rached at $1,800,000, was transferred to his parents in the summer of 2001 for inadequate consideration. They asserted in addition that no transfer documents had been produced.

109 In response, it was asserted that the agreement to transfer the real estate was made on September 29, 1997. The consent of SRI was required for the transfer. Thus, there was a binding agreement to transfer the property well before the relevant limitation period, made at a time when the debtor was not insolvent.

110 It was further submitted that the transfer was made for fair and reasonable consideration. There was no evidence that it was made with an intent to hinder, delay or defraud creditors.

111 The registration of the transfer was not made until mid-2001; however, the reason for the delay in the registration was the negotiation to secure SRI's consent to the transfer.

3. RARC and RARI shares

112 The dissenting creditors also question a series of transactions which occurred at the beginning of the trial of the Litigation in which Mr. Abou-Rached transferred his interests in RARC and RARI to various companies, mainly SRI and five companies represented by Mr. Marco Becker, the principal representative of SRI. Mr. Abou-Rached transferred his interests in RARC to his parent's companies, Garmeco Canada and Garmeco Lebanon.

113 All pledges and transfers are subject to Mr. Abou-Rached recovering the shares on payment of an appropriate sum. The shareholders are obliged to maintain Mr. Abou-Rached as manager and director.

114 In response, it is submitted that these transfers were all made for fair consideration at a time when Mr. Abou-Rached was not insolvent. The transactions were not made with the intention to hinder or defeat creditors. They occurred outside the relevant limitation periods under the *Act*. In short, it is submitted that these are not reviewable transactions under the *Act* or under Provincial legislation.

4. 1096 West 10th Ave. Property

115 The final disputed transaction is in reference to the property located at 1096 West 10 th Avenue, Vancouver. The dissenting creditors assert that RAR granted a second mortgage on the property to a numbered company wholly owned by Hilda Abou-Rached, 434088 B.C. Ltd. In June 1995, following the hearing of the Petition before Henderson J., Abou-Rached increased the value of the second mortgage from $400,000 to $1 million. Roger Abou-Rached has not explained or accounted for the increase.

116 RAR transferred the property to 434088 B.C. Ltd. August 2000, shortly after the conclusion of the Genesee trial. The reported consideration of $1,250,000 has not been documented. The consideration falls short of the value of $3,000,000 given by Abou-Rached in 1995.

117 In response, it is submitted that the property was owned by RARI not by Mr. Abou-Rached. In 1995, Hilda Abou-Rached, Mr. Abou-Rached's mother, purchased 434088 B.C. Ltd. (the "Company") for the amount due on the mortgage of the 1096 property when Mr. Abou-Rached could not refinance. At the time, Robert de Grasse was a director of the Company.

118 In August 2000, the property was transferred to the Company. The consideration was:

> (a) the assignment of the liability under the existing mortgages; namely $700,000 to CIBC Mortgage Corporation, $600,000 to the Company and $1,500,000 to SRI,
>
> (b) $50,000 for chattels, and
>
> (c) payment of a fee of $100,000 to SRI to permit assignment of the mortgage.

119 The value of the property at the time of the transfer was approximately $735,000. The property has an assessed value of $330,000.

120 It was submitted that the transaction was for fair consideration and is not a reviewable transaction. The debtor was not in insolvent circumstances when the transaction was entered into. Nor is there evidence that the transfer was made with the intent to defeat, hinder, delay or defraud creditors to give the Company a preference.

121 The Trustee reviewed these and other transactions and concluded:

> Further information and review is required before the Trustee can draw any definitive conclusions as to whether or not any particular transaction constitutes a settlement or fraudulent preference under the provisions of the ***Bankruptcy and Insolvency Act***. It is our preliminary view, however, certain transactions may be reviewable and warrant further investigation. To properly evaluate these transactions, an extensive forensic investigation or audit would be required and judicial consideration of the matters may be required. The time involved, expense, and risk of this process would be significant to the creditors. Moreover, if on completion of the forensic investigation or audit the inspectors and/or the creditors were of the view that one or more transactions were potentially voidable and they wished to challenge the validity of these transactions in Court, we are advised that any such challenges would be vigorously defended by the various secured and/or related parties. Therefore, although there may be an unknown recovery, there may also be a significant loss.

122 The jurisprudence in this province, binding upon me, is clear that, with respect to the factors enumerated in s. 173, an allegation of fraud or breach of trust can only be found where there had been a conviction or a finding of fraud by a judgment in a criminal or civil court, see *Herd, Re* (1989), 77 C.B.R. (N.S.) 209 (B.C. C.A.). There has been no such finding in this case.

123 The dissenting creditors submit that the *Act* is a federal statute and is to be applied consistently across Canada. There are jurisdictions in which a prior civil or criminal finding of fraud is not required. All jurisdictions require proof of fraud to have been met on at least the civil standard.

124 I am bound to follow the British Columbia jurisprudence and since there is no prior finding of fraud, that is the end of the matter. However, even if I were not so bound, I am satisfied that fraud has not been established on the evidence before me.

125 Questions arise with respect to the transactions in relation to their timing, the parties, and the underlying motivation. Mr. Abou-Rached's conduct in the Litigation was such as to give rise to questions in relation to any and all of his dealings. However, a substantial gulf separates questions and suspicions from a finding of fraud.

126 The dissenting creditors then submit, in the alternative, that if I conclude that there are "grounds for concern", the concern should form a basis upon which to conclude that the Proposals are not reasonable.

127 In the face of the Trustee's report and the approval of the majority of creditors, I am of the view that more than suspicion or grounds for concern must be shown in order for the Proposals to be found not to be reasonable. On a review of all of the circumstances, I remain satisfied that the Proposals are reasonable within the meaning of s. 59 of the *Act*.

VI. ORDER FOR CROSS-EXAMINATION

128 In the further alternative, the dissenting creditors seek orders, pursuant to s. 163(2) of the *Act* to cross examine some fifteen individuals.

129 Section 163(2) provides:

> On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court. (emphasis added)

130 Counsel for SRI submits that sufficient cause has not been shown so as to justify the order sought. She relies upon *Hartland Pipeline Services Ltd. (Trustee of) v. Bennett Jones* (2000), 18 C.B.R. (4th) 28 (Alta. Q.B.), a decision in which two secured creditors sought cross-examination on an affidavit of a principal of the bankrupt company after the trustee had conducted an examination under section 163(1). In that decision, Paperny J. approved of the following passage from *NsC Diesel Power Inc., Re* (1997), 49 C.B.R. (3d) 213 (N.S. S.C. [In Chambers]):

> There must be some demonstrated connection between evidence, if any, of something being amiss and the ability of the named person to shed some light on it as it relates to the administration of the estate.

131 Counsel also made reference to the following statement from the Nova Scotia Court of Appeal in *NsC Diesel Power Inc., Re* (1998), 6 C.B.R. (4th) 96 (N.S. C.A.).

> The wording of s. 163(2) of the Act that requires an applicant to show sufficient cause to warrant the order being granted requires that the applicant put forth factual information in affidavit form or in sworn testimony that would disclose something more than a desire to go on a fishing expedition.

132 I have concluded that the material before me does not meet the threshold of sufficient cause. In my view the application suffers from the same lack of focus identified in *R.L. Coolsaet of Canada Ltd., Re* (1996), 45 C.B.R. (3d) 30 (Ont. Bktcy.), at 33, namely, " . . . a request in such broad terms suggests a lack of focus and a speculation that in a plethora of examinations some information may be forthcoming on which to frame an action."

133 The application for cross-examination is denied.

VII. REASONABLE SECURITY

134 The final issue, a fact pursuant to s. 173 having been proved, is whether the Proposal should be approved. It is common ground that the Proposals do not provide reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims. The question is whether, pursuant to s. 59(3) of the *Act*, the court is prepared to grant approval on the basis of some lesser recovery.

135 Given that the Proposals are viable and secured and given the paucity of assets of the debtors otherwise available to the creditors, I am prepared to exercise my discretion under s. 59(3) and approve the Proposals as amended.

VII. DISPOSITION

136 In the result, the Proposals of Mr. Abou-Rached and RAR, as amended, are approved. The appeals from the decision of the Trustee are dismissed. The application for cross-examination is dismissed.

Order accordingly.

TAB 5

2003 CarswellOnt 1015
Ontario Superior Court of Justice [Commercial List]

Farrell, Re

2003 CarswellOnt 1015, [2003] O.J. No. 1206, 121 A.C.W.S. (3d) 997, 40 C.B.R. (4th) 53

In the Matter of the Proposal of David Robert Farrell of the Town of King City in the Regional Municipality of York in the Province of Ontario

Lederman J.

Heard: March 24, 2003
Judgment: March 28, 2003 *
Docket: 31-OR-410134

Counsel: *Brandon Jaffe*, for Debtor, David Robert Farrell
Geoff Hall, for Objecting Creditor, Millard, DesLauriers & Shoemaker LLP

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.ii Reasonable terms
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.iii Interests of creditors
Headnote
Bankruptcy --- Proposal — Approval by court — Conditions — Reasonable terms
Debtor was 56 years old and ran accountancy practice as sole practitioner with longstanding clients — Debtor's statement of affairs disclosed nine unsecured creditors with total claims of $222,892.45 — Debtor made proposal that he pay trustee sum of $28,800 payable over three-year period at rate of $800 per month — At meeting of creditors four creditors with claims totalling $165,771.50 voted to accept proposal — One creditor, with claim of $24,912.28, voted against proposal — Objecting creditor was accounting firm of which debtor was former partner — Objecting creditor offered to purchase debtor's practice on terms that included non-solicitation and non-competition clause with respect to clients — Debtor refused to cooperate with sale of his practice — Debtor brought motion for approval of proposal — Motion granted — Debtor's proposal was reasonable and calculated to benefit general body of creditors — Terms of objecting creditor's offer to purchase debtor's practice would make it very difficult for debtor to start afresh recruiting new clients to his practice — In making proposal that is reasonable debtor need not put himself in position where he has deprived himself of ability to earn his livelihood — Majority of creditors, representing 86 per cent of claims, voted for acceptance of proposal — Objecting creditor's offer would not necessarily give creditors substantially more than if proposal were approved — No assurance existed that creditors would do better in bankruptcy context than under proposal.
Bankruptcy --- Proposal — Approval by court — Conditions — Interests of creditors
Debtor was 56 years old and ran accountancy practice as sole practitioner with longstanding clients — Debtor's statement of affairs disclosed nine unsecured creditors with total claims of $222,892.45 — Debtor made proposal that he pay trustee sum of

$28,800 payable over three-year period at rate of $800 per month — At meeting of creditors four creditors with claims totalling $165,771.50 voted to accept proposal — One creditor, with claim of $24,912.28, voted against proposal — Objecting creditor was accounting firm of which debtor was former partner — Objecting creditor offered to purchase debtor's practice on terms that included non-solicitation and non-competition clause with respect to clients — Debtor refused to cooperate with sale of his practice — Debtor brought motion for approval of proposal — Motion granted — Debtor's proposal was reasonable and calculated to benefit general body of creditors — Majority of creditors, representing 86 per cent of claims, voted for acceptance of proposal — Objecting creditor's offer would not necessarily give creditors substantially more than if proposal were approved — Even if sale of practice were completed on terms suggested by objecting creditor there was no assurance that any of clients would remain with objecting creditor so as to generate contemplated billings — No assurance existed that creditors would do better in bankruptcy context than under proposal.

Table of Authorities

Cases considered by *Lederman J.*:

Engels v. Richard Killen & Associates Ltd., 2002 CarswellOnt 2435, 35 C.B.R. (4th) 77, 60 O.R. (3d) 572 (Ont. S.C.J.) — considered

Lofchik, Re, 1998 CarswellOnt 194, 1 C.B.R. (4th) 245 (Ont. Bktcy.) — considered

Stone, Re, 22 C.B.R. (N.S.) 152, 1976 CarswellOnt 56 (Ont. S.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 59(2) — considered

MOTION by debtor for approval of proposal.

***Lederman J.*:**

1 The issue on this motion is whether the court should approve the Proposal made by the debtor, David Robert Farrell ("Farrell"). Essentially, the Proposal is that Farrell pay the Trustee the sum of $28,800 payable over a three year period at the rate of $800 per month.

2 The Statement of Affairs discloses nine unsecured creditors with total claims in the amount of $222,892.45.

3 At a meeting of creditors, four creditors with aggregate claims in the amount of $165,771.50 voted to accept the Proposal. One creditor, Millard, DesLauriers & Shoemaker LLP ("MDS") who is owed $24,912.28 voted against the Proposal. In other words, 86% of the dollar value of creditors' claims voted in favour whereas 14% voted against the Proposal.

4 MDS is the objecting creditor on this motion. MDS is willing to purchase Farrell's accounting practice either from him or from a Trustee in bankruptcy appointed upon Farrell's bankruptcy should the Proposal not be approved by the court. The terms upon which MDS is willing to purchase Farrell's practice are that:

a) MDS will pay one half of the normal annual billings for each client retained over a three year period;

b) Farrell is required to provide full cooperation in order to ensure the transition of clients to MDS, including proper introductions and unrestrained endorsement of MDS; and

c) Farrell is required to enter into a non-competition agreement with respect to the clients purchased by MDS.

5 Farrell practises chartered accountancy as a sole practitioner. Up to 1997 he had practised as partner in MDS, but involuntarily withdrew at that time.

6 One of Farrell's clients was The Fabco Group which he took with him when he left MDS. In continuing to act for The Fabco Group, Farrell retained the services of junior staff members of MDS to assist him in performing audits. An amount of $24,912.28 remains unpaid for services rendered between May 1 - August 2, 2002. MDS's staff generated fees of $75,000 from Fabco, but Farrell used those fees for payment of other business and personal expenses without paying MDS for the use of its staff.

7 In September 2002, Fabco allowed other accountants to bid for its audit work and MDS was successful in getting the contract. Farrell lost the account. Farrell has threatened to complain to The Institute of Chartered Accountants of Ontario because of concerns that he has as to whether MDS used confidential information to make the successful bid.

8 It is MDS's position that depending on the precise revenue being generated by Farrell's accounting practice, a sale of the practice to MDS would generate significant value for the estate to the benefit of all of Farrell's creditors.

9 Even with the loss of the Fabco account, MDS submits that Farrell's annual gross fees would be approximately $120,000. Using a purchase price of one half of gross fees, MDS estimates the value of the practice at $60,000 which is double Farrell's Proposal of approximately $29,000.

10 Farrell has no intention of providing the cooperation or executing a non-competition agreement called for in MDS's offer. MDS's position is that Farrell's refusal to cooperate with the sale of his accounting practice would allow him to keep the practice for himself and yet deny his creditors its value.

11 Under section 59(2) of the *Bankruptcy and Insolvency Act* ("*BIA*"), for court approval to be obtained, the court must be satisfied that the terms of the proposal are reasonable and are calculated to benefit the general body of creditors.

12 Several interests are taken into account under section 59(2) of the *BIA*:

> The first interest is that of the debtor: to give him an opportunity to meet with his creditors and to find a way of producing assets or revenue which will provide them with a dividend outside of bankruptcy. The second interest is that of the creditors: to protect the creditors generally by ensuring that what is put up by way of a proposal is a reasonable one, but bearing in mind that by the time it gets to the court the proposal has been supported by and is therefore desired by the majority of creditors. The third interest is that of the public at large in the integrity of the bankruptcy legislation.
>
> *Stone, Re* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.), at 152

13 Farrell is 56 years old and runs his accountancy practice as a sole practitioner with longstanding clients. If a sale of his practice included a non-solicitation and non-competition clause with respect to those clients, it would be very difficult for Farrell to start afresh recruiting new clientele into his practice. In making a proposal that is reasonable, the debtor need not put himself in a position where he has virtually deprived himself of the basic ability to earn his livelihood.

14 As for the interests of the creditors, a large majority of them have voted for acceptance of the Proposal and it requires strong reasons for the court to substitute its judgment for that of the creditors: see *Lofchik, Re*, [1998] O.J. No. 332 (Ont. Bktcy.).

15 Moreover, if the Proposal is not approved and a bankruptcy ensues, there is no common law implied obligation on the part of a bankrupt not to compete and to solicit former clients: see *Engels v. Richard Killen & Associates Ltd.* (2002), 60 O.R. (3d) 572 (Ont. S.C.J.). Accordingly, there is no certainty that the Trustee can impose upon the bankrupt these positive obligations not to compete with respect to his former clients and thus, there is no assurance that the creditors would do better in a bankruptcy context than under the Proposal.

16 Furthermore, the amount of the purchase price offered by MDS remains uncertain because even if the sale of the practice was completed on the terms suggested by MDS, there is no assurance that any of the clients would stay with MDS so as to generate the contemplated billings.

17 There are also costs associated with MDS's offer. MDS's offer does not include any provision for payment of professional fees in respect of completing the sales transaction or monitoring the accounts over the three-year period.

18 As stated by Farley J. in *Lofchik, Re* the question is not whether the proposal is generous. Rather, the question is whether the payment terms of the proposal are reasonable in the sense of being adequate enough to meet the requirements of commercial morality and maintaining the integrity of the bankruptcy system. The Proposal was accepted by 86% of the claims voted and

the only objecting creditor was MDS. In light of the uncertainty of the value of MDS's offer to purchase Farrell's accountancy practice and the conditions of non-competition that are required, I cannot conclude that MDS's offer will afford the creditors substantially more than if the Proposal was approved.

19 On its terms, the debtor's Proposal as accepted by the majority of creditors is reasonable and calculated to benefit the general body of the creditors.

20 Farrell's assets are not of a value equal to 50 cents on the dollar on the amount of his unsecured liabilities. This has arisen from circumstances from which the debtor cannot justly be held responsible in view of the following circumstances:

a) Prior to his departure from MDS in 1997, his draw was insufficient to stay current with his personal expenses in light of legal fees incurred in matrimonial proceedings and the settlement of his wife's equalization claim;

b) The matrimonial home was sold and the proceeds were barely sufficient to retire joint debts which were secured against title to the matrimonial property;

c) During the start-up period as a sole practitioner, he had little cash and no accounts receivable;

d) He endeavoured to make payments towards his income tax and GST liability although he was unable to pay the full amounts due and owing; and

e) When it became clear in September 2002 that he may lose the Fabco account, it was apparent that he would have insufficient cash flow to pay CCRA the arrears due.

21 For these reasons the Proposal is approved. If the parties cannot agree as to costs submissions may be made in writing.

Motion granted.

Footnotes

* Additional reasons at 2003 CarswellOnt 1670 (Ont. S.C.J. [Commercial List]).

TAB 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: James, Re | 2011 ONSC 493, 2011 CarswellOnt 268, 73 C.B.R. (5th) 216, 197 A.C.W.S. (3d) 331 | (Ont. S.C.J., Jan 20, 2011)

2010 CarswellOnt 1047
Ontario Superior Court of Justice

Rennie, Re

2010 CarswellOnt 1047, 185 A.C.W.S. (3d) 826, 64 C.B.R. (5th) 278

In Bankruptcy and Insolvency

In the Matter of the Proposal of Grant Holden Rennie of the City of Toronto, in the Province of Ontario

Reg. Scott W. Nettie

Heard: January 25, 2010; February 3, 2010
Judgment: February 24, 2010
Docket: Toronto Estate No. 31-1120405

Counsel: Bruce A. Simpson for Applicant
Miles D. O'Reilly, Q.C. for Trustee

Subject: Insolvency; Contracts; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.iii Interests of creditors
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — Interests of creditors
Debtor made proposal under Bankruptcy and Insolvency Act (BIA) — Proposal committed debtor to pay $33,600 over 60 months — Debtor owned recreational vehicles with realization value of $1,000 — Debtor also owned one-third interest in mortgaged cottage property (cottage interest) — Realization value of cottage interest was at least $54,000 — Debtor and co-owners of cottage made declarations that cottage interest was charged with entire amount of mortgage — Debtor took position that doctrine of exoneration applied and that there was no equity in cottage interest — Proposal was accepted by debtor's creditors — Debtor brought application for court approval of proposal — Application dismissed — Proposal did not satisfy test under s. 59(2) of BIA — Proposal was not reasonable or calculated to benefit general body of creditors — Deemed assignment in bankruptcy would yield significantly more return to creditors than proposal — Deemed assignment would result in debtor making payments of $11,330.55 under surplus income provisions of BIA — When cottage interest and recreational vehicles were added to these payments, creditors should expect to receive in excess of $65,000 from deemed assignment — Cottage interest would vest in trustee and would not be subject to exoneration — Doctrine of exoneration did not apply to facts at bar — There was no evidence of written agreement by co-owners to have cottage interest bear burden of mortgage repayment — There was no evidence to support assertion that all mortgage payments were made by debtor — There was no demonstration of disability or undue influence.
Table of Authorities
Cases considered by *Reg. Scott W. Nettie*:
Abou-Rached, Re (2002), 2002 BCSC 1022, 2002 CarswellBC 1642, 35 C.B.R. (4th) 165 (B.C. S.C.) — considered

Banks v. Diegel & Feick Inc. (1981), 39 C.B.R. (N.S.) 311, 1981 CarswellOnt 211 (Ont. S.C.) — distinguished
Booth, Re (1998), 4 C.B.R. (4th) 45, 1998 CarswellOnt 2053 (Ont. Bktcy.) — followed
Fox v. Burns (May 31, 1978), Gould D.C.J. (Ont. Dist. Ct.) — referred to
McClory, Re (2006), 19 C.B.R. (5th) 305, 2006 CarswellOnt 911 (Ont. S.C.J.) — considered
Pittortou, Re (1984), [1985] 1 W.L.R. 58, [1985] 1 All E.R. 285 (Eng. Ch. Div.) — followed
Silbernagel, Re (2006), 2006 CarswellOnt 2523, 20 C.B.R. (5th) 155, 81 O.R. (3d) 152 (Ont. S.C.J.) — considered
Slan v. Blumenfeld (1997), 34 O.R. (3d) 713, 1997 CarswellOnt 3062, 34 O.T.C. 183 (Ont. Gen. Div.) — considered

Statutes considered:

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

Pt. III, Div. I — referred to

s. 59 — referred to

s. 59(2) — considered

Statute of Frauds, R.S.O. 1990, c. S.19
Generally — referred to

s. 4 — considered

APPLICATION by debtor for court approval of his proposal under *Bankruptcy and Insolvency Act*.

***Reg. Scott W. Nettie*:**

1 This was the application by Grant Holden Rennie (the "Debtor") for Court approval of his proposal under Division I of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). The hearing occurred on two separate days before me. It proceeded on the report of Killen Landau & Associates Ltd., trustee under the Proposal (the "Trustee"), and other documents filed at the hearing. These include the January 22, 2010, declaration of the Debtor (the "Debtor's Declaration"), and the January 21, 2010, declaration of the Debtor's father, John MacLeod Rennie (the "Father's Declaration") [1] . The Court heard submissions and argument from counsel on behalf of the Debtor and the Trustee.

2 The Debtor is a 49 year old married man with one child. His wife is the proponent under a separate proposal to her creditors, wherein she is obliged to make payments of $275.00 per month. According to the Trustee's report in this Proposal, there is a good deal of overlap between their two sets of creditors.

3 The Debtor has declared $74,060.00 on his Statement of Affairs. He is self employed, through his corporation, as a general contractor and carpenter. He offers, in this Proposal, to pay his creditors $560.00 per month over 59 months, plus an initial deposit of $560.00, for a total of $33,600.00.

4 The Proposal was accepted by the requisite double majority at the meeting of creditors called to consider the Proposal. [2] From the Trustee's report, it appears that this vote was cast by voting letter. Thus, we will never know what analysis, if any, the creditor [3] undertook in deciding to accept the proposal.

5 What we do know is that s. 59 BIA requires Court approval of a proposal, even when accepted by the creditors. The two prong test set out for Court approval is as follows:

> Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.

6 We know also from decisions such as *McClory, Re* (2006), 19 C.B.R. (5th) 305 (Ont. S.C.J.), and *Silbernagel, Re*, 2006 CarswellOnt 2523 (Ont. S.C.J.), that the Court is charged with carrying out its duty, independent of the wishes of the creditors. It is for the Court to be satisfied as to satisfaction of the s. 59(2) BIA test. The Court, even on an unopposed application for approval before the Registrar, is not the handmaiden of the creditors, and will not simply rubber stamp its approval. That is not what Parliament intended in Division I of the BIA.

7 That aside, it is also true that the Court should take into consideration in deciding to exercise its discretion to approve a proposal, or not, the wishes of the creditors, expressed through their acceptance of the proposal. Since every proposal before the Court for approval was necessarily accepted by creditors, the Court must balance this interest finely. It is fair to say, and supported in cases such as *Abou-Rached, Re* (2002), 35 C.B.R. (4th) 165 (B.C. S.C.), that where a large majority of creditors has accepted a proposal, substantial deference may be accorded to those wishes. In that case, a substantial number of creditors representing significant dollar value due by the debtor voted and participated in the approval process.

8 In the case at bar, we have one lone voting letter representing 14% of the debtors by number, and approximately 12% of possible unsecured debt. Even removing the contingent claim of Canadian Imperial Bank of Commerce in the amount of $60,000.00, the vote by Royal Bank of Canada is only 22% of the debt. This is not, in my view, the kind of substantial majority meant in the cases, even though it is 100% of the votes at the meeting. Having presided over countless of these applications, and having spent a significant amount of my time in practice as counsel to another Canadian bank, I think it fair to observe that the debt being voted, from the VISA department of Royal Bank of Canada, was in all likelihood voted on by a harried collections officer, or a third party collections and insolvency agent engaged by the creditor, and not with an eye to anything other than taking the obvious deal on the table and closing a file, one of thousands. I cannot infer from the vote any meaningful consideration which ought to be accorded any particular deference in carrying out this Court's duties under s. 59(2) BIA.

9 Against this backdrop, I must consider the s. 59(2) BIA tests.

10 One of the exercises that the Court, on such an application, goes through is a consideration of the effects of a refusal of Court approval. The BIA provides that in such a case, the debtor is deemed to have made an assignment in bankruptcy as at the date of refusal by the Court. It is appropriate to consider what, if any, benefit or realizations may be had by the creditors in the case of a deemed assignment in bankruptcy. This has the effect of guarding against debtors trying to shelter too much of their distributable assets in a proposal. For example, if a debtor proposed only $10,000.00 to her creditors, while thereby reserving to her own use a $100,000.00 house, it would seem unreasonable for the creditors to accept in the proposal 1/10 of that which would vest in the trustee on an assignment. Of course, this is an extreme example, and the Court must be careful to consider other factors such as costs of realization, and of administration of each type of potential estate -the proposal estate or the bankruptcy estate which issues on the deemed assignment.

11 Such a consideration is relevant to the case at bar. The Debtor has presented two cash flow statements, or budgets - one at the outset of the Proposal and one as at February 1, 2010. As well, the Statement of Affairs indicates a 1/3 interest in a cottage property in Burks Falls, Ontario (the "Cottage"). The Statement of Affairs also discloses some nominally valued recreational assets with a realization value of $1,000.00. [4]

12 Turning first to a consideration of the amount of surplus income which the creditors could expect to receive from the Debtor in the event of an assignment in bankruptcy, we see that at the time of the filing of the Proposal, family unit income of $5,260.00 net per month was indicated for a family unit of three. The Debtor earns 45% of this income. Against Superintendent's Standards for a family of three of $2,862.00, this leaves surplus income of $2,398.00 per month. The Debtor's share is 45% or $1,079.10 per month. Under the surplus income provisions of the BIA as they now stand [5], the Debtor would be obliged to make payments to the bankruptcy trustee of 50% of this amount for 21 months. This totals $11,330.55.

13 If the only other realizations to be expected in a bankruptcy were the recreational vehicles, or even the GMC cube van, it is readily apparent that the proposal, even over 60 months as it is, is a better realization for the creditors. Assuming it to be

financially viable, and I will return to this point below, it would appear to be reasonable and calculated to benefit the general body of creditors.

14 As the February 1, 2010 budget shows an even lower family unit income, on this specific analysis, the same outcome follows. The reduced income in the February 1, 2010, budget will be a factor in the viability analysis, below.

15 For this Debtor, the analysis does not end with the surplus income and the vehicles.

16 The Cottage was acquired by the Debtor and his parents, John MacLeod Rennie and Kathleen Rennie, on or about June 17, 1994. The evidence and documents tendered at the hearing establish that until November 23, 2004, there were no encumbrances against title to the Cottage. The Cottage has had various values ascribed to it. The sworn Statement of Affairs of the Debtor indicates it to have a value of $350,000.00 as at October 15, 2008, yet documents filed at the hearing by the Debtor include a realtor's opinion of value with a range of $299,000.00 to $310,000.00, as at May, 2009. All agree that the only outstanding encumbrance is the November, 2004, mortgage to Canadian Imperial Bank of Commerce ("CIBC"), in the present outstanding amount of approximately $120,000.00.

17 For the purposes of this Application, I need not resolve the quantum of equity in the Cottage. I will work from the figure of $299,000.00, being the lowest, and most beneficial to the Debtor, value advanced. At 5% commission, and legal fees on a sale, and net of the mortgage, it is fair, in my view, to consider that the Cottage is worth $162,000.00. It may, in fact, be worth much more. This would indicate that the value of the Debtor's admitted 1/3 share of the Cottage is $54,000.00, or more.

18 If we add $54,000.00 to the amount of surplus income prescribed for this family unit, and the recreational vehicles, creditors should expect to receive in a bankruptcy (which is what would follow from a refusal of Court approval of the Proposal) in excess of $65,000.00, subject, of course to fees of the trustee, and any legal fees to enforce the trustee's rights in the Cottage. This is nearly double that offered in the Proposal. If this analysis holds true, then how can any Court, exercising its discretion under s. 59(2) BIA, even according any deference to the creditors' slimly expressed wishes, find that the Proposal is reasonable or calculated to benefit the general body of creditors?

19 It cannot.

20 The analysis does not, however, end there. The Debtor has claimed, presumably on behalf of his parents, that the doctrine of the equity of exoneration applies to the facts at bar. As a result, the Debtor claims that his 1/3 interest in the Cottage is charged with the entire amount of the mortgage to CIBC, resulting in absolutely no equity being available to his creditors.

21 Curiously, the Trustee, who would, *prima facie*, become trustee in bankruptcy on any deemed assignment if the Proposal is not approved by the Court, supports this position. Perhaps the Trustee confuses its role in working with the Debtor to craft and present the Proposal with its overarching duty to the creditors to maximize return.

22 In effect, the Debtor, and his father, in their declarations, state that there was agreement between the three co-owners that the mortgage placed by all three over the Cottage in 2004 was for the entire benefit of the Debtor and that, as a result, the co-owners would consider that it was, as amongst themselves, the Debtor's interest which must bear first dollar burden to pay the mortgage. The reasons for this alleged agreement are set out in the Debtor's Declaration and the Father's Declaration. Allegedly, the Debtor received all of the benefit of the mortgage advance, and has made all payments on the mortgage from his own funds.

23 Four questions for analysis flow from this assertion, even supposing that it lies in the mouth of a potential bankrupt or his trustee to make it given their duties to aid and act, respectively, to the utmost in realizing assets for distribution amongst creditors.

24 These questions are: what is the doctrine?; does it exist in Ontario?; does it apply to the facts at bar?; and should the Court apply the doctrine, it being equitable relief?

What is the doctrine?

complete explanation as to the disbursement of the funds by the Debtor, I do not find, if the doctrine is as expansive as counsel would have the Court believe, that the presumption is warranted.

Should equity intervene on the facts at bar

43 For all of the reasons aforesaid, whether or not I am correct in my findings on the nature of the doctrine today, I am not persuaded that a Court would intervene and exercise its discretion to do equity. While that is not the decision that is being asked of me today, my view of the answer, and the foregoing analysis, properly informs me as to the question that I am being asked to answer, and that is whether or not the Proposal is reasonable or calculated to benefit the general body of creditors.

44 Having concluded that the doctrine is limited in its scope in our modern society, and would not apply; and having concluded that even if it is not so limited, it would not apply to these facts; and being of the view that it would not be an appropriate case for equity to intervene in any event, I must conclude that in a bankruptcy by deemed assignment, the Debtor's 1/3 interest in the Cottage would vest in his trustee, and not be subject to the equity of exoneration in favour of his co-owners. This results in the effect of a bankruptcy being that it will yield significantly more return to the creditors than the Proposal, and, as such, I cannot find the Proposal to be reasonable or calculated to benefit the general body of creditors. The Proposal is much more calculated, in my view, to benefit the Debtor and his parents.

45 Finally, even if I am found to be completely incorrect in my analysis thus far, or if I am found to have strayed too far beyond the ambit of the approval application in performing my analysis herein, I would not approve the Proposal on the basis that it is not demonstrably viable, from a financial perspective.

46 The February 1, 2010, budget indicates a shortfall in cash for this family of $744.00 each and every month, after payment of the Proposal amount of $560.00 and the spouse's proposal amount of $275.00. As in the case of *Booth, Re*, 1998 CarswellOnt 2053 (Ont. Bktcy.) at paragraph 6:

> The court is authorized to approve only proposals which are reasonable and calculated to benefit the general body of creditors. "Reasonable" means that on a dispassionate view, the court is satisfied that the things proposed can, in fact, be carried out. The court, in other words, reviews the terms of the proposal in order to ensure that the creditors have not, in their enthusiasm or lack of attention approved a proposal which is bound to fail.

47 As in *Booth, Re*, a budget showing a significant shortfall is proxy for a proposal doomed to failure. Counsel submitted that the general contracting income of the Debtor may increase, but also candidly advised that the numbers were based on 2009 revenues, and they are, I observe, similar to the 2007 numbers in the original budget, which counsel submitted was a good year. I take judicial notice of the recent ending of the federal Home Renovation Tax Credit and conclude that its one year existence probably accounts for 2009 being a much better year for the Debtor than 2008, and that it is more likely than not that general residential contracting and carpentry, the Debtor's business, will be slower this year than last without the continuation of the Home Renovation Tax Credit as stimulation for that sector.

48 Counsel for the Debtor also advised, and there is no evidence on the point, that the Debtor's wife is committed to getting a second job to ensure the success of this Proposal. I find that to be understandable but wishful thinking on her part when I observe that her present income is $2,215.00 per month, and that to bring this family to the mere breakeven point, she would need a second, part-time, job which has the effect of increasing her monthly income by at least $744.00 or some 33%. This is a huge increase, and not sufficiently likely in my estimation as to be realistic. Without this, there is no hope of the Proposal succeeding.

49 I conclude, therefore, that the Proposal is not reasonable as it is not financially viable.

50 In such a circumstance, s. 59(2) BIA is clear that the Court shall not approve the Proposal.

51 For all of these reasons, the Proposal is not approved, and the Debtor is deemed to have made an assignment in Bankruptcy as at today. The Trustee is directed to register its interest in the Cottage, on title thereto, forthwith.

Application dismissed.

Footnotes

1 The Father's Declaration was commissioned by one of Mr. Simpson's staff, Laura Whitney Carbis. It is commissioned in excess of the authority granted her by the Minster in appointing her a Commissioner for Oaths, as her appointment was territorially limited to the City of Toronto, and Ms. Carbis purports to have commissioned the document at the City of Barrie, in the County of Simcoe. Nonetheless, in the interest of commercial and judicial efficiency, I have treated the Father's Declaration as properly commissioned.

2 In the case at bar, this sounds somewhat more of a resounding acceptance than it is. At the meeting, one creditor, out of a total of 7 declared creditors, voted its $17,998.60 interest in favour, out of a total of $134,060.00 in declared unsecured debt, including contingent debt.

3 Royal Bank of Canada

4 I note also a claim for exemption for two automobiles. If, as one presumes, the 2004 GMC cube van is claimed exempt as a tool of the trade, which is not evidenced on the Statement of Affairs, one then wonders how this can be for someone who is expressed to be operating his business through a corporation, and is, presumably, receiving salary from the business.

5 It is the present surplus income obligations which would adhere to a deemed assignment made after September 17, 2009.

6 *Statue of Frauds*, R.S.O. 1990 chapter S.19, s. 4

TAB 7

2007 ABQB 153
Alberta Court of Queen's Bench

Wandler, Re

2007 CarswellAlta 482, 2007 ABQB 153, [2007] 7 W.W.R. 371, [2007] A.W.L.D. 2170, [2008] A.W.L.D. 2228, 156 A.C.W.S. (3d) 995, 32 C.B.R. (5th) 292, 418 A.R. 55, 73 Alta. L.R. (4th) 48

In the Matter of the Proposal of Donald Phillip Wandler

J.E. Topolniski J.

Heard: February 2, 2007
Judgment: March 6, 2007
Docket: Edmonton BE03-910082

Counsel: Tim Ludwig for BDO Dunwoody Limited
Michael J. Lema for Objecting Creditor, Canada Revenue Agency

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.b Conditions
VI.4.b.iii Interests of creditors
Headnote
Bankruptcy and insolvency --- Proposal — Approval by court — Conditions — Interests of creditors
Bankrupt became insolvent due to relationship breakdown, overuse of credit, tax liability, and son's drug problems — Bankrupt was in debt to eight unsecured creditors for combined $148,001 — Major unsecured creditor was due 60 percent of total amount owed — Bankrupt put forth proposal providing for payment of $18,000 from future earnings in satisfaction of trustee's fees and expenses and creditors' claims — Proposal was approved by two unsecured creditors at creditors meeting, without attendance of major creditor — Bankrupt brought application for approval of proposal — Application dismissed — Bankrupt did not lead any evidence showing that insolvency arose from circumstances outside of own responsibility — Interests of public lay in fashioning of proposal which preserved integrity of bankruptcy process and complied with requirements of commercial morality — Court was not to approve proposal unless debtor provided reasonable security for payment of creditors — Proposal did not provide for reasonable protection of major creditor — Bankrupt was offering far less than $0.50 on dollar on amount owed.
Table of Authorities
Cases considered by *J.E. Topolniski J.*:
Aquatex Corp., Re (1998), 8 C.B.R. (4th) 177, 1998 CarswellAlta 1094, 1998 ABQB 1006 (Alta. Q.B.) — referred to
Dav-Jor Contracting Ltd., Re (2006), 2006 BCCA 330, 2006 CarswellBC 1611, (sub nom. *Dav-Jor Contracting Ltd. (Bankrupt), Re)* 376 W.A.C. 202, (sub nom. *Dav-Jor Contracting Ltd. (Bankrupt), Re)* 228 B.C.A.C. 202, 28 C.B.R. (5th) 157, [2006] 4 C.T.C. 206 (B.C. C.A.) — referred to
Davis, Re (1924), 1924 CarswellOnt 74, 5 C.B.R. 182, 27 O.W.N. 131 (Ont. Bktcy.) — referred to
Dolson, Re (1984), 49 C.B.R. (N.S.) 255, 1984 CarswellOnt 119 (Ont. Bktcy.) — considered
Gardner, Re (1921), 1921 CarswellOnt 3, 1 C.B.R. 424, 49 O.L.R. 252, 59 D.L.R. 555 (Ont. S.C.) — referred to
Gareau, Re (1922), 2 C.B.R. 265, 61 Que. S.C. 57, 1922 CarswellQue 3 (C.S. Que.) — referred to
Gill, Re (1988), 1988 CarswellBC 529, 69 C.B.R. (N.S.) 132 (B.C. S.C.) — considered
Grobstein v. Brock Mills Ltd. (1961), 1961 CarswellQue 29, (sub nom. *Orchid Fashions Inc., Re)* 2 C.B.R. (N.S.) 103 (C.S. Que.) — considered

McNamara v. McNamara (1984), 53 C.B.R. (N.S.) 240, 1984 CarswellOnt 186 (Ont. Bktcy.) — considered
Mernick, Re (1994), 24 C.B.R. (3d) 8, 1994 CarswellOnt 257 (Ont. Gen. Div. [Commercial List]) — considered
Mernick, Re (1994), 25 C.B.R. (3d) 225, 1994 CarswellOnt 275 (Ont. C.A.) — referred to
Murray (A Debtor), Re (1968), [1969] 1 W.L.R. 246, [1969] 1 All E.R. 441, 113 S.J. 142 (Eng. Ch. Div.) — considered
National Fruit Exchange Inc., Re (1948), 1948 CarswellQue 21, 29 C.B.R. 125 (C.S. Que.) — considered
Reed, Bowen & Co., Re (1886), 17 Q.B.D. 244 (Eng. C.A.) — considered
Samson v. Alliance nationale (1935), 17 C.B.R. 304, 60 Que. K.B. 311, 1935 CarswellQue 30 (C.A. Que.) — referred to
Silbernagel, Re (2006), 2006 CarswellOnt 2523, 20 C.B.R. (5th) 155, 81 O.R. (3d) 152 (Ont. S.C.J.) — referred to
Stone, Re (1976), 22 C.B.R. (N.S.) 152, 1976 CarswellOnt 56 (Ont. S.C.) — referred to
Sumner Co. (1984), Re (1987), 79 N.B.R. (2d) 191, 201 A.P.R. 191, 1987 CarswellNB 26, 64 C.B.R. (N.S.) 218 (N.B. Q.B.) — referred to
Tridont Health Care Inc., Re (1991), 4 C.B.R. (3d) 290, 1991 CarswellOnt 179 (Ont. Bktcy.) — considered

Statutes considered:

Bankruptcy Act, 1883 (46 & 47 Vict.), c. 52
Generally — referred to
Bankruptcy Act, 1914 (4 & 5 Geo. 5), c. 59
s. 16(10) — considered
Bankruptcy Act, S.C. 1919, c. 36
s. 13(9) — referred to
Bankruptcy Act, 1949, S.C. 1949, c. 7 (2nd Sess.)
s. 34(3) — referred to
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Pt. III, Div. I — referred to

Pt. III, Div. II — referred to

s. 59 — referred to

s. 59(2) — considered

s. 59(3) — considered

s. 172(2) — considered

s. 173 — considered

s. 173(1)(a) — considered

ss. 198-200 — referred to
Civil Enforcement Act, R.S.A. 2000, c. C-15
Generally — referred to

APPLICATION by bankrupt for approval of proposal to creditors.

***J.E. Topolniski J.*:**

1 This Memorandum of Decision is supplemental to the Reasons for Decision which I delivered orally on February 2, 2007.

I. The Application

2 Donald Wandler ("Debtor") applies for court approval of his Division I, *Bankruptcy and Insolvency Act* ("BIA") [1] proposal to his unsecured creditors, made November 18, 2006 ("Proposal"). The application is opposed by the Debtor's largest unsecured creditor, Canada Revenue Agency ("CRA"), on the ground of non-compliance with s. 59(3) of the BIA, which requires that security be provided for the performance of the Proposal ("performance security").

II. Background

3 The facts are straightforward. The Proposal affects eight unsecured creditors ("creditors"), whose claims total $148,001.00. CRA's claim is for $90,000.00, or about 60 percent of the total unsecured debt. The Proposal provides that the Debtor will pay $18,000.00 from his future earnings in satisfaction of the Trustee's fees and expenses (about $ 5,400.00) and the creditors' claims ("Payment"). The Payment is due in thirty-six installments of $500.00 each, the first due on filing of the Proposal ("Initial Payment") and continuing monthly thereafter. The Proposal also provides that the Debtor will file a provisional income tax return.

4 A representative of CRA told the Trustee before the meeting of creditors to vote on the Proposal that she had sent CRA's negative vote and proxy via the mail, and did not plan to attend the meeting. As matters unfolded, the vote and proxy did not arrive in time for the meeting. The Proposal was approved by two creditors with a combined claim value of $13,645.56.

5 The Trustee reports that the Debtor's insolvency is attributable to relationship breakdown, overuse of credit, tax liability, and his son's drug problems. The Debtor's 2006 net income to November was $60,000.00. The realizable value of his assets is $9,202.00, of which he claims that all but $2,002 is exempt [under the provisions of the Civil Enforcement Act [2]] or encumbered.

6 The Trustee recommends that the Court approve the Proposal as it is advantageous to the creditors and they voted in favour of it, urging a generous interpretation of s. 59(3) to ensure that consumer debtors are not deprived of the right to make Division I proposals to their creditors. The Trustee says there is authority for the proposition that s. 59(3) may not require performance security per se, but rather a reasonable chance that the Proposal will succeed.

7 The Debtor did not attend the application or proffer any evidence to support his application.

8 CRA contends that s. 59(3) mandates performance security in the Debtor's circumstance.

A. General Principles Governing Applications for Court Approval of Proposals

9 A debtor bears the onus of establishing that a proposal should be approved. [3] Where a proposal calls for payment over an extended time, the debtor must show a reasonable prospect of being able to generate the money to make the payments. [4]

10 As a proposal substantially interferes with creditors' rights, the provisions of the BIA must be complied with strictly. [5]

11 Proposals are clearly preferable to bankruptcies. Nonetheless, the court must consider all of the stakeholders' interests on an application to approve a proposal: the debtor's interest in restructuring debt; the creditors' interests in resolving claims in a reasonable fashion; and the public interest in maintaining the integrity of the bankruptcy process and commercial morality. [6]

12 Because proposals are arrangements submitted for the approval of creditors, at least some of whom may not have had the benefit of legal advice and may be unfamiliar with legal nuance, the words used in proposals should be given their plain and ordinary meaning. [7]

B. The Statutory Framework

13 Natural persons whose debts do not exceed $75,000.00 have recourse to the "consumer proposal" provisions in Part III, Division II of the BIA. For corporations and natural persons whose debts exceed $75,000.00, recourse is under Part III, Division I of the BIA. In either case, the law recognizes that proposals have significant impact on the stakeholders. The Act

addresses those impacts through express provisions to safeguard stakeholder interests, just one of which is the requirement for court scrutiny of all proposals accepted by the creditors.

14 Section 59 provides the framework for and considerations governing the court's scrutiny of Division I proposals. Section 59 reads as follows:

> 59(1) The court shall, before approving the proposal, hear a report of the trustee in the prescribed form respecting the terms thereof and the conduct of the debtor, and, in addition, shall hear the trustee, the debtor, the person making the proposal, any opposing, objecting or dissenting creditor and such further evidence as the court may require.
>
> (2) Where the court is of the opinion that the terms of the proposal are not reasonable or are not calculated to benefit the general body of creditors, the court shall refuse to approve the proposal, and the court may refuse to approve the proposal whenever it is established that the debtor has committed any one of the offences mentioned in sections 198 to 200.
>
> (3) Where any of the facts mentioned in section 173 are proved against the debtor, the court shall refuse to approve the proposal unless it provides reasonable security for the payment of not less than fifty cents on the dollar on all the unsecured claims provable against the debtor's estate or such percentage thereof as the court may direct.
>
> [Emphasis added.]

15 Section 173 of the BIA enumerates certain circumstances and behaviour relating to a debtor. It reads in part as follows:

> 173(1) The facts referred to in section 172 are:
>
> (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible.

16 The requirement of performance security for court approval of proposals has been a feature of the BIA dating to The Bankruptcy Act, S.C. 1919, c. 36, s. 13(9). In 1949, the Act was amended (Bankruptcy Act, S.C. 1949, c. 7, s. 34(3)) to allow the court the discretion to lower the percentage of the security. The requirement of performance security and the court's discretion in terms of the percentage has remained unchanged ever since.

C. The Jurisprudence

17 A review of the jurisprudence concerning the mandate for performance security under s. 59(3) of the BIA, its predecessor provisions, and parallel legislation in the United Kingdom is helpful.

18 *Murray (A Debtor), Re*[8] concerned the performance security required for a scheme of arrangement under s. 16(10) of the English Bankruptcy Act, 1914. Like s. 59(3) of our BIA, that provision required a threshold level of performance security, but unlike s. 59(3) it did not allow the court the discretion to lower the threshold amount. The scheme of arrangement in that case provided for monthly cash payments and allowed the debtor six months to obtain planning approval to redevelop and sell his matrimonial home, failing which the trustee could sell the property. On appeal, the court reversed the initial ruling that the security was unacceptable as not providing the creditors with the required amount in the six month time allotted, finding that there was a reasonable probability that the performance security could be paid in a reasonably short period. At p. 445, Cross J. commented that a broad view of the words "reasonable security" should be taken when a proposal is highly favourable to the creditors and has been accepted by them.

19 The proposal in *Dolson, Re*[9] did not provide for performance security and the payment under the proposal was by installments, the first payment being due thirty days after approval of the proposal. Anderson J. refused to approve the proposal,

stating that where a debtor, as in that case, had previously taken advantage of the BIA (a bankruptcy and another proposal), only extraordinary circumstances would justify the court in exercising its discretion to reduce the percentage of the performance security. No such circumstances were found.

20 In *McNamara v. McNamara*, [10] the performance security offered consisted of assets minimally worth 20 cents on the dollar which had vested in the trustee. Saunders J. refused to exercise his discretion to reduce the amount of security from the statutory minimum, noting that there was inadequate evidence as to the proposal's viability, and commenting that the debtors' inability to provide security up to the statutory requirement was a factor in assessing the reasonableness of the proposal under the equivalent of s. 59(2) of the present Act.

21 In *Mernick, Re*, [11] the proposal in effect was a bankruptcy without investigative assistance. Farley J. found the proposal unreasonable on its face, noting that it was for a fraction of a cent on the dollar and fell below the minimum statutory threshold required by s. 59(3). The case took an unusual turn when the creditor opposing the application in the first instance settled with the debtor and entered into a consent order allowing an appeal of Farley J.'s decision, which had the effect of remitting the matter for a rehearing. In granting the consent order, the Ontario Court of Appeal noted that it did not reflect on the court's view of the merits of the appeal from the initial decision. The eventual outcome of the case is not reported.

22 *Grobstein v. Brock Mills Ltd.* [12] is another case in which the court refused to approve a proposal for a variety of reasons. The court suggested [13] that great care and caution must be exercised before approving a proposal that does not provide for reasonable security where there is a "fact" or bankruptcy offence in the relevant predecessor provisions to s. 173 and ss. 198 to 200.

23 *Sumner Co. (1984), Re* [14] is yet another case where approval of a proposal was objected to on the basis of performance security. The court refused to approve the proposal, in part as the performance security failed to comply with the predecessor of s. 59(3).

24 Performance security is sometimes plainly set out as such in the proposal or it may be implicit. However, it must be meaningful, the onus of proof of which rests with the debtor. *National Fruit Exchange Inc., Re* [15] is an example of a proposal which was not approved for want of meaningful security. The court in that case rejected the debtors' principals' personal guarantees as performance security because there was no evidence to show that the principals had assets to support the guarantees.

III. Analysis

25 *McNamara, Mernick*, and implicitly *Orchid*, consider the adequacy of performance security simply to be one factor, albeit an important one, in the overall assessment of the reasonableness of a proposal. This approach requires reading in language or reading ss. 59(2) and (3) conjunctively, an exercise which, in my view, is unwarranted given the purpose of the BIA proposal provisions generally, the specific purpose of s. 59, and the express language of ss. 59(2) and (3). Another approach, which I find more appealing given the express language of s. 59(3) which directs that the court do certain things if s. 173 "facts" are made out, is to read these subsections disjunctively.

26 The s. 59(3) requirement for performance security is designed to further the interests of creditors and the public. It is a requirement that, in my view, is additional to the requirements enunciated in s. 59(2). As compared to the s. 59(2) requirements, which apply to all proposals, the requirement under s. 59(3) for performance security applies only in a specified circumstance; where the debtor's situation or past conduct is blameworthy, falling within s. 173.

27 While s. 173 facts might well lead to a measure of skepticism that the debtor will satisfy his or her obligations under the proposal, they serve primarily as a reflection of public policy. Section 59(3) and s. 172(2) both refer to the facts set out in s. 173.

28 Section 172(2) stipulates that, on proof of any of those facts, the court shall refuse to discharge the bankrupt, shall suspend the discharge for a period that the court thinks proper, or shall grant the discharge on condition that the bankrupt perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

29 In *Reed, Bowen & Co., Re*,[16] Lord Esher, M.R. commented on the reason why the English Bankruptcy Act of 1883 had been passed, stating:

> It was because of the known and proved behaviour of creditors with regard to their insolvent debtors that this Act was passed, taking away from the majority of creditors that power which they had so recklessly and carelessly used, and putting a controlling power into the hands of the Court for the purpose of protecting the creditors against their own recklessness; for the purpose of preventing a majority of creditors from dealing thus recklessly, not only with their own property, but with that of the minority, and of enforcing, so far as the legislature could, a more careful and moral conduct on the part of debtors.
>
> [Emphasis added.]

30 In moving in Canada for leave to introduce Bill No. 25 in respect of bankruptcy on March 27, 1918, Mr. S.W. Jacobs stated:

> At present no distinction whatever is made as between the honest and the dishonest debtor in the matter of obtaining a discharge; they are all thrown into the discard. By this measure it is proposed that the courts shall carefully scrutinize the business dealings and the business relations of traders, and shall make a distinction - shall separate the sheep from the goats. When the court is of the opinion that a debtor has been obliged to assign through misfortune, he shall be given the necessary relief. If, on the other hand, it should be found, in scrutinizing his affairs, that he wrecked his own business wilfully, then, of course, he should receive no relief whatever. That is the crux of every bankruptcy law ...[17]
>
> [Emphasis added.]

31 That Bill was not passed, but the one which was during the next session of Parliament, and which was the forerunner of the current BIA, reflected the same public policy of fostering moral conduct on the part of debtors.

32 Like the s. 172(2) requirement, the prohibition against approving a proposal where any of the s. 173 facts have been proved against the debtor unless the debtor provides reasonable security for the payment serves to protect not only the interests of creditors but also the public's interest in commercial morality.[18]

33 As stated in Houlden and Morawetz's *Bankruptcy and Insolvency Law of Canada*:[19]

> In deciding whether the proposal should be approved, the court must take the following interests into account: (a) the interests of the debtor in making a settlement with creditors; (b) the interests of creditors in procuring a settlement which is reasonable and which does not prejudice their rights; and (c) the interests of the public in the fashioning of a settlement which preserves the integrity of the bankruptcy process and complies with the requirements of commercial morality.

34 The Debtor's assets in the present case clearly are less than fifty cents on the dollar of his unsecured liabilities. Accordingly, the onus shifts to him to show that this situation has arisen from circumstances for which he cannot justly be held responsible.[20] He offered no evidence in support of his application and chose not to appear at it. The Trustee says that he could not muster such evidence.[21] Consequently, s. 59(3) is triggered.

35 Viewed in its best light, the Initial Payment might be considered performance security implicit in the Proposal. The Initial Payment equates to .027 percent of the total amount due under the Proposal. That is not reasonable performance security.

36 In *Dolson*, Anderson J. in stated that the lack of any performance security is fatal to a proposal, but suggested that the court might exercise its discretion to reduce the percentage of security required, at least in extraordinary circumstances. Presumably he meant that the court could reduce the security to zero. I disagree. I prefer the view taken in Houlden and Morawetz that if no performance security is offered under a proposal, the court cannot approve it since s. 59(3) requires that there be a percentage of fifty cents on the dollar and zero is not a percentage of fifty cents. In any event, there must be some evidence presented to

justify the court exercising its discretion to lower the percentage of performance security, and here there was non other than the creditors' approval of the Proposal, which alone is insufficient.

37 The desirability of promoting proposals over bankruptcies is obvious. However, even such a laudable objective cannot override Parliament's directive that there be reasonable creditor protection by way of performance security for Division I proposals if, as here, a s. 173 "fact" is established.

Conclusion

38 The application is dismissed.

Application dismissed.

Footnotes

1 R.S.C, 1985, c. B-3, s. 1; 1992, c. 27, s. 2.

2 R.S.A. 2000, c. C-15.

3 *Aquatex Corp., Re*. 8 C.B.R. (4th) 177, 1998 ABQB 1006 (Alta. Q.B.) at para. 20; *McNamara v. McNamara* (1984), 53 C.B.R. (N.S.) 240 (Ont. Bktcy.).

4 *Gareau, Re* (1922), 2 C.B.R. 265 (C.S. Que.).

5 *Davis, Re* (1924), 5 C.B.R. 182, 27 O.W.N. 131 (Ont. Bktcy.).

6 *Gardner, Re* (1921), 1 C.B.R. 424 (Ont. S.C.); *Stone, Re* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.); *Sumner Co. (1984), Re* (1987), 64 C.B.R. (N.S.) 218 (N.B. Q.B.).

7 *Dav-Jor Contracting Ltd., Re*, [2006] 4 C.T.C. 206, 2006 BCCA 330 (B.C. C.A.).

8 (1968), [1969] 1 All E.R. 441 (Eng. Ch. Div.).

9 (1984), 49 C.B.R. (N.S.) 255 (Ont. Bktcy.).

10 (1984), 53 C.B.R. (N.S.) 240 (Ont. Bktcy.).

11 (1994), 24 C.B.R. (3d) 8 (Ont. Gen. Div. [Commercial List]), rev'd (1994), 25 C.B.R. (3d) 225 (Ont. C.A.).

12 (1961), 2 C.B.R. (N.S.) 103 (C.S. Que.).

13 at para. 8.

14 (1987), 64 C.B.R. (N.S.) 218 (N.B. Q.B.).

15 (1948), 29 C.B.R. 125 (C.S. Que.).

16 (1886), 17 Q.B.D. 244 (Eng. C.A.) at p. 250, 3 Morrell 90.

17 *Official Report of the Debates of the House of Commons of the Dominion of Canada*, 13th Parliament, 1st Session, 8-9 George V, 1918, vol. 1, p. 206.

18 *Gardner, Re* (1921), 1 C.B.R. 424 (Ont. S.C.) at para. 8; *Stone, Re* (1976), 22 C.B.R. (N.S.) 152 (Ont. S.C.) at para. 2; *Silbernagel, Re* (2006), 20 C.B.R. (5th) 155 (Ont. S.C.J.).

19 S.W. Holden and C.A. Maires, *Bankruptcy and Insolvency Law of Canada*, looseleaf, vol. 1, 3rd ed. (Toronto: Thompson Cardwell, 2005) at p. 2 152.

20 *Samson v. Alliance nationale* (1935), 17 C.B.R. 304 (C.A. Que.).

21 For a description of what evidence may discharge the onus, see the bankruptcy discharge case, *Gill, Re* (1988), 69 C.B.R. (N.S.) 132 (B.C. S.C.) at para. 14, where it was held that there must be some element of culpability or blameworthiness, some recklessness or blind disregard for one's own financial well-being. See also *Tridont Health Care Inc., Re* (1991), 4 C.B.R. (3d) 290 (Ont. Bktcy.) at para.9, which augments *Gill* by requiring a consideration of the debtor's level of sophistication and ability to obtain professional assistance, whether the matter was in the context of a discharge or a proposal.

End of Document

TAB 8

Province of Alberta

BUSINESS CORPORATIONS ACT

Revised Statutes of Alberta 2000
Chapter B-9

Current as of June 17, 2021

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

Regulations

The following is a list of the regulations made under the *Business Corporations Act* that are filed as Alberta Regulations under the Regulations Act

	Alta. Reg.	*Amendments*
Business Corporations Act		
Business Corporations	118/2000	*231/2000, 191/2001, 206/2001, 251/2001, 83/2005, 218/2005, 35/2007, 68/2008, 104/2009, 31/2012, 105/2012, 170/2012, 125/2013, 146/2015, 115/2017, 10/2019, 128/2019*

(9) When under subsection (8) the auditor or a former auditor informs the directors of an error or misstatement in a financial statement,

(a) the directors shall prepare and issue revised financial statements or otherwise inform the shareholders, and

(b) if the corporation is a distributing corporation, the corporation shall file the revised financial statements with the Executive Director or inform the Executive Director of the error or misstatement in the same manner that the shareholders were informed of it.

(10) Every director or officer of a corporation who knowingly contravenes subsection (7) or (9) is guilty of an offence and liable to a fine of not more than $5000 or to imprisonment for a term of not more than 6 months or to both.

1981 cB-15 s165;1988 c7 s3;1995 c28 s64

Qualified privilege

172 Any oral or written statement or report made under this Act by the auditor or a former auditor of a corporation has qualified privilege.

1981 cB-15 s166

Part 14
Fundamental Changes

Amendment of articles

173(1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

(a) change its name, subject to section 12,

(b) add, change or remove any restriction on the business or businesses that the corporation may carry on,

(c) change any maximum number of shares that the corporation is authorized to issue,

(d) create new classes of shares,

(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 or into the same or a different number of shares of other classes or series,

(g) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions of that series,

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

(i) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions of that series,

(j) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series,

(k) revoke, diminish or enlarge any authority conferred under clauses (i) and (j),

(l) increase or decrease the number of directors or the minimum or maximum number of directors, subject to sections 107 and 112,

(m) subject to section 48(8), add, change or remove restrictions on the transfer of shares,

(m.1) add or remove an express statement establishing the unlimited liability of shareholders as set out in section 15.2, or

(n) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

(2) The directors of a corporation may, if authorized by the shareholders in the special resolution effecting an amendment under this section, revoke the resolution before it is acted on without further approval of the shareholders.

(3) Notwithstanding subsection (1), but subject to section 12, where a corporation has a designating number as a name, the directors may amend its articles to change that name to a verbal name.

RSA 2000 cB-9 s173;2005 c8 s42

(e) the rights of any person owning shares of the corporation at the time of an amendment to its articles constraining share issues or transfers.

(5) An issue or a transfer of a share or an act of a corporation is valid notwithstanding any contravention of this section or the regulations.

1981 cB-15 s168;1987 c15 s17;1992 c21 s6

Proposal for amendment

175(1) Subject to subsection (2), a director or a shareholder who is entitled to vote at an annual meeting of shareholders may, in accordance with section 136, make a proposal to amend the articles.

(2) Notice of a meeting of shareholders at which a proposal to amend the articles is to be considered shall set out the proposed amendment and, if applicable, shall state that a dissenting shareholder is entitled to be paid the fair value of the shareholder's shares in accordance with section 191, but failure to make that statement does not invalidate an amendment.

1981 cB-15 s169

Class votes

176(1) The holders of shares of a class or, subject to subsection (2), of a series are entitled to vote separately as a class or series on a proposal to amend the articles to

(a) increase or decrease the maximum number of authorized shares of that class,

(b) increase the maximum number of authorized shares of a class having rights or privileges equal or superior to the rights or privileges attached to the shares of that class,

(c) effect an exchange, reclassification or cancellation of all or part of the shares of that class,

(d) add, change or remove the rights, privileges, restrictions or conditions attached to the shares of that class and, without limiting the generality of the foregoing,

(i) remove or change prejudicially rights to accrued dividends or rights to cumulative dividends,

(ii) add, remove or change prejudicially redemption rights,

(iii) reduce or remove a dividend preference or a liquidation preference, or

(iv) add, remove or change prejudicially conversion privileges, options, voting, transfer or pre-emptive rights, rights to acquire securities of a corporation or sinking fund provisions,

(e) increase the rights or privileges of any class of shares having rights or privileges equal or superior to the rights or privileges attached to the shares of that class,

(f) create a new class of shares having rights or privileges equal or superior to the rights or privileges attached to the shares of that class,

(g) make the rights or privileges of any class of shares having rights or privileges inferior to the rights or privileges of the shares of that class equal or superior to the rights or privileges of the shares of that class,

(h) effect an exchange or create a right of exchange of all or part of the shares of another class into the shares of that class, or

(i) constrain the issue or transfer of the shares of that class or extend or remove that constraint.

(2) The holders of a series of shares of a class are entitled to vote separately as a series under subsection (1) only if the series is affected by an amendment in a manner different from other shares of the same class.

(3) Subsection (1) applies whether or not shares of a class or series otherwise carry the right to vote.

(4) A proposed amendment to the articles referred to in subsection (1) is adopted when the holders of the shares of each class or series entitled to vote separately on the amendment as a class or series have approved the amendment by a special resolution.

1981 cB-15 s170;1987 c15 s18

Delivery of articles of amendment

177(1) Subject to any revocation under section 173(2) or 174(3), after an amendment has been adopted under section 173, 174 or 176, articles of amendment in the prescribed form shall be sent to the Registrar.

(2) If an amendment is to change the name of a corporation, documents relating to corporate names that are prescribed by the regulations shall, unless otherwise provided by the Registrar, be sent to the Registrar.

subsection (18), may withdraw the shareholder's notice of objection, in which case the corporation is deemed to consent to the withdrawal and the shareholder is reinstated to the shareholder's full rights as a shareholder, failing which the shareholder retains a status as a claimant against the corporation, to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors of the corporation but in priority to its shareholders.

(20) A corporation shall not make a payment to a dissenting shareholder under this section if there are reasonable grounds for believing that

(a) the corporation is or would after the payment be unable to pay its liabilities as they become due, or

(b) the realizable value of the corporation's assets would by reason of the payment be less than the aggregate of its liabilities.

RSA 2000 cB-9 s191;2005 c40 s7;2009 c53 s30

Part 15
Corporate Reorganization and Arrangements

Articles of reorganization resulting from court order

192(1) In this section, "order for reorganization" means an order of the Court made under

(a) section 242,

(b) the *Bankruptcy and Insolvency Act* (Canada) approving a proposal, or

(c) any other Act of the Parliament of Canada or an Act of the Legislature that affects the rights among the corporation, its shareholders and creditors.

(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 173.

(3) If the Court makes an order for reorganization, the Court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms of those debt obligations, and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

(4) After an order for reorganization has been made, articles of reorganization in prescribed form shall be sent to the Registrar together with the documents required by sections 20 and 113, if applicable.

(5) On receipt of articles of reorganization, the Registrar shall issue a certificate of amendment in accordance with section 267.

(6) An order for reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

(7) A shareholder is not entitled to dissent under section 191 if an amendment to the articles of incorporation is effected under this section.

1981 cB-15 s185;1994 c23 s51

Court-approved arrangements

193(1) In this section, "arrangement" includes, but is not restricted to,

(a) an amendment to the articles of a corporation,

(b) an amalgamation of 2 or more corporations,

(c) an amalgamation of a body corporate with a corporation that results in an amalgamated corporation subject to this Act,

(d) a division of the business carried on by a corporation,

(e) a transfer of all or substantially all the property of a corporation to another body corporate in exchange for property, money or securities of the body corporate,

(f) an exchange of securities of a corporation held by security holders for property, money or other securities of the corporation or property, money or securities of another body corporate that is not a take-over bid as defined in section 194,

(g) a liquidation and dissolution of a corporation,

(h) a compromise between a corporation and its creditors or any class of its creditors or between a corporation and the holders of its shares or debt obligations or any class of those holders, or

TAB 9

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

2000 ABQB 442
Alberta Court of Queen's Bench

Canadian Airlines Corp., Re

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

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

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

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

Paperny J.

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

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

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements

XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Civil practice and procedure
XXIII Practice on appeal
XXIII.10 Leave to appeal
XXIII.10.c Appeal from refusal or granting of leave

Headnote

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

Airline brought application for approval of plan of arrangement under Companies' Creditors Arrangement Act — Investment corporation brought counter-application for declaration that plan constituted merger or transfer of airline's assets to AC Corp., that plan would not affect investment corporation, and directing repurchase of notes pursuant to trust indenture, and that actions of airline and AC Corp. in formulating plan were oppressive and unfairly prejudicial to them — Application granted; counter-application dismissed — All statutory conditions were fulfilled and plan was fair and reasonable — Fairness did not require equal treatment of all creditors — Aim of plan was to allow airline to sustain operations and permanently adjust debt structure to reflect current market for asset values and carrying costs, in return for AC Corp. providing guarantee of restructured obligations — Plan was not oppressive to minority shareholders who, in alternative bankruptcy scenario, would receive less than under plan — Reorganization of share capital did not cancel minority shareholders' shares, and did not violate s. 167 of Business Corporations Act of Alberta — Act contemplated reorganizations in which insolvent corporation would eliminate interests of common shareholders, without requiring shareholder approval — Proposed transaction was not "sale, lease or exchange" of airline's property which required shareholder approval — Requirements for "related party transaction" under Policy 9.1 of Ontario Securities Commission were waived, since plan was fair and reasonable — Plan resulted in no substantial injustice to minority creditors, and represented reasonable balancing of all interests — Evidence did not support investment corporation's position that alternative existed which would render better return for minority shareholders — In insolvency situation, oppression of minority shareholder interests must be assessed against altered financial and legal landscape, which may result in shareholders' no longer having true interest to be protected — Financial support and corporate integration provided by other airline was not assumption of benefit by other airline to detriment of airline, but benefited airline and its stakeholders — Investment corporation was not oppressed — Corporate reorganization provisions in plan could not be severed from debt restructuring — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 5.1(2) — Business Corporations Act, S.A. 1981, c. B-15, s. 167.

Table of Authorities

Cases considered by *Paperny J.*:

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

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) — referred to

Algoma Steel Corp. v. Royal Bank (April 16, 1992), Doc. Toronto B62/91-A (Ont. Gen. Div.) — referred to

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

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

Cadillac Fairview Inc., Re (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]) — referred to

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

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

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

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

First Edmonton Place Ltd. v. 315888 Alberta Ltd. (1988), 60 Alta. L.R. (2d) 122, 40 B.L.R. 28 (Alta. Q.B.) — referred to

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

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

Norcen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 64 Alta. L.R. (2d) 139, [1989] 2 W.W.R. 566, 72 C.B.R. (N.S.) 20, 72 C.R. (N.S.) 20 (Alta. Q.B.) — referred to

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

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

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

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

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

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

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

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

Savage v. Amoco Acquisition Co. (1988), 59 Alta. L.R. (2d) 260, 68 C.B.R. (N.S.) 154, 40 B.L.R. 188, (sub nom. *Amoco Acquisition Co. v. Savage)* 87 A.R. 321 (Alta. C.A.) — considered

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

SkyDome Corp., Re (March 21, 1999), Doc. 98-CL-3179 (Ont. Gen. Div. [Commercial List]) — referred to

T. Eaton Co., Re (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J. [Commercial List]) — considered

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

Wandlyn Inns Ltd., Re (1992), 15 C.B.R. (3d) 316 (N.B. Q.B.) — referred to

Statutes considered:

Aeronautics Act, R.S.C. 1985, c. A-2

Generally — referred to

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

Generally — referred to

Business Corporations Act, S.A. 1981, c. B-15

Generally — referred to

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

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

s. 167(1)(e) — considered

s. 167(1)(f) — considered

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

s. 183 — considered

s. 185 — considered

s. 185(2) — considered

s. 185(7) — considered

s. 234 — considered

Canada Transportation Act, S.C. 1996, c. 10

Generally — referred to

s. 47 — referred to

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

Generally — considered

s. 2 "debtor company" — referred to

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

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

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

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

s. 12 — referred to

Competition Act, R.S.C. 1985, c. C-34

Generally — referred to

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

***Paperny J.*:**

I. Introduction

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

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

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

II. Background

Canadian Airlines and its Subsidiaries

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

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

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

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

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

Events Leading up to the CCAA Proceedings

9 Canadian's financial difficulties significantly predate these proceedings.

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

11 In the latter half of 1994, Canadian built on the improved balance sheet provided by the 1994 Restructuring, focussing on strict cost controls, capacity management and aircraft utilization. The initial results were encouraging. However, a number of factors including higher than expected fuel costs, rising interest rates, decline of the Canadian dollar, a strike by pilots of Time Air and the temporary grounding of Inter-Canadien's ATR-42 fleet undermined this improved operational performance. In 1995, in response to additional capacity added by emerging charter carriers and Air Canada on key transcontinental routes, CAIL added additional aircraft to its fleet in an effort to regain market share. However, the addition of capacity coincided with the slow-down in the Canadian economy leading to traffic levels that were significantly below expectations. Additionally, key

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

50 The Plan has three principal aims described by Canadian:

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

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

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

51 The proposed treatment of stakeholders is as follows:

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

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

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

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

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

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

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

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

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

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

The Affected Unsecured Creditors fall into the following categories:

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

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

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

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

e. Claims of tax authorities against Canadian; and

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

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

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

54 In connection with its assessment of the Plan, the Monitor performed a liquidation analysis of CAIL as at March 31, 2000 in order to estimate the amounts that might be recovered by CAIL's creditors and shareholders in the event of disposition of CAIL's assets by a receiver or trustee. The Monitor concluded that a liquidation would result in a shortfall to certain secured

creditors, including the Senior Secured Noteholders, a recovery by ordinary unsecured creditors of between one cent and three cents on the dollar, and no recovery by shareholders.

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

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

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

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

III. Analysis

59 Section 6 of the CCAA provides that:

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

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

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

(3) the plan must be fair and reasonable.

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

1. Statutory Requirements

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

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

(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5,000,000;

(c) the notice calling the meeting was sent in accordance with the order of the court;

(d) the creditors were properly classified;

(e) the meetings of creditors were properly constituted;

(f) the voting was properly carried out; and

(g) the plan was approved by the requisite double majority or majorities.

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

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

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

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

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

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

2. Matters Unauthorized

64 This criterion has not been widely discussed in the reported cases. As recognized by Blair J. in *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.) and Farley J. in *Re Cadillac Fairview Inc.* (February 6, 1995), Doc. B348/94 (Ont. Gen. Div. [Commercial List]), within the CCAA process the court must rely on the reports of the Monitor as well as the parties in ensuring nothing contrary to the CCAA has occurred or is contemplated by the plan.

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

a. Legality of proposed share capital reorganization

66 Subsection 185(2) of the ABCA provides:

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

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

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

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

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

Section 167 of the ABCA

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

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

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

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

71 The relevant portions of section 167 provide as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section 183 of the ABCA

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

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

Ontario Securities Commission Policy 9.1

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

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

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

b. Release

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

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

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

d. Oppression

Oppression and the CCAA

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

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

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

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

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

143 Where a company is insolvent, only the creditors maintain a meaningful stake in its assets. Through the mechanism of liquidation or insolvency legislation, the interests of shareholders are pushed to the bottom rung of the priority ladder. The expectations of creditors and shareholders must be viewed and measured against an altered financial and legal landscape. Shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditors' claims are not being paid in full. It is through the lens of insolvency that the court must consider whether the acts of the company are in fact oppressive, unfairly prejudicial or unfairly disregarded. CCAA proceedings have recognized that shareholders may not have "a true interest to be protected" because there is no reasonable prospect of economic value to be realized by the shareholders given the existing financial misfortunes of the company: *Royal Oak Mines Ltd.*, *supra*, para. 4., *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Company*, *supra*.

144 To avail itself of the protection of the CCAA, a company must be insolvent. The CCAA considers the hierarchy of interests and assesses fairness and reasonableness in that context. The court's mandate not to sanction a plan in the absence of fairness necessitates the determination as to whether the complaints of dissenting creditors and shareholders are legitimate, bearing in mind the company's financial state. The articulated purpose of the Act and the jurisprudence interpreting it, "widens the lens"

to balance a broader range of interests that includes creditors and shareholders and beyond to the company, the employees and the public, and tests the fairness of the plan with reference to its impact on all of the constituents.

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

Oppression allegations by Resurgence

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

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

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

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

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

151 Next, Air Canada made it clear beginning in the fall of 1999 that Canadian would have to complete a financial restructuring so as to permit Air Canada to acquire CAIL on a financially sound basis and as a wholly owned subsidiary. Following the implementation of the moratorium, absent which Canadian could not have continued to operate, Canadian and Air Canada commenced efforts to restructure significant obligations by consent. They perceived that further damage to public confidence that a CCAA filing could produce, required Canadian to secure a substantial measure of creditor support in advance of any public filing for court protection. Before the Petitioners started the CCAA proceedings on March 24, 2000, Air Canada, CAIL and lessors of 59 aircraft in its fleet had reached agreement in principle on the restructuring plan.

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

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

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

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

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

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

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

e. Unfairness to Shareholders

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

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

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

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

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

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

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

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

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

consolidated financial statements of CAC for the quarter ended March 31, 2000 show total shareholders equity went from a deficit of $790 million to a deficit of $1.214 million, an erosion of $424 million.

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

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

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

e. The Public Interest

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

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

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

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

174 The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways. It is difficult to imagine a case where the economic and social impacts of a liquidation could be more catastrophic. It would

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

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

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

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

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

Application granted; counter-applications dismissed.

Footnotes

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

End of Document

TAB 10

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

1996 CarswellOnt 5598
Ontario Court of Justice (General Division) [Commercial List]

Beatrice Foods Inc., Re

1996 CarswellOnt 5598, 43 C.B.R. (4th) 10

In the Matter of Beatrice Foods Inc.

And In the Matter of an application under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 for a compromise and arrangement with respect to Beatrice Foods Inc. and a reorganization of share capital and appointment of directors of Beatrice Foods Inc. under the Canada Business Corporations Act, R.S.C. 1985, c. C-44

Application Under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36

Houlden J.A. (ex officio)

Judgment: October 21, 1996
Docket: 295-96

Counsel: *Joseph Groia*, *Barry I. Goldberg* and *Jonathan Stainsby*, for Beatrice Foods Inc. and Beatrice Foods Holdings Corp.
Patricia D.S. Jackson, *David E. Baird* and *Thomas J. Matz*, for Informal Committee of Noteholders
Ronald Walker, *Sheryl Seigel* for the Senior Banks
Malcolm M. Mercer, *Terry Dolan* and *Norma Priday*, for Merrill Lynch Funds

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles
XIX.1.c Application of Act
XIX.1.c.iv Miscellaneous
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Application of Act
Applicant brought application for order under Companies' Creditors Arrangement Act (CCAA) for approval of plan of compromise and arrangement and for order under Canada Business Corporations Act (CBCA) amending its articles to effect concurrent reorganization of share capital and to appoint directors — Application granted — Statutory requirements under CCAA had been complied with and plan was fair and reasonable — Section 191 of CBCA conferred jurisdiction on court to amend articles of applicant as requested — Order under CCAA constituted order made under "any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors" within meaning of s. 191 of CBCA — Section 191(2) of CBCA gives substantive and not merely procedural powers to amend articles of CBCA corporation — Court may amend

articles to effect any change that might lawfully be made by amendment under s. 173 of CBCA — Shareholders had no status to object to plan as common shares had no value.

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

Applicant brought application for order under Companies' Creditors Arrangement Act (CCAA) for approval of plan of compromise and arrangement and for order under Canada Business Corporations Act (CBCA) amending its articles to effect concurrent reorganization of share capital and to appoint directors — Application granted — Statutory requirements under CCAA had been complied with and plan was fair and reasonable — Section 191 of CBCA conferred jurisdiction on court to amend articles of applicant as requested — Order under CCAA constituted order made under "any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors" within meaning of s. 191 of CBCA — Section 191(2) of CBCA gives substantive and not merely procedural powers to amend articles of CBCA corporation — Court may amend articles to effect any change that might lawfully be made by amendment under s. 173 of CBCA — Shareholders had no status to object to plan as common shares had no value.

Table of Authorities

Cases considered by *Houlden J.A. (ex officio)*:

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

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — considered

s. 173 — considered

s. 173(1)(o) — considered

s. 176(1)(b) — considered

s. 191 — considered

s. 191(1) "reorganization" (c) — considered

s. 191(2) — considered

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

Generally — considered

s. 4 — considered

s. 5 — considered

s. 20 — considered

APPLICATION for order approving plan of compromise and arrangement and for order amending applicant's articles and appointing directors.

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

1 Beatrice Foods Inc. ("Beatrice") is applying for an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") for approval of a plan of compromise and arrangement and under s. 191 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*") for an order amending the articles of the applicant to effect a concurrent reorganization of share capital of Beatrice and to appoint directors.

2 Beatrice is a corporation under the *CBCA* and operates in the dairy, food products and baked goods businesses in both Canada and the United States. It has some 3,200 employees. Beatrice owes approximately $172,000,000 to a group of senior

banks. It defaulted on its obligations to the senior banks in 1995. The senior banks entered into a standstill arrangement with Beatrice, but under the arrangement Beatrice must pay $100,000,000 to the senior banks on October 31, 1996. If the plan is not approved, Beatrice lacks the means to make the payment.

3 Beatrice is also indebted to the holders of 12 % senior subordinated notes. The amount owing to the noteholders, together with interest is approximately $240,000,000.

4 Beatrice Foods Holdings Corp. ("Holdings") holds 100% of Beatrice's issued and outstanding shares. Ninety-eight percent of Holdings is owed by Funds which are represented by Merrill Lynch Capital Partners Inc. The Funds are opposing these applications.

5 The plan in essence, provides for the following:

(a) the repayment in full of indebtedness to the Senior Banks;

(b) the exchange of 12% Senior Subordinated Notes held by Beatrice noteholders for new common shares in Beatrice, rights to buy additional new common shares, new subordinated notes maturing in 30 years bearing interest at 1% and a small amount of cash; and

(c) the cancellation of all issued and outstanding common shares and the issuance to the holder of such shares of:

(1) warrants entitling the holder to purchase new common shares at a specified exercise price; and

(2) a right to purchase all issued new common shares at a fixed price for four weeks after implementation of the Plan.

6 Since Beatrice is a large company with a substantial work force, I propose to say very little about the financial affairs of the company. Detailed information concerning all relevant aspects of Beatrice's finances is contained, however, in the material which has been put before me and I have carefully reviewed it.

7 In January, 1996, Beatrice retained R.B.C. Dominion Securities Inc. for the purpose of exploring all recapitalization, restructuring and disposition alternatives and opportunities available to Beatrice. Although R.B.C. Dominion Securities contacted over 150 prospective investors, only two binding proposals were received and only one proposal was for the purchase of the entire company. The offer received for the whole company would have paid the claims of the senior banks, but the noteholders would have had a substantial deficiency. In the past two weeks, a further offer has been received but this offer again is not sufficient to pay the noteholders in full. I am satisfied that the common shares held by the Funds have no value and that there is no likelihood in the foreseeable future that they will have any value. The 1995 annual review of operations for Merrill Lynch Capital Appreciation Fund II valued the equity in Beatrice at zero as of May 1996.

8 Dealing first with the *CCAA* application, I am satisfied that the statutory requirements have been complied with, that nothing has been done which is not authorized by the *CCAA* and that the plan is fair and reasonable. Mr. Mercer, for the Funds, has requested that the plan be amended to allocate to the Funds seven percent of the new equity including seven percent of the rights (with the resulting capital contribution applied thereby) or to accord dissent and appraisal rights to the existing common shareholders. I have pointed out to Mr. Mercer that, in my opinion, I have no jurisdiction to make such an amendment. In any event, to make either of those amendments would, in my opinion, render the plan unworkable.

9 Mr. Mercer's principal ground of opposition is that s. 191 of the *CBCA* does not confer jurisdiction on the court to amend the articles of Beatrice as requested by the applicant. Section 191 reads as follows:

191. (1) In this section, "reorganization" means a court order made under

(a) section 241;

(b) the *Bankruptcy Act* approving a proposal; or

(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

(2) If a corporation is subject to an order referred to in subsection (1), its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173.

(3) If a court makes an order referred to in subsection (1), the court may also

(a) authorize the issue of debt obligations of the corporation, whether or not convertible into shares of any class or having attached any rights or options to acquire shares of any class, and fix the terms thereof; and

(b) appoint directors in place of or in addition to all or any of the directors then in office.

(4) After an order referred to in subsection (1) has been made, articles of reorganization in prescribed form shall be sent to the Director together with the documents required by sections 19 and 113, if applicable.

(5) On receipt of articles of reorganization, the Director shall issue a certificate of amendment in accordance with section 262.

(6) A reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

(7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

10 For an order to be made under s. 191(1)(c), it is necessary, Mr. Mercer submitted, that the other Act of Parliament affect the rights among the corporation and its shareholders and the *CCAA* is not such an act. Under the *CCAA*, the court can, he submits, sanction a compromise or arrangement between a debtor company and its creditors, but it cannot sanction a compromise or arrangement between a debtor company and shareholders Accordingly, the *CCAA* is not an Act of Parliament that falls within s. 191(1)(c).

11 I have on occasion made orders under the *CCAA* in conjunction with orders under the *CBCA*. Sections 4 and 5 of the *CCAA* contemplates that the court may order a meeting of shareholders. In addition, s. 20 of the *CCAA* provides:

20. The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them

12 When discussing the reorganization provisions in the *Proposals for a New Business Corporations Law*, the *Dickerson Report*, which formed the basis for the comprehensive reform of Canada's corporations law, clearly anticipated that s. 191 would permit the elimination of issued shares. The Report (*Proposals for a New Business Corporations Law*, Robert W.V. Dickerson et at., v.1: Commentary, Part 14.00: Fundamental Changes, (Toronto: Information Canada, 1971) states, with reference to the section in the draft bill which became s. 191 (at p. 124):

To clear up the obscure meaning of "reorganization", subsection (1) of s. 14.18 states that the term includes a court order made under the *Bankruptcy Act*, s. 19.04 [the oppression remedy] and any other federal law. The object of the section is to enable 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 all the formalities of the Draft Act, particularly shareholder approval of the proposed amendment. 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 note holders or preferred shareholders.

Presumably then the corporation will be in a position to borrow further upon the security of its assets. In addition, the court will have power to reconstitute the board of directors, thus permitting representatives of the creditors of the corporation to take over the administration of the corporation until the corporation is one again solvent.

13 In discussing s. 191 of the *CBCA*, the authors of Fraser & Stewart, *Company Law of Canada*, (6th ed.: 1993), at p. 581, state that:

A reorganization, for purposes of s. 191, is defined in s. 191(1) to be a court order which is made pursuant either to the oppression remedy powers of s. 241, or an order under the *Bankruptcy and Insolvency Act* approving a proposal in bankruptcy, or any other federal act that affects the rights of a corporation, its shareholders and creditors. An example of such a federal statute would be the *Companies' Creditors Arrangement Act*.

14 In *Central Capital Corp., Re* (1996), 132 D.L.R. (4th) 223 (Ont. C.A.), Weiler J.A. said (at p. 257):

By virtue of s. 20 of the *CCAA*, arrangements under the Act mesh with the reorganization provisions of the *CBCA* so as to affect the company's relations with its shareholders. Shareholders have no right to dissent to a reorganization: s. 191(7). On a reorganization, among other things, the articles may be amended to alter or remove rights and privileges attached to a class of shares and to create new classes of shares: s. 173, *CBCA*. These statutory provisions provide a clear indication that, on a reorganization, the interests of all shareholders, including shareholders with a right of redemption, are subordinated to the interests of the creditors. Where the debts exceed the assets of the company, a sound commercial result militates in favour of resolving this problem in a manner that allows creditors to obtain repayment of their debt in the manner which is most advantageous to them.

15 I agree with the interpretation of the relevant provisions of the *CCAA* and the *CBCA*. I am of the opinion that a court order under the *CCAA* is an order under an Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

16 Section 191(2) of the *CBCA* gives substantive, not simply procedural, powers to amend the articles of a *CBCA* corporation. The court may amend the articles to effect any change that might lawfully be made by an amendment under s. 173 of the *CBCA*. Section 173(1)(o) provides that:

173. (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to

. . . . .

(o) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

17 Section 173 is supported by s. 176(1)(b) which contemplates amendments to the articles of a corporation to effect a cancellation of all or part of the shares of a class of shares. Section 176(1)(b) provides:

176. (1) The holders of shares of a class or, subject to subsection (4), of a series are, unless the articles otherwise provide in the case of an amendment referred to in paragraphs (a), (b) and (e), entitled to vote separately as a class or series on a proposal to amend the articles to

. . . . .

(b) effect an exchange, reclassification or cancellation of all or part of the shares of such class.

18 I have found that the common shares have no value. I agree with the applicant that, in these circumstances, the shareholders have no status to object to the plan. An order will therefore go as requested. In the circumstances, there will be no order as to costs.

Application granted.

TAB 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Peloton Pharmaceutiques inc., Re | 2017 QCCS 1165, 2017 CarswellQue 2378, EYB 2017-277850 | (Que. Bktcy., Mar 29, 2017)

2009 QCCS 537
Quebec Superior Court

Shermag Inc., Re

2009 CarswellQue 2487, 2009 QCCS 537, [2009] R.J.Q. 1289, 51 C.B.R. (5th) 95, J.E. 2009-897, EYB 2009-156550

In the matter of the plan of compromise or arrangement of:

Shermag Inc. (Petitioner) and RSM Richter Inc. (Monitor) and Jaymar Furniture Corp., Scierie Montauban Inc., Mégabois (1989) Inc., Shermag Corporation, Jaymar Sales Corporation (Mis-en-causes) and Groupe Bermex Inc. (Intervenant)

R. Mongeon, J.C.S.

Heard: March 13, 2009
Judgment: March 26, 2009
Docket: C.S. Qué. Montréal 500-11-033234-085

Counsel: Me Denis Ferland, Me Christian Lachance for Shermag Inc.
Me Martin Desrosiers for Geosam Investments Inc.
Me Mélanie Hébert for Marchés financiers
Me Marc-André Blain for Groupe Bermex Inc.

Subject: Insolvency; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Debtor S was incorporated pursuant to provisions of Quebec Companies Act ("QCA") — S was at stage of completing and filing plan of arrangement under Companies' Creditors Arrangement Act ("CCAA") — Pursuant to arrangement, all of S's shares would be cancelled and new equity would be issued in favour of one of its shareholders, GIL — S brought motion seeking authorization to file plan of arrangement without seeking or obtaining its shareholders' approval — Motion dismissed — When court is called upon to approve and/or sanction changes to articles of corporation in order to permit implementation of plan of arrangement, it may do so only if it considers changes to be in accordance with applicable law and if proposed changes are fair and reasonable to all stakeholders, including shareholders — While CCAA plan is, first and foremost, matter between company and its creditors, plan of arrangement should not be pretext for expropriating shareholders — Here, it was far from being certain that special treatment given to GIL in plan of arrangement would not be unfairly prejudicial to other shareholders of debtor company — While plan did not have to be perfect, total expropriation of shareholders' rights was not proper balance of interests in compromise — QCA contained entire set of rules applicable to issuance, transfer and restrictions of shares, and

court had no inherent or discretionary power to set aside those statutory provisions — Trial judge did not have comprehensive plan before him allowing him to conclude whether plan as whole was fair and reasonable — Therefore, shareholders' approval was necessary to restructure share-capital of S.

Faillite et insolvabilité --- Proposition — Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation du tribunal — « Juste et équitable »

Débiteur S était incorporé en vertu des dispositions de la Loi sur les compagnies du Québec (« LCQ ») — S en était à compléter et à déposer un plan d'arrangement sous le régime de la Loi sur les arrangements avec les créanciers des compagnies (« LACC ») — En vertu de cet arrangement, toutes les actions de S seraient annulées et de nouveaux capitaux seraient émis en faveur d'un de ses actionnaires, GIL — S a déposé une requête visant à obtenir l'autorisation d'aller de l'avant avec son plan d'arrangement sans l'approbation de ses actionnaires — Requête rejetée — Tribunal peut approuver ou confirmer des changements aux statuts d'une société visant à permettre la mise en vigueur d'un plan d'arrangement seulement s'il est d'avis que les changements proposés sont en conformité avec le droit applicable et s'ils sont justes et équitables pour toutes les parties intéressées, y compris les actionnaires — Bien que le plan conçu en vertu de la LACC soit, d'abord et avant tout, une question qui regarde la compagnie et ses créanciers, un plan d'arrangement ne devrait pas servir de prétexte pour exproprier les actionnaires — Ici, il était loin d'être évident que le traitement de faveur accordé à GIL dans le plan d'arrangement n'aurait aucun effet injuste envers les actionnaires de la compagnie débitrice — Soit, le plan n'avait pas à être parfait, mais l'expropriation en bloc des droits des actionnaires ne constituait pas un compromis équilibré des intérêts en jeu — La LCQ comprenait un ensemble complet de règles régissant l'émission, le transfert et les restrictions d'actions, et le tribunal n'avait ni le pouvoir inhérent ni le pouvoir discrétionnaire l'habilitant à ignorer ces dispositions législatives — Le juge de première instance n'avait pas devant lui une version complète du plan lui permettant de statuer si le plan, dans son ensemble, était juste et raisonnable — Par conséquent, l'approbation des actionnaires était nécessaire avant de procéder à la restructuration du capital-action de S.

Table of Authorities

Cases considered by *Mongeon J.C.S.*:

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

Beatrice Foods Inc., Re (1996), 43 C.B.R. (4th) 10, 1996 CarswellOnt 5598 (Ont. Gen. Div. [Commercial List]) — distinguished

Boutiques San Francisco Inc., Re (2004), 2004 CarswellQue 10918, 7 C.B.R. (5th) 189 (C.S. Que.) — distinguished

Cable Satisfaction International Inc., Re (2006), 2006 QCCS 3957, 2006 CarswellQue 6692 (Que. Bktcy.) — distinguished

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

Lac d'Amiante du Québec ltée c. 2858-0702 Québec inc. (2001), 2001 SCC 51, 2001 CarswellQue 1864, 2001 CarswellQue 1865, (sub nom. *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.)* 204 D.L.R. (4th) 331, (sub nom. *Lac d'Amiante du Québec ltée v. 2858-0702 Québec inc.)* 274 N.R. 201, [2001] 2 S.C.R. 743, 14 C.P.C. (5th) 189 (S.C.C.) — considered

Laidlaw, Re (2003), 39 C.B.R. (4th) 239, 2003 CarswellOnt 787 (Ont. S.C.J.) — distinguished

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

Mine Jeffrey inc., Re (2003), 35 C.C.P.B. 71, 2003 CarswellQue 90, 40 C.B.R. (4th) 95, [2003] R.J.D.T. 23, (sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.)* [2003] R.J.Q. 420 (C.A. Que.) — considered

PCI Chemicals Canada Inc., Re (2002), 2002 CarswellQue 831, [2002] R.J.Q. 1093 (C.S. Que.) — followed

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) — considered

Stelco Inc., Re (2006), 2006 CarswellOnt 406, 17 C.B.R. (5th) 78, 14 B.L.R. (4th) 260 (Ont. S.C.J. [Commercial List]) — distinguished

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 — referred to

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

s. 167 — referred to

Introduction

1 Shermag Inc. (Shermag) seeks an authorization to file a plan of arrangement under the CCAA which will provide for the cancellation of all its shares (common and preferred and the issuance of new equity in favour of one of its current shareholders, Geosam Investments Limited (Geosam)

2 Geosam is currently acting as DIP Lender of Shermag.

3 Shermag wishes to cause such plan to be approved by the creditors and the Court, but not by its current shareholders who, for all intents and purposes, will see their shares expropriated without compensation for the benefit of an existing shareholder.

4 Groupe Bermex Inc. is a 20% shareholder of Shermag and contests this Motion on the basis that existing shareholders have more rights than the mere economic value of their shares and that the proposed scheme is in direct contravention of section 49 of the Quebec Companies Act (QCA).

5 This Motion raises three questions:

a) should the Court embark into the task of giving opinions outside the process of approving a plan of arrangement?

b) is the proposed modification to the share-capital of Shermag possible under Canadian legislation such as the Canada Business Corporations Act (CBCA) or other similar provincial equivalent statutes?

c) is the proposed modification possible under the QCA and, if not, may the Court authorize it on the basis of its inherent or discretionary powers?

6 The following reasons will respond positively to the first question, express serious doubts with respect to the second and answer negatively to the third question.

The relevant facts

7 Shermag. is under the protection of the Companies' Creditors Arrangement Act since May 5, 2008. Its operations have been financed through DIP loans from time to time, in accordance with the terms of the Initial Order (as amended).

8 A Claims Process Order was filed on July 16, 2008 with a Claims Bar Date of September 5, 2008.

9 On July 31, 2008, the original DIP Lender, Wachovia Capital Markets assigned all of its rights, title and interest to the current DIP Lender Geosam Investments Limited ("Geosam").

10 Shermag also sought protection of the United States Courts (under chapter 15 of the United States Bankruptcy Code), which was granted on January 13, 2009, recognizing the Canadian proceedings as a Foreign Main Proceeding and accepting the Claims Process Order previously ratified by this Court with a new Claims Bar Date of February 27, 2009 for claims from U.S. creditors.

11 Shermag and its subsidiaries are now at the stage of completing and filing their plan of arrangement. However, for the plan to be implemented in its proposed form, Shermag asks this Court to authorize it to file a plan which will provide, *inter alia*, for the cancellation of all of its issued and outstanding shares and for the issuance of new shares which will be entirely vested in the hands of Geosam.

12 The actual cancellation of Shermag's share capital and issuance of new shares will occur only upon the approval and homologation of the plan of arrangement.

13 Shermag intends to proceed with this proposed plan without seeking or obtaining shareholders' approval as it is normally done in corporate reorganizations affecting shareholders' rights.

14 The real purpose and object of the present Petition is therefore to seek a declaratory judgment somewhat in the form of an "advanced ruling", since the present judgment will not "per se", effect or ratify the proposed modifications to the share-capital of the Debtor. This will be done only upon approval of the plan by the creditors and its subsequent ratification by this Court.

15 The Court does not have before it all of the terms and conditions of the proposed plan of arrangement. What it has is a representation by the Monitor that the current financial situation is critical, that the proposed plan of arrangement is the only path leading to a possible restructuring and that the Shermag shares have no value (based on three different valuation scenarios). In other words, if this Motion is not adjudicated upon in favour of Geosam, it will not be prepared to disburse the necessary funds to justify the filing of a comprehensive plan of arrangement susceptible of being ratified by the creditors.

16 Consequently, what appears an attempt by Shermag to merely seek the Court's opinion is not a true portrait of the situation. Without the benefit of the Court's view on the question, Shermag may not be able to submit a plan. If the Court gives its opinion, then Shermag may be able to arrange its affairs and file a plan of arrangement.

17 Accordingly, the Court will accept to decide on the issue. This is, in my view, the purpose and intent of the C.C.A.A.

18 The Court must approach its function in the same spirit as the interpretation to be given to the provisions of the C.C.A.A. As Madame Justice Mayrand wrote in PCI Chemicals Inc. [1] the "broad and liberal approach" is a principle which must always be present while interpreting and applying the act. There is no reason why the Courts should depart from this cardinal rule when asked for the kind of decision sought here, even, if in "normal" circumstances Courts are not there generally to give opinions but to resolve issues and confrontations. Courts must be ready to depart from their traditional approach to resolution of conflicts. Here the question is important and the undersigned feels that he would not fulfill his judicial duty if the Motion would be dismissed for the sole reason that it calls for an opinion or an "advanced ruling" on a portion of a plan of arrangement not yet submitted, even in draft form.

19 The question submitted is therefore quite simple in its formulation: is shareholders' approval necessary to restructure the share-capital of a Quebec corporation which is currently insolvent and under a process of restructuring under the C.C.A.A.?

20 Shermag is incorporated pursuant to the provisions of the QCA. [2]

21 Under the QCA, any share-capital reorganization proceeds under the provisions of section 49 which reads (in part) as follows:

> . . .
>
> (1)º Where a compromise or arrangement is proposed between a company and its shareholders or any class of them, affecting the rights of shareholders or any class of them, under the company's constituting act or by-laws, a judge of the Superior Court of the district in which the company has its head office may, on application in a summary way of the company or of any shareholder, order a meeting of the shareholders of the company or of any class of shareholders, as the case may be, to be summoned In such manner as the said judge directs.
>
> . . .
>
> (emphasis added)

22 Section 49 QCA is somewhat equivalent to section 192 CBCA.

23 Shermag Inc. represents however that there is no corresponding provision in the QCA to section 191 CBCA. More particularly Shermag Inc. cannot directly avail itself of the provisions of sections 191(1) and (2) CBCA which read as follows:

> . . .

(o) add, change or remove any other provision that is permitted by this Act to be set out in the articles.

Termination

(2) The directors of a corporation may, if authorized by the shareholders in the special resolution effecting an amendment under this section, revoke the resolution before it is acted on without further approval of the shareholders.

Amendment of number name

(3) Notwithstanding subsection (1), where a corporation has a designating number as a name, the directors may amend its articles to change that name to a verbal name.

R.S., 1985, c. C-44, s. 173; 1994, c. 24, s. 19; 2001, c. 14, ss. 83, 134(F).

. . .

25 Shermag and Geosam argue that the proposed modification to the share-capital of Shermag falls within one or more of the sub-sections of section 173 and that if Shermag was incorporated under the CBCA, this whole question would be easily resolved. I am far from being convinced that the proposed changes would so easily be permitted but it is obvious that the process would be less complicated.

26 While it is true that the contemplated changes to the share-capital of a company may be far-reaching, section 173 does not expressly provide for the pure and simple cancellation and expropriation of all shareholders' rights with respect to all classes of shares, to be replaced by new shares to be held by a sole shareholder for his entire benefit and to the potential detriment of others.

27 If such a special resolution would be passed outside the context of a reorganization under the CCAA its chances of successful approval by the shareholders would probablly be non-existent. The shareholders would more than likely vote against such changes.

28 When a Court acts under section 191 CBCA, it does not necessarily follow that it may do just about anything and impose new articles upon shareholders which would not meet the basic test of fairness and reasonableness usually associated to such process.

29 More specifically, when a Court, this time acting under the CCAA, is called upon to approve and/or sanction changes to the articles of a CBCA corporation in order to permit the implementation of a plan of arrangement, it may do so only if it considers the changes to be in accordance with the applicable law and if the proposed changes are fair and reasonable to all stakeholders (which include shareholders).

30 Shermag argues that if it was incorporated under the CBCA or another provincial statute, and not under the QCA, it could proceed as suggested without the necessity of obtaining shareholder approval. In support of this proposition, the following authorities are cited:

1)* Canadian Airlines Corp., Re*, [2000] 10 W.W.R. 269 (Alta. Q.B.)

31 Here, Madam Justice Paperny was asked to sanction a plan of arrangement which seriously affected the rights and value of the shares of Canadian Airlines Corporation (CAC).

32 In her introduction, she writes:

. . .

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.

. . .

(emphasis added)

33 In that particular instance, the plan of arrangement was submitted to the Court *after* creditors' approval. However, after the implementation of complex financial debt restructuring, the plan provided no recovery for the shareholders of Canadian Airlines. Certain shareholders opposed the plan, characterizing the transaction as a cancellation of issued shares, unauthorized by section 167 of the Alberta Business Corporations Act or, alternatively, in violation of section 183 ABCA.

34 After reviewing the relevant provisions of the ABCA and more particularly section 185(2) (which appears to be the counterpart of section 191(1) CBCA) and section 167 ABCA (which is the equivalent of section 173 CBCA), the Court then examined the specific provisions of the plan modifying the share-capital of CAC. The proposed Articles of Reorganization of the shares of CAC were not only *available* to the Court but *each change so proposed corresponded to changes permitted under section 167 ABCA*:. [3]

. . .

[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' share capital under the Plan does not violate section 167.

. . .

(emphasis added)

35 At this present juncture, the proposed plan of Shermag is not even drafted, the specific terms and conditions affecting its share-capital are not available for review and the creditors have not approved anything. Consequently, I cannot make any finding that the proposed reorganization of the shares of Shermag would not violate the letter and/or spirit of section 173 CBCA if the debtor company was to be incorporated under the CBCA instead of the QCA. Furthermore, a careful review of section 173 CBCA does not expressly authorize the pure and simple cancellation (equivalent to total expropriation) of shares of a company incorporated under the CBCA. Some of its subparagraphs seem to suggest that drastic transformations can be made to the articles but total expropriation of all the rights of all shareholders in favour of another who wishes to acquire all such rights for its own benefit is certainly not within the purpose and ambit of section 173 CBCA. Unequal treatment of shareholders is not the kind of result envisaged.

36 After finding that the proposed share capital reorganization fell within the applicable statutory dispositions of the ABCA, Madam Justice Paperny did write:

. . .

[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:

> 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 For example, the reorganization of an insolvent corporation may 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.

. . .

(emphasis added)

37 The circumstances of the case before me are quite different. Taken out of the context of a comprehensive plan approved by the creditors, can it be said that it will be fair and reasonable to give a blessing to the proposed changes in the share-capital and share ownership of Shermag? Am I asked to exercise my discretion in a vacuum? It should not be forgotten that the representation made before me at this stage is a proposed *cancellation* of all existing shares and the issuance of a new class of shares in which *none of the existing shareholders will be invited to participate, save one*, which makes it a "sine qua non" condition of further financing and funding the debtor company. This whole process "looks, smells and walks" like a take-over bid without the formalities. Geosam's insistence to become the sole shareholder of Shermag is not necessarily compatible with Geosam's argument that the shares have no value. On the contrary, it would seem that the shares in question definitely have value (monetary or otherwise) for Geosam.

38 Paperny J. also wrote:

. . .

[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 Fairvlew*, [1995] 0 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.

. . .

(emphasis added)

39 Here, it is far from being certain that the special treatment sought by Geosam as a shareholder of Shermag may not be unfairly prejudicial to the other shareholders of the debtor company

40 Here again, I am asked to consider a very narrow issue without the benefit of the whole plan and without knowing if the plan will in fact be approved by the creditors.

41 Section 6 CCAA provides as follows:

. . .

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.

. . .

42 I draw from this section that a CCAA plan is, first and foremost, a matter between the company and its creditors. Shareholders of an insolvent company may not be allowed to block a plan of arrangement but a plan of arrangement should not be the pretext for expropriating the shareholders.

43 I have already pointed out that I am unable to verify if the plan complies with all (explicit or implicit) statutory requirements nor am I able for that matter to verify if the proposed plan is "fair and reasonable" and in so doing, if I am really in a position to dispense the proposed share reorganization from sanction by the shareholders.

44 Would Paperny J. have been able to sanction the plan in Canadian Airlines if the ABCA would not have had specific provisions within which she could ensure that the plan met all statutory requirements? I think not.

2)* Loewen Group Inc., Re *(2001), 32 C.B.R. (4th) 54* *(Ont. S.C.J. [Commercial List])

45 In this well known decision of Farley J., the proposed plan provided for a sale of all or substantially all the assets of the debtor company without the necessity of obtaining shareholder approval under section 126 of the British Columbia Company Act. Farley J. wrote:

> . . .
>
> 3. In my view s. 126 contemplates a voluntary disposal of the assets and undertaking of a corporation by the directors and not a transfer of property pursuant to a vesting order issued pursuant to the CCAA (or other federal bankruptcy and insolvency legislation), In this case pursuant to s. 18.6(2) of the CCAA. An arrangement between a bankrupt or insolvent corporation and its directors, including the disposal of the corporation's property to implement the arrangement, falls within the exclusive jurisdiction of the federal Parliament. Provincial legislation which would otherwise apply to the sale of the corporation's property has no application in such circumstances. See *Montreal Trust Co. v. Abitibi Power & Paper Co.*, [1938] O.R. 589 (Ont. C.A.), at pp. 601-2.
>
> . . .
>
> 7. If a conflict arises between the CCAA and a provincial statute, then under the doctrine of paramountc, the CCAA provision prevails and the conflicting provisions of the provincial statute are rendered inoperative. See *Pacific National Lease Holding Corpo. V. Sun Life Trust Co.* (1995), 34 C.B.R. (3d) 4 (B.C.C.A.) at pp.11-2. Thus even if s. 126 of the BC Company Act were to be interpreted as applying (which I have found it does not), then In this case the Loewen shareholders would have an opportunity to veto a key component of the US Plan which is being recognized by this Court pursuant to s. 18.6(2) of the CCAA. Thus there would be a irreconcilable conflict between those provisions of the provincial statute and the CCAA.
>
> 8. Under U.S. bankruptcy law, shareholders having no economic interest to protect have no right, to vote on a plan of reorganization. Consistent with that appropriate economic and legal principle, courts in Ontario and Alberta have held that where shareholders similarly have no economic interest to protect, it would defeat the policy objectives of the CCAA to give those shareholders a right to veto a plan of arrangement. In the subject case the shareholders of Loewen have no economic interest. Loewen has in fact to its credit consistently advised in press releases that it considered its shares to be valueless, notwithstanding that these shares continued to trade for somewhat more than nominal value during a considerable portion of the CCAA and U.S. Chapter 11 Bankruptcy Code proceedings.
>
> . . .
>
> (emphasis added)

46 It is suggested that, by analogy, I should follow the same reasoning, in that there is, from a practical point of view, little or no difference between a sale of all of the assets of a debtor company and a transfer of all of the shares of the same company to a new shareholder, to the detriment of the existing shareholders.

47 With respect, I disagree. Firstly, a sale of assets affects the rights of shareholders "qua" investors, not "qua" shareholders. Their shares remain Intact, although valueless. Secondly, the CCAA is intended to regulate firstly the dealings of the corporation and its *creditors* and not necessarily between the corporation and its *shareholders* and in doing so, the Court must try to maintain

a just equilibrium between stakeholders. Although a Court may have to interfere with shareholders rights in the context of a plan of arrangement under the CCAA, it can only do so *within the limits of the applicable statutory provisions governing the debtor corporation*. It is not for nothing that Geosam wishes to become the sole shareholder of Shermag Inc., otherwise it would not proceed in that fashion. One may easily imagine that there might be some monetary advantage which may be worth something to Geosam.

48 Accordingly, although this Court is sympathetic to the argument that shareholders of an insolvent corporation should not be given a right of veto to a proposed plan more particularly when their shares are without value, this is not a reason in and of itself to propose a plan which will expropriate all shareholders' rights without any compensation. There are more rights attached to the quality of a shareholder than the value of the shares he or she holds.

3)* Boutiques San Francisco Inc., Re *(2004), 7 C.B.R. (5th) 189* *(C.S. Que.), Gascon J.)

49 This matter is somewhat similar to the previous decision of Loewen Group, where my colleague Gascon J. was being asked to approve the sale of a substantial portion of the *assets* (and not the shares) of the debtor company without obtaining shareholder approval. He wrote:

> . . .
>
> 14] Quant à la deuxième question touchant les actionnaires de la débitrice requérante, on demande une déclaration voulant que la vente ne requière pas leur approbation.
>
> [15] Le Tribunal est loin d'être convaincu qu'il s'agit ici d'une vente qui concerne la quasi-totalité des biens de l'entreprise. Que ce soit selon le critère qualitatif ou le critère quantitatif auxquels réfère l'arrêt Cogeco *Câble inc. c. CFCF inc.* [5] , il semble loin d'être acquis que ce soit le cas dans les circonstances de la vente des boutiques de la bannière San Francisco.
>
> [16] À tout événement, le Tribunal fait siens les propos des auteurs Martel et Martel dans leur ouvrage connu sur les aspects juridiques de la compagnie au Québec [6] :
>
> > Le transfert de propriété des biens d'une société à l'occasion d'un arrangement sous l'autorité de la *Loi sur les arrangements avec les créanciers des compagnies* ou à l'occasion de sa faillite n'est pas soumis au vote des actionnaires tant en vertu de la *Lois canadienne sur les sociétés par action* que des lois corporatives provinciales.
>
> [17] Dans cet extrait, ces auteurs réfèrent au jugement rendu dans l'affaire *Loewen Groiup Inc.* [7] . Essentiellement, le juge Farley y a mentionné que les actionnaires n'avaient pas un intérêt économique en jeu dans le cadre d'une compagnie insolvable. Ils ne devraient donc pas avoir de droit de veto dans le cadre de la réorganisation de cette compagnie, y compris dans les situations où cette réorganisation implique la vente de la totalité ou d'une partie substantielle de ses actifs.
>
> [18] Le Tribunal considère qu'il s'agit là d'appuis suffisants pour procéder à la vente sans que l'approbation des actionnaires ne soit obtenue. Encore une fois, afin de faciliter le processus de la vente, le Tribunal est disposé à émettre la déclaration recherchée à cet égard.
>
> . . .
>
> (emphasis added)

50 The situation here is quite different. Although, once again, the undersigned agrees that the shareholders of Shermag should not be given the right to block a transaction when it is clear that their shares have no value, what is contemplated here is not a sale of assets.

51 Once again, the principle set forth in the Boutiques San Francisco or Loewen Group cases is not at issue here. The proposed Shermag plan (as flimsy as it may be at this point) does not envisage the disappearance of the same rights at all.

4) Cable Satisfaction International Inc., Re** S.C.M. 500-11-020963-035, Commercial Division (Quebec S.C.) March 19, 2004 [2006 CarswellQue 6692 (Que. Bktcy.)]

52 In this matter, Mr. Justice Paul Chaput was asked to sanction a plan which provided, in its first version, a 2% distribution to the existing shareholders of the debtor. This was included in the information circular prior to the meeting of the creditors. At the meeting, the creditors proposed an amendment to the plan and voted in favour of the cancellation of the 2% distribution in question. Chaput J. wrote:

> . . .
>
> [49] From the representations made, the Court understands that the shareholders are not investing nor participating in the arrangement or the reorganization.
>
> [50] The Amended Plan does take away the 2% participation which had been proposed for the shareholders. However, the creditors who will suffer an important shortfall have decided that since the shareholders bring nothing to the efforts being made to revitalize the company, they should get nothing.
>
> [51] In the present case, the reorganization proposed in the Plan is also sought under section 191 C.B.C.A. Sub-section (7) of that section reads as follows:
>
> > (7) A shareholder Is not entitled to dissent under section 190 If an amendment to the articles of incorporation is effected under this section.
>
> [52] On a reorganization, Martel comments as follows [5] :
>
> > Lorsqu'une société fédérale est insolvable et qu'elle fait une proposition à ses créanciers en vertu de la *Loi sur la faillite et l'insolvabilité* ou une transaction ou un arrangement avec ceux-ci sous l'autorité de la *Loi sur les arrangements avec les créanciers des compagnies*, elle peut à cette occasion apporter des modifications à ses statuts par voie de réorganisation en vertu de l'article 191 de la *Loi canadienne sur tes sociétés par actions*. L'ordonnance rendue par le tribunal en vertu des deux premières de ces lois peut effectuer dans les statuts de la société toute modification prévue à l'article 173, incluant des modifications au capital-actions, sans qu'aucune résolution des actionnaires ne soit requise. De plus, le tribunal qui rend l'ordonnance peut autoriser, en en fixant les modalités, l'émission de titras de créance (obligations, débentures ou billets) convertibles ou non en actions de toute catégorie ou assorties de l'option d'acquérir de telles actions; il peut aussi ajouter d'autres administrateurs ou remplacer ceux qui sont en fonction.
> >
> > La réorganisation ordonnée par le tribunal s'effectue par le dépôt de clauses de réorganisation (formule 14) auprès du Directeur, et de la délivrance par celui-ci d'un certificat de modification.
> >
> > Non seulement les actionnaires ne sont-ils pas appelés à voter sur la réorganisation, mais en plus ils ne bénéficient pas du droit de dissidence. Le raisonnement derrière cette entorse à la protection statutaire des actionnaires est que, puisque la société est insolvable, leurs actions ne valent rien et il ne leur appartient pas de faire échec à une proposition ou un arrangement avec les créanciers qui sera à l'avantage de la société et, éventuellement, si la société parvient à survivre et à redémarrer grâce à cette démarche, au leur. »
> >
> > . . .
> >
> > (*references omitted*)

53 Relying on the findings of Papemy J. in *Canadian Airlines*, *supra*, Chaput J. came to the conclusion that the creditors could vote against any distribution to the shareholders without rendering the plan "unfair". As Papemy J. stated at paragraph 170 of the *Canadian Airlines* case, "...it is not unfair that shareholders receive nothing."

Accordingly, the Cable satisfaction plan was approved. However, before doing so, Chaput J. ensured that the proposed plan complied with all statutory requirements including compliance with section 191 CBCA. Furthermore, in Cable Satisfaction, the shareholders were not deprived of their shares. The situation before me is, once again, quite different.

54 Other decisions have been cited by counsel for Geosam which, at first blush, seem to accept the principle of pure and simple cancellation of share-capital without any form of replacement or protection of shareholder rights other than those attached to the value of their shares. This added jurisprudence suggests further reflexion and analysis.

5) Algoma Steel Inc., Re 2002 CanLII 49571 [2001 CarswellOnt 4640 (Ont. S.C.J. [Commercial List])]

55 In that instance, Lesage J. of the Ontario Supreme Court sanctioned a third plan of arrangement which had previously been approved by the statutory majorities of its five classes of affected creditors. He therefore had before him a comprehensive plan which had passed the test before the creditors. He was able to verify that the plan:

> a) was in strict compliance with all statutory requirements and adherence to the previous orders of the Court;
>
> b) ensure that all materials and procedures were examined so that nothing was being done which was not authorized by the CCAA; and
>
> c) was fair and reasonable.

56 Firstly, I do not have a comprehensive plan before me which would normally permit me to say that the plan as a whole is fair and reasonable. Nevertheless, I am asked to rule on an important element of the plan to come. Am I really in a position to do this? The approval of a plan is the approval of a plan as a whole after the creditors have had the opportunity to vote in it. Can I really exercise my discretion under the CCAA without these elements? Can I exercise any discretion in the context of a declaratory judgment or am I obliged to look only at the statutes and apply the law as it is written? Discretion, in my view does not come Into play prior to the sanction of the plan as a whole.

57 Even though I agree with the principle that a plan is a compromise and cannot be perfect, there are some cardinal principles beyond which one may not go. Total expropriation of shareholders' rights is not a proper balance of interests in a compromise. Lesage J. cited a passage from Farley J. as follows which shows how far a Court may go but what are also the limits of its power of intervention:

> . . .
>
> As Farley J. stated at pp. 173-4 of *Sammi Atlas Inc.* in reference to the 3rd element for consideration:
>
> > ... Is the Plan fair and reasonable? A plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if It is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see If rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights: see *Campeau Corp., Re* reflex, (1992), 10 C.B.R. (3d) 104 (Ont. Gen, Div.) at p. 109. It is recognized that the CCAA contemplates that a minority of creditors is bound by the plan which a majority have approved — subject only to the court determining that the plan is fair and reasonable: see *Northland Properties Ltd.* at p. 201; *Olympia & York Developments Ltd.* at p. 509....
>
> Later on the same page he continued:
>
> > Those voting on the Plan (and I note there was a very significant "quorum" present at the meeting) do so on a business basis. As Blair J. said at p. 510 of *Olympia & York Developments Ltd.*:

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

58 Lesage J. finally wrote at paragraph [7] the following conclusion.

> . . .
>
> The Third Plan is sanctioned and approved. Order accordingly together with the ancillary relief requested including the amendment to Algoma's articles of incorporation to cancel the existing common shares (as not having any value); see s. 186 of the *(Ontario) Business Corporations Act; Beatrice Foods Inc., Re* [(October 21, 1996), Houlden J. (Ont. Gen. Div.)] unreported; *Canadian Airlines Corp.*, supra, at pp. 288-90.
>
> . . .

59 I cannot, therefore, rely on this decision to respond positively to Shermag's request *at this stage*. This will have to come later. It may be that a cancellation of the existing common shares is possible under section 173 CBCA but usually, a cancellation of a class of shares is followed by the issuance of new shares replacing those cancelled to the *original* shareholders. If *all* the shares are cancelled, then perhaps no new shares are issued. Otherwise, there is a serious risk of having some shareholders who may be treated unfairly, vis-à-vis others.

6) Beatrice Foods Inc. (Re) Beatrice Foods Inc., (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List])

60 In that instance, the power of the Court to amend articles of a company under the combined effect of sections 191(2) and 173 CBCA was accepted. But here again, the amendment was limited to:

> ...the cancellation of all issued and outstanding common shares and the issuance to the holder of such shares of:
>
> 1) Warrants entitling the holder to purchase new common shares at a specified exercise price; and
>
> 2) A right to purchase all issued new common shares at a fixed price for four weeks after implementation of the Plan.

61 This is not what Shermag is proposing. The plan in Beatrice Foods Inc. is permissible under sections 191(2) and 173 CBCA. This plan did not call for the pure and simple cancellation of shares with nothing in return, even if the return is not as interesting as what the shareholders held originally.

62 The Beatrice Foods Inc, and Canadian Airlines cases do not stand for the proposition that a Court acting under section 191(1) and (2) CBCA may literally wipe out all of the share-capital of a company held by certain shareholders without giving something in return to those shareholders and then transferring all shareholders' rights to one shareholder to the detriment of others.. An arrangement is not an expropriation without compensation.

7) Laidlaw, Re 2003 CanLII 8003 [2003 CarswellOnt 787 (Ont. S.C.J.)]

63 In this particular matter, Farley J. was asked to render an order pursuant to section 191 of the CBCA amending the articles of the company. He stated that:

> [7] ... Section 191 of the CBCA permits the court to order necessary amendments to the articles of a corporation without shareholder or dissent rights...

. . .

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

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

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

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

(d) Section 173 of the CBCA is supported by paragraph 176(2)(b) of the CBCA, which contemplates amendments to the articles of a corporation to effect the cancellation of all or part of the shares of a class of shares.

See Beatrice; *Re Algoma Steel Inc.* 2002 CanLII 49571 (ON S.C.), (2002), 30 C.B.R. (4th) 1 (Ont. S.C.J.), R. Dickerson, L. Getz and J. Howard, *Proposals for a New Business Corporations Law for Canada*, vol 1 (Ottawa: Information Canada, 1971) at p. 124.

. . .

64 This is once again a case where all the shares are cancelled and no new shares are issued to a new shareholder. There seems to be no apparent unfair treatmet of one shareholder as opposed to another.

8) Stelco Inc., Re [Sanction hearing] (2006), 17 C.B.R. (5th) 78 (Ont. S.C.J. [Commercial List]), Ontario S.C.J. (Farley J.)

65 In that case the following was held:

However that is not the end of that issue: what of the shareholders?

[13] Is the Plan fair, reasonable and equitable for the existing shareholders of S? They will be wiped out under the Plan and their shares eliminated. New equity will be created in which the existing shareholders will not participate. They have not been allowed to vote on the Plan.

. . .

[14] It is well established that a reorganization pursuant to s. 191 of the CBCA may be made in conjunction with a sanction order under the CCAA and that such a reorganization may result in the cancellation of existing shares of the reorganized corporation based on those shares/equity having no present value (in the sense of both value "now" and the likelihood of same having value in the reasonably foreseeable future, absent the reorganization including new debt and equity injections and permitted indulgences or other considerations and adjustments.

. . .

66 Then further:

[16] The question then is does the equity presently existing in S have true value at the present time independent of the Plan and what the Plan brings to the table? If it does then the interests of the EH and the other existing shareholders must be considered appropriately in the Plan. This is fairly put in K.P. McElcheran, *Commercial Insolvency In Canada* (Toronto, Lexis Nexie Canada Inc.: 2005) at p. 290 as:

> If, at the time of the sanction hearing, the business and assets of the debtor have a value greater than the claims of the creditors, a plan of arrangement would not be fair and reasonable if it did not offer fair consideration to the shareholders.

[17] However if the shareholders truly have no economic interest to protect (keeping in mind that insolvency and the depth of that insolvency may vary according to which particular test of insolvency is applied in respect of a CCAA proceeding: as to which, see *Re Stelco Inc.*, [2004] O.J. No. 1257 (S.C.J. [Commercial List]), leave to appeal dismissed [2004] O.J. No. 1903 (C.A.), leave to appeal dismissed (S.C.C.) No. 30447). In *Cable Satisfaction*, Chaput J. at p. 218 observed that when shareholders have no economic interest to protect, then they have no claim to a right under the proposed arrangement and the "[m]ore so when, as in the present case, the shareholders are not contributing to any of the funding required by the Plan." I do note in the case of the Stelco Plan and the events leading up to it, including the capital raising and sale processes, that despite talk of an equity financing by certain shareholders, including the EH, no concrete offer ever surfaced.

67 I see a distinction between the Stelco situation and the present one in that none of the *previous* shareholders are treated differently. They seem to be on an equal footing. New shares are created *in which the existing shareholders will not participate*. This is not what is proposed to me by Shermag and Geosam which is currently a 19.9% *existing* shareholder.

68 In summary, upon reviewing the above-cited cases, I must take into account that none of these cases present a factual situation where *existing* shareholders are treated unequally vis-à-vis other *existing* shareholders of the same class.

69 Each case is a "cause d'espèce" and all the facts as a whole must be taken into account. This can only be done when the entire plan is filed and voted upon by the creditors and other stakeholders who have a say in the process.

70 Finally, none of the above-cited cases illustrate a situation where, by the exercise of inherent or discretionary powers, whole new sections of the law have been re-written or added to the existing legislation applicable to a particular debtor company. All these cases rely on an interpretation of section 173 CBCA (or a provincial equivalent) to hold that what is proposed is legal. I am far from being convinced that Shermag's proposed plan is fair and reasonable enough to pass the section 173 CBCA test. I say so because:

> a) The proposition appears to be unfair to some of the existing shareholders and profitable to one shareholder to the detriment of others; and
>
> b) Geosam's insistence to become the sole shareholder of Shermag is such that there may be some value to the shares, perhaps not expressed in money (notwithstanding the Monitor's opinion that the shares have no economic value, a finding which I do not put in question).
>
> c) Section 173 CBCA however broadly interpreted it may or should be, does not appear to have been drafted to permit or authorize the pure and simple cancellation of all of the shares of a corporation and the issuance of new equity, for the advantage of one existing shareholder to the detriment of all others.

71 However, all of the foregoing becomes a secondary question.

72 The real question is, can I do what I am asked to do under the QCA?

73 It is evident that the QCA is somewhat archaic compared to more modern statutes governing corporate entities in Canada. It is common knowledge that the QCA is currently under reform and hopefully sooner than later the new Quebec Act will incorporate the most recent and more adequate statutory dispositions with respect to corporate reorganizations, as they can be found in the CBCA, the OBCA or the ABCA.

74 But, as of today, sections 191 and 173 CBCA do not have their equivalent in the Quebec statute. It is suggested that the combined effect of my discretionary powers under the CCAA, my inherent jurisdiction as a Superior Court Judge or my specific

powers under article 46 of the Quebec Code of civil procedure allow me to incorporate, into the Quebec statute, provisions equivalent to sections 191 and 173 CBCA.

75 This is quite appealing.

76 However, even if I do realize that Quebec corporations may not have access to the same "tools" to restructure themselves, in the absence of statutory dispositions equivalent to those found, for example in the CBCA, there is a limit beyond which I cannot go. The present instance is a clear example of same.

77 The statutory provisions relating to the capital stock of a Quebec corporation are found in division XVII of the QCA, and enunciated in articles 45 to 52.

78 These provisions contain the entire set of rules applicable to the issuance, transfer, restrictions, allotment and types of shares (articles 45 to 47 QCA).

79 Article 48 QCA determines the different classes of shares as well as the rights conditions and limitation attached to each class including voting rights, dividends, and conversions.

80 Article 48(7) QCA stipulates that:

> . . .
>
> 7º No shares shall be converted without the consent of the holders thereof, except in conformity with the conditions attaching thereto or on a compromise under section 49.
>
> . . .
>
> (emphasis added)

81 Article 49 QCA applies to compromises and arrangements between a company and its shareholders:

> . . .
>
> 49. 1º Where a compromise or arrangement is proposed between a company and its shareholders or any class of them, affecting the rights of shareholders or any class of them, under the company's constituting act or by-laws, a judge of the Superior Court of the district in which the company has its head office may, on application in a summary way of the company or of any shareholder, order a meeting of the shareholders of the company or of any class of shareholders, as the case may be, to be summoned in such manner as the said judge directs.
>
> 2º If the shareholders, or class of shareholders, as the case may be, present in person or by proxy at the meeting, agree, by three-fourths of the shares of each class represented, to the compromise or arrangement either as proposed or as altered or modified at such meeting, such compromise or arrangement may be sanctioned by a judge as aforesaid.
>
> If so sanctioned, such compromise or arrangement shall thereupon be confirmed by supplementary letters patent deposited in the register by the enterprise registrar. Subject to such deposit, but from the date of the supplementary letters patent, the compromise or arrangement shall be binding on the company and the shareholders or class of shareholders, as the case may be.
>
> . . .

82 Article 50 QCA deals with compromises or arrangements between a company and its creditors:

> . . .

> 50. 1º Where a compromise or arrangement is proposed between a company and its creditors, or any class of them, a judge of the Superior Court of the district In which the company has its head office or principal establishment may, on application in a summary way of the company or of any creditor who might be affected, order a meeting of the creditors of the company, or of any class of creditors, as the case may be, to be summoned in such manner as the said judge directs.
>
> 2º If the said creditors, or class of creditors, as the case may be, present in person or by proxy at the meeting, agree, by three-fourths in value of the creditors, or class of creditors, as the case may be, present or represented at the meeting, to the compromise or arrangement either as proposed or as altered or modified at such meeting, such compromise or arrangement may be sanctioned by a judge as aforesaid. Prior to any such sanction, the judge shall require the production before him of a duly certified copy of a resolution of the company, embodying and approving the said compromise or arrangement as agreed to by the creditors.
>
> If so sanctioned, a certified copy of the judgment or order giving such sanction shall be filed with the enterprise registrar, who shall deposit a notice to that effect in the register, ompromise binding.
>
> From the date of such deposit, the compromise or arrangement shall be binding on the company and the creditors or class of creditors, as the case may be.
>
> 3º The word "creditors" when used in this section shall include only the holders of scrip interest certificates, or scrip dividend certificates, and warrants, and provided the same do not carry any registered claim or registered hypothec on the company's property or assets.
>
> . . .

83 Article 51 QCA deals with dissenting shareholders after an offer to acquire all the shares of a certain class has been accepted by the holders of 9/10 of the shares of such class. As for article 52 QCA it deals with shares held in trust.

84 Nowhere is it provided that a Tribunal may impose changes to the articles of a Quebec corporation in any context, let alone an insolvency context.

85 But for sections 191(1) and (2) CBCA this would also be true of any federally incorporated company. All the previous jurisprudence reviewed above would not exist if the said provisions would not exist under the CBCA or if corresponding provisions would not exist for example in the ABCA. Absent these corresponding provisions, Madam Justice Paperny would not have been able to ensure that the proposed arrangement in Canadian Airlines was *in compliance with the Alberta law*.

86 The Quebec law being silent on the powers of the Court alone to modify articles is, however, not silent in the manner in which a corporate restructuring or reorganization may be effected when rights attributed to shares are concerned.

87 The methodology is clearly outlined in sections 48, 49 and 50 QCA. Therefore, we are not in the presence of a legislative void: we are in the presence of statutory dispositions which set the rules. The rules may be outdated but they are still the rules and until they are abrogated and/or amended by the Quebec legislature, the Courts must follow and apply these rules. Inherent or discretionary powers are not equivalent to legislative powers.

88 One of the most recent decisions dealing with inherent jurisdiction and discretionary powers of a judge supervising a restructuring under the CCAA is the Stelco Inc. case before the Ontario Court of Appeal dealing with the removal and reinstatement of two members of the Board of Directors. [4]

89 At paragraphs 31, 32 and 33, Blair J. deals with the argument of jurisdiction as follows:

> . . .

TAB 12

2010 QCCS 4450
Quebec Superior Court

AbitibiBowater Inc., Re

2010 CarswellQue 10118, 2010 QCCS 4450, 193 A.C.W.S. (3d) 360, 72 C.B.R. (5th) 80, EYB 2010-179705

In The Matter of the Plan of Compromise or Arrangement of

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and The Other Petitioners Listed on Schedules "A", "B" and "C" (Debtors) and Ernst & Young Inc. (Monitor)

Clément Gascon, J.S.C.

Heard: September 20-21, 2010
Judgment: September 23, 2010
Docket: C.S. Montréal 500-11-036133-094

Counsel: Mr. Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud, for the Debtors
Me Gilles Paquin, Me Avram Fishman, for the Monitor
Mr. Robert Thornton, for the Monitor
Me Bernard Boucher, for BI Citibank (London Branch), as Agent for Citibank, N.A.
Me Jocelyn Perreault, for Bank of Nova Scotia (as Administrative and Collateral Agent)
Me Marc Duchesne, Me François Gagnon, for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders
Mr. Frederick L. Myers, Mr. Robert J. Chadwick, for the Ad hoc Committee of Bondholders
Mr. Michael B. Rotsztein, for Fairfax Financial Holdings Ltd.
Me Louise Hélène Guimond, for Syndicat canadien des communications, de l'énergie et du papier (SCEP) et ses sections locales 59-N, 63, 84, 84-35, 88, 90, 92, 101, 109, 132, 138, 139, 161, 209, 227, 238, 253, 306, 352, 375, 1256 et 1455 and for Syndicat des employés(es) et employés(es) professionnels(-les) et de bureau - Québec (SEPB) et les sections locales 110, 151 et 526
Me Neil Peden, Mr. Raj Sahni, for The Official Committee of Unsecured Creditors of AbitibiBowater Inc. & al.
Me Sébastien Guy, for Cater Pillar Financial Services and Desjardins Trust inc.
Mr. Richard Butler, for Her Majesty the Queen in Right of the Province of British Columbia and the Attorney General of British Columbia
Me Louis Dumont, Mr. Neil Rabinovitch, for Aurelius Capital Management LLC and Contrarian Capital Management LLC
Mr. Christopher Besant, for NPower Cogen Limited
Mr. Len Marsello, for the Attorney General for Ontario
Mr. Carl Holm, for Bowater Canada Finance Company
Mr. David Ward, for Wilmington Trust US Indenture Trustee of Unsecured Notes issued by BCFC

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Pulp and paper company experienced financial difficulties and sought protection under Companies' Creditors Arrangement Act — In order to complete its restructuring process, company prepared plan of arrangement — Under plan, company's secured debt obligations would be paid in full while unsecured debt obligations would be converted to equity of reorganized entity — Monitor as well as overwhelming majority of stakeholders strongly supported plan while only handful of stakeholders raised limited objections — Company brought motion seeking approval of plan by Court — Motion granted — Sole issue to be determined was whether plan was fair and reasonable — Here, level of approval by creditors was significant factor to consider — Monitor's recommendation to approve plan was another significant factor, given his professionalism, objectivity and competence — As most of objecting parties had agreed upon "carve-out" wording to be included in Court's order, only two creditors actually objected to plan and it was Court's view that their objections were either ill-founded or moot — Should Court decide to go against vast majority of stakeholders' will and reject plan, not only would those stakeholders be adversely prejudiced but company would also go bankrupt — Court should not seek perfection as plan was result of many compromises and of favourable market window — Court was of view that it was important to allow company to move forthwith towards emergence from 18-month restructuring process — Therefore, Court considered it appropriate and justified to approve plan of arrangement.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation par le tribunal — « Juste et équitable »

Compagnie papetière a connu des problèmes financiers et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Afin de compléter son processus de restructuration, la compagnie a préparé un plan d'arrangement — Dans le cadre du plan, les dettes de la compagnie faisant l'objet d'une garantie seraient payées au complet tandis que les dettes de la compagnie ne faisant pas l'objet d'une garantie seraient converties en actions de l'entité restructurée — Contrôleur de même que la vaste majorité des parties intéressées étaient fortement en faveur du plan tandis qu'une poignée seulement des personnes intéressées soulevaient des objections limitées — Compagnie a déposé une requête visant l'approbation du plan par le Tribunal — Requête accueillie — Seule question à trancher était de savoir si le plan était juste et raisonnable — En l'espèce, la proportion des créanciers s'étant prononcés en faveur du plan était un élément important à considérer — Recommandation du contrôleur d'approuver le plan était un autre élément important, compte tenu de son professionnalisme, de son objectivité et de sa compétence — Comme la majeure partie des parties s'étant prononcées contre le plan avaient donné leur accord à la rédaction d'une clause de « retranchement » destinée à faire partie de l'ordonnance du Tribunal, seuls deux créanciers s'objectaient au plan dans les faits et le Tribunal était d'avis que leurs objections étaient soient sans fondement ou sans objet — S'il fallait que le Tribunal décide d'aller à l'encontre de la volonté de la vaste majorité des personnes intéressées et de rejeter le plan, non seulement ces personnes subiraient-elles des impacts négatifs mais aussi la compagnie ferait-elle faillite — Tribunal ne devrait pas chercher la perfection puisque le plan était le fruit de plusieurs compromis et le résultat d'une fenêtre d'opportunité favorable en terme de marché — Tribunal était d'avis qu'il était important que la compagnie puisse dès à présent mener à son terme un processus de restructuration long de dix-huit mois — Par conséquent, de l'avis du Tribunal, il était approprié et justifié de sanctionner le plan d'arrangement.

Table of Authorities

Cases considered by *Clément Gascon, J.S.C.*:

AbitibiBowater Inc., Re (2009), 2009 QCCS 6459, 2009 CarswellQue 14194 (C.S. Que.) — referred to

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

Cable Satisfaction International Inc. v. Richter & Associés inc. (2004), 2004 CarswellQue 810, 48 C.B.R. (4th) 205 (C.S. Que.) — referred to

Charles-Auguste Fortier inc., Re (2008), 2008 CarswellQue 11376, 2008 QCCS 5388 (C.S. Que.) — referred to

Doman Industries Ltd., Re (2003), 2003 BCSC 375, 2003 CarswellBC 552, 41 C.B.R. (4th) 42 (B.C. S.C. [In Chambers]) — referred to

Hy Bloom inc. c. Banque Nationale du Canada (2010), 66 C.B.R. (5th) 294, 2010 QCCS 737, 2010 CarswellQue 1714, 2010 CarswellQue 11740, [2010] R.J.Q. 912 (C.S. Que.) — referred to

Laidlaw, Re (2003), 39 C.B.R. (4th) 239, 2003 CarswellOnt 787 (Ont. S.C.J.) — referred to

MEI Computer Technology Group Inc., Re (2005), 2005 CarswellQue 13408 (C.S. Que.) — referred to

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175, 1988 CarswellBC 558 (B.C. S.C.) — referred to
Northland Properties Ltd., Re (1989), (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 73 C.B.R. (N.S.) 195, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* [1989] 3 W.W.R. 363, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 34 B.C.L.R. (2d) 122, 1989 CarswellBC 334 (B.C. C.A.) — referred to
Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 17 C.B.R. (3d) 1, (sub nom. *Olympia & York Developments Ltd., Re)* 12 O.R. (3d) 500, 1993 CarswellOnt 182 (Ont. Gen. Div.) — referred to
PSINET Ltd., Re (2002), 33 C.B.R. (4th) 284, 2002 CarswellOnt 1261 (Ont. S.C.J. [Commercial List]) — referred to
Raymor Industries inc., Re (2010), 66 C.B.R. (5th) 202, 2010 CarswellQue 9092, 2010 QCCS 376, 2010 CarswellQue 892, [2010] R.J.Q. 608 (C.S. Que.) — referred to
Sammi Atlas Inc., Re (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — referred to
T. Eaton Co., Re (1999), 1999 CarswellOnt 4661, 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) — referred to
TQS inc., Re (2008), 2008 CarswellQue 5282, 2008 QCCS 2448 (C.S. Que.) — referred to
Uniforêt inc., Re (2003), 43 C.B.R. (4th) 254, 2003 CarswellQue 3404 (C.S. Que.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Chapter 11 — referred to
Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 191 — considered

s. 241 — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 6 — considered

s. 9 — referred to

s. 10 — referred to
Corporations Tax Act, R.S.O. 1990, c. C.40
s. 107 — referred to
Excise Tax Act, R.S.C. 1985, c. E-15
s. 270 [en. 1990, c. 45, s. 12(1)] — referred to
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
s. 159 — referred to
Ministère du Revenu, Loi sur le, L.R.Q., c. M-31
art. 14 — referred to
Retail Sales Tax Act, R.S.O. 1990, c. R.31
s. 22 — referred to
Taxation Act, 2007, S.O. 2007, c. 11, Sched. A
s. 117 — referred to

MOTION by debtor company seeking Court's approval of plan of arrangement.

***Clément Gascon, J.S.C.*:**

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.

The Relevant Background

2 On April 17, 2009 [2009 CarswellQue 14194 (C.S. Que.)], 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*").

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.

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).

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.

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.

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.

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*

Footnotes

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

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.

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. v. Richter & Associés inc.*, J.E. 2004-907 (C.S. Que.) [2004 CarswellQue 810 (C.S. Que.)].

6 See Monitor's Fifty-Eight Report dated September 16, 2010.

7 *T. Eaton Co., Re* (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. Gen. Div. [Commercial List]); *PSINET Ltd., Re* (Ont. S.C.J. [Commercial List]).

8 *Uniforêt inc., Re* (C.S. Que.) [2003 CarswellQue 3404 (C.S. Que.)], *TQS inc., Re*, 2008 QCCS 2448 (C.S. Que.), B.E. 2008BE-834; *PSINET Ltd., Re* (Ont. S.C.J. [Commercial List]); *Olympia & York Developments Ltd. (Re)* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.).

9 *Olympia & York Developments Ltd. (Re)* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.); *Boutiques San Francisco inc. (Arrangement relatif aux)*, SOQUIJ AZ-50263185 , B.E. 2004BE-775; *PSINET Ltd., Re* (Ont. S.C.J. [Commercial List]); *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed 73 C.B.R. (N.S.) 195 (B.C. C.A.).

10 The Indenture Trustee acting under the Unsecured Notes supports the Noteholders in their objections.

11 See, in this respect, *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.); *Charles-Auguste Fortier inc., Re* (2008), J.E. 2009-9, 2008 QCCS 5388 (C.S. Que.); *Hy Bloom inc. c. Banque Nationale du Canada*, [2010] R.J.Q. 912 (C.S. Que.).

12 *Quebecor World Inc. (Arrangement relatif à)*, S.C. Montreal, Nº 500-11-032338-085, 2009-06-30, Mongeon J.

13 *Raymor Industries inc. (Proposition de)*, [2010] R.J.Q. 608, 2010 QCCS 376 (C.S. Que.); *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., Re* [2005

CarswellQue 13408 (C.S. Que.)], (S.C., 2005-11-14), SOQUIJ AZ-50380254, 2005 CanLII 54083; *Doman Industries Ltd., Re*, 2003 BCSC 375 (B.C. S.C. [In Chambers]); *Laidlaw, Re* (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.

End of Document