District of Ontario
Division No. 09 -Toronto
Court File No. 31-2295766
Estate No. 31-2295766

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE PROPOSAL OF DIGITAL UNDERGROUND MEDIA INC., A COMPANY INCORPORATED PURSUANT TO THE LAWS OF THE PROVINCE OF ONTARIO, WITH A HEAD OFFICE IN THE CITY OF VANCOUVER, IN THE PROVINCE OF BRITISH COLUMBIA

BRIEF OF AUTHORITIES OF DIGITAL UNDERGROUND MEDIA INC.

(Motion returnable November 14, 2017)

Date: November 13, 2017

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3	*Can-Mar Precast Corp, Re. 1994 CarswellOnt 313 (Ont. Gen. Div., in bankruptcy)*
4	Robert W.V. Dickerson et al., *Proposals for a New Business Corporations Law for Canada,* vol. 1 (Ottawa: Information Canada, 1971)
5	*Kitchener Frame Ltd., Re,* 2012 ONSC 234, 212 A.C.W.S. (3d) 631 (Ont. S.C.J. [Comm. List])
6	*Laidlaw, Re* (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.)
7	*Royal Oak Mines Inc., Re*, [1999] O.J. No. 4848, 14 C.B.R. (4th) 279 (Ont. S.C.J. [Comm. List])
8	*Stelco Inc, Re* (2006), 17 C.B.R. (5th) 78 (Ont. S.C.J. [Comm. List])
9	*Telepanel Systems Inc., Re (2009),* Ontario Endorsement 31-448752 (Ont. S.C.J. [Comm. List]) [unreported]

TAB 1

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
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Bankruptcy and insolvency
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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.

End of Document

TAB 2

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.
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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
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XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
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Civil practice and procedure

XXIII Practice on appeal
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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.

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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 international routes of CAIL failed to produce anticipated results. The cumulative losses of CAIL from 1994 to 1999 totalled $771 million and from January 31, 1995 to August 12, 1999, the day prior to the issuance by the Government of Canada of an Order under Section 47 of the *Canada Transportation Act* (relaxing certain rules under the *Competition Act* to facilitate a restructuring of the airline industry and described further below), the trading price of Canadian's common shares declined from $7.90 to $1.55.

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

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

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

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

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

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

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

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

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

Initial Discussions with Air Canada

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

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

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

Offer by Onex

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

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

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

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

28 Following the withdrawal of the AirCo offer to purchase CAC, and notwithstanding Air Canada's stated intention to proceed with its offer, there was a renewed uncertainty about Canadian's future which adversely affected operations.

As described further below, Canadian lost significant forward bookings which further reduced the company's remaining liquidity.

Offer by 853350

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

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

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

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

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

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

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

35 In late December, 1999, Air Canada agreed to enter into certain transactions designed to ensure that Canadian would have enough liquidity to continue operating until the scheduled completion of the 853350 take-over bid on January

4, 2000. Air Canada agreed to purchase rights to the Toronto-Tokyo route for $25 million and to a sale-leaseback arrangement involving certain unencumbered aircraft and a flight simulator for total proceeds of approximately $20 million. These transactions gave Canadian sufficient liquidity to continue operations through the holiday period.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Restructuring Plan

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 24th and April 7th Orders of this court) were sent to the Affected Creditors, the directors and officers of the Petitioners, the Monitor and persons who had served a Notice of Appearance, on April 25, 2000.

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

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

2. Matters Unauthorized

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

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

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

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

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

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

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

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

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

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

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

3. Fair and Reasonable

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

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

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

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

a. The composition of the unsecured vote;

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

c. Alternatives available to the Plan and bankruptcy;

d. Oppression;

e. Unfairness to Shareholders of CAC; and

f. The public interest.

a. Composition of the unsecured vote

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

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

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

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

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

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

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

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

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

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

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

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

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

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

106 The authorities which address minority creditors' complaints speak of "substantial injustice" (*Re Keddy Motor Inns Ltd.* (1992), 13 C.B.R. (3d) 245 (N.S. C.A.), "confiscation" of rights (*Re Campeau Corp.* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.); *Re SkyDome Corp.* (March 21, 1999), Doc. 98-CL-3179 (Ont. Gen. Div. [Commercial List])) and majorities "feasting upon" the rights of the minority (*Re Quintette Coal Ltd.* (1992), 13 C.B.R. (3d) 146 (B.C. S.C.). Although it cannot be disputed that the group of Unsecured Noteholders represented by Resurgence are being asked to accept a significant reduction of their claims, as are all of the affected unsecured creditors, I do not see a "substantial injustice", nor view their rights as having been "confiscated" or "feasted upon" by being required to succumb to the wishes of the majority in their class. No bad faith has been demonstrated in this case. Rather, the treatment of Resurgence, along with all other affected unsecured creditors, represents a reasonable balancing of interests. While the court is directed to consider whether there is an injustice being worked within a class, it must also determine whether there is an injustice with respect the stakeholders as a whole. Even if a plan might at first blush appear to have that effect, when viewed in relation to all other parties, it may nonetheless be considered appropriate and be approved: *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 1 (Ont. Gen. Div.) and *Re Northland Properties Ltd.*, *supra* at 9.

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

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

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

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

b. Receipts on liquidation or bankruptcy

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

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

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

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

Pension Plan Surplus

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

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

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

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

118 It is acknowledged that surplus prior to termination can be accessed through employer contribution holidays, which Canadian has taken to the full extent permitted. However, there is no basis that has been established for any surplus being available to be withdrawn from an ongoing pension plan. On a pension plan termination, the amount available as a solvency surplus would first have to be further reduced by various amounts to determine whether there was in fact any true surplus available for distribution. Such reductions include contingent benefits payable in accordance with

the provisions of each respective pension plan, any extraordinary plan wind up cost, the amounts of any contribution holidays taken which have not been reflected, and any litigation costs.

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

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

CRAL

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

122 For the purpose of the Liquidation Analysis, the Monitor did not consider other airlines as comparable for evaluation purposes, as the Monitor's valuation was performed on a distressed sale basis. The Monitor further assumed that without CAIL's national and international network to feed traffic into and a source of standby financing, and considering the inevitable negative publicity which a failure of CAIL would produce, CRAL would immediately stop operations as well.

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

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

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

International Routes

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

Government of Canada. In the event of bankruptcy/receivership of CAIL, CAIL's trustee/receiver could not sell them and accordingly they are of no value to CAIL.

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

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

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

130 Further, statements made by CAIL in mid-1999 as to the value of its international routes and operations in response to an offer by Air Canada, reflected the amount CAIL needed to sustain liquidity without its international routes and was not a representation of market value of what could realistically be obtained from an arms length purchaser. The Monitor concluded on its investigation that CAIL's Narida and Heathrow slots had a realizable value of $66 million, which it included in the Liquidation Analysis. I find that this conclusion is supportable and that the Monitor properly concluded that there were no other rights which ought to have been assigned value.

Tax Pools

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

Capital Loss Pools

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

Undepreciated capital cost ("UCC")

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

Operating Losses

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

Fuel tax rebates

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

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

c. Alternatives to the Plan

137 When presented with a plan, affected stakeholders must weigh their options in the light of commercial reality. Those options are typically liquidation measured against the plan proposed. If not put forward, a hope for a different or more favourable plan is not an option and no basis upon which to assess fairness. On a purposive approach to the CCAA, what is fair and reasonable must be assessed against the effect of the Plan on the creditors and their various claims, in the context of their response to the plan. Stakeholders are expected to decide their fate based on realistic, commercially viable alternatives (generally seen as the prime motivating factor in any business decision) and not on speculative desires or hope for the future. As Farley J. stated in *T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at paragraph 6:

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

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

d. Oppression

Oppression and the CCAA

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

140 Section 234 gives the court wide discretion to remedy corporate conduct that is unfair. As remedial legislation, it attempts to balance the interests of shareholders, creditors and management to ensure adequate investor protection and

maximum management flexibility. The Act requires the court to judge the conduct of the company and the majority in the context of equity and fairness: *First Edmonton Place Ltd. v. 315888 Alberta Ltd.* (1988), 40 B.L.R. 28 (Alta. Q.B.). Equity and fairness are measured against or considered in the context of the rights, interests or reasonable expectations of the complainants: *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (B.C. S.C.).

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

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

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

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

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

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

177 The representations of the Government of Canada are also compelling. Approximately one year ago, CAIL approached the Transport Department to inquire as to what solution could be found to salvage their ailing company. The Government saw fit to issue an order in council, pursuant to section 47 of the *Transportation Act*, which allowed an opportunity for CAIL to approach other entities to see if a permanent solution could be found. A standing committee in the House of Commons reviewed a framework for the restructuring of the airline industry, recommendations were made and undertakings were given by Air Canada. The Government was driven by a mandate to protect consumers and promote competition. It submitted that the Plan is a major component of the industry restructuring. Bill C-26, which addresses the restructuring of the industry, has passed through the House of Commons and is presently before the Senate. The Competition Bureau has accepted that Air Canada has the only offer on the table and has worked very closely with the parties to ensure that the interests of consumers, employees, small carriers, and smaller communities will be protected.

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

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

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

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

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

IV. Conclusion

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

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

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

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

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

Application granted; counter-applications dismissed.

Footnotes

* 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]).

TAB 3

1994 CarswellOnt 313
Ontario Court of Justice (General Division), In Bankruptcy

Can-Mar Precast Corp., Re

1994 CarswellOnt 313, 28 C.B.R. (3d) 216, 51 A.C.W.S. (3d) 17

Re proposal of CAN-MAR PRECAST CORPORATION

Registrar Ferron

Judgment: January 19, 1994
Docket: Doc. 31-2746

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles
Headnote
Bankruptcy --- Proposal — Approval by Court — General
Proposals — Approval by court — Jurisdiction of Registrar — Registrar's jurisdiction confined to approving unopposed proposals.
An insolvent company made a proposal to its creditors. One of the shareholders in a company that was owed money by the insolvent company opposed the proposal.
Held:
The proposal was approved.
The jurisdiction of the Registrar is confined to the approval of unopposed proposals. Where a creditor opposes the proposal, the Registrar must adjourn the matter. Therefore, the success of the shareholder's opposition depended on it being found to be a creditor. As the insolvent company was not indebted to the shareholder, the shareholder was not a creditor and, therefore, did not have the status to oppose the proposal.

Application for approval of proposal.

Registrar *Ferron* (Endorsement):

1 In the application for the approval of the proposal of Can-Mar Precast Corporation, 643837 Ontario Limited moves for an order refusing that approval.

2 The jurisdiction of the Registrar is confined to the approval of proposals which are not opposed. Accordingly, if a creditor of Can-Mar opposes the application for approval, the Registrar does not have jurisdiction to hear the matter and it must be adjourned. The motion, therefore, brought by 643837 is predicated, for its validity, on a finding that that company is in fact a creditor of the insolvent person, Can-Mar Precast Corporation.

3 643837 is a 50% shareholder in a company named Coral Precast Limited with Cormil Drywall Inc. and Stock Senior Corporation, which hold the balance of the shares.

4 It is agreed that Can-Mar owes Coral $300,000 and that Can-Mar is not itself indebted in any way the moving party 643837 Ontario Limited.

5 In the proposal, Michael Cannone, who controls both Can-Mar, Cormil and Stock Senior, has agreed with Can-Mar to postpone Coral's debt to it. 643837 Ontario Limited objects to that action and has, in fact, commenced an action against Cannone, and several other parties including Cormil, Stock Senior and Coral for, inter alia, an order setting aside the postponement agreement to which I have referred. Can-Mar is not a party to that action, and no remedy is otherwise sought against that company.

6 It seems to be that, even if 643837 Ontario Limited succeeded in that action, it still will not be a creditor of Can-Mar and such result would only put it in a position to nullify the postponement agreement between Can-Mar and Coral and presumably, if the board of directors were altered, object to the acceptance by creditors of the proposal.

7 In any event, at this point on this application to approve, 643837 Ontario Limited is not a creditor and has no status to intervene and to oppose the proposal now before the court.

8 Accordingly, there being no valid objecting creditor, and the proposal having been overwhelmingly accepted by creditors and otherwise calculated to benefit creditors, the proposal must be approved.

9 Ordered accordingly.

Proposal approved.

TAB 4

New Business Corporations Law

Proposals for a New Business Corporations Law for Canada

VOLUME I
Commentary

by

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PART 14.00
Fundamental Changes

upon the holders of a class of shares to which particular rights, privileges, restrictions or conditions are attached the right to dissent from any amendment to the articles that derogates from the rights of holders of that class of shares. Subsection (3) sets out the substantive right to dissent. Subsections (4) to (27) of this section are largely self-explanatory. They set out in detail the procedure to be followed by a shareholder to obtain the appraised value of his shares. Although very long, these provisions are necessary to render the substantive right to dissent meaningful. They are an adaptation of similar provisions contained in s. 623 of the New York Business Corporation Law.

374. 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 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 once again solvent.

375. The procedure and formalities relating to the perfection of reorganization are parallel to the earlier provisions and therefore do not require commentary.

TAB 5

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 interpretation of the *BIA* would defeat the purpose of the legislation. See *N.T.W. Management Group Ltd., Re* (1994), 29 C.B.R. (3d) 139 (Ont. Bktcy.); *Olympia & York Developments Ltd., Re* (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd., Re* (1997), 45 C.B.R. (3d) 85 (Ont. Bktcy.).

47 Moreover, the statutes which deal with the same subject matter are to be interpreted with the presumption of harmony, coherence and consistency. See *NAV Canada c. Wilmington Trust Co.*, 2006 SCC 24 (S.C.C.). This principle militates in favour of adopting an interpretation of the *BIA* that is harmonious, to the greatest extent possible, with the interpretation that has been given to the *CCAA*.

48 Counsel points out that historically, some case law has taken the position that s. 62(3) of the *BIA* precludes a proposal from containing a release that benefits third parties. Counsel submits that this result is not supported by a plain meaning of s. 62(3) and its interaction with other key sections in the *BIA*.

49 Subsection 62(3) of the *BIA* reads as follows:

> (3) The acceptance of a proposal by a creditor does not release any person who would not be released under this Act by the discharge of the debtor.

50 Counsel submits that there are two possible interpretations of this subsection:

> (a) It prohibits third party releases — in other words, the phrase "does not release any person" is interpreted to mean "cannot release any person"; or
>
> (b) It simply states that acceptance of a proposal does not automatically release any party other than the debtor — in other words, the phrase "does not release any person" is interpreted to mean "does not release any person without more"; it is protective not prohibitive.

51 I agree with counsel's submission that the latter interpretation of s. 62(3) of the *BIA* conforms with the grammatical and ordinary sense of the words used. If Parliament had intended that only the debtor could be released, s. 62(3) would have been drafted more simply to say exactly that.

52 Counsel further submits that the narrow interpretation would be a stringent and inflexible interpretation of the *BIA*, contrary to accepted wisdom that the *BIA* should be interpreted in a flexible, purposive manner.

53 The *BIA* proposal provisions are designed to offer debtors an opportunity to carry out a going concern or value maximizing restructuring in order to avoid a bankruptcy and related liquidation and that these purposes justify taking a broad, flexible and purposive approach to the interpretation of the relevant provisions. This interpretation is supported by *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.).

54 Further, I agree with counsel's submissions that a more flexible purposive interpretation is in keeping with modern statutory principles and the need to give purposive interpretation to insolvency legislation must start from the proposition that there is no express prohibition in the *BIA* against including third-party releases in a proposal. At most, there are certain limited constraints on the scope of such releases, such as in s. 179 of the *BIA*, and the provision dealing specifically with the release of directors.

55 In the absence of an express prohibition against including third-party releases in a proposal, counsel submits that it must be presumed that such releases are permitted (subject to compliance with any limited express restrictions, such as in the case of a release of directors). By extension, counsel submits that the court is entitled to approve a proposal containing a third-party release if the court is able to satisfy itself that the proposal (including the third-party release) is reasonable and for the general benefit for creditors such that all creditors (including the minority who did not vote in favour of the proposal) can be required to forego their claims against parties other than the debtors.

56 The Applicants also submit that s. 62(3) of the *BIA* can only be properly understood when read together with other key sections of the *BIA*, particularly s. 179 which concerns the effect of an order of discharge:

> 179. An order of discharge does not release a person who at the time of the bankruptcy was a partner or co-trustee with the bankrupt or was jointly bound or had made a joint contract with the bankrupt, or a person who was surety or in the nature of a surety for the bankrupt.

57 The order of discharge of a bankrupt has the effect of releasing the bankrupt from all claims provable in bankruptcy (section 178(2) *BIA*). In the absence of s. 179, this release could result in the automatic release at law of certain types of claims that are identified in s. 179. For example, under guarantee law, the discharge of the principal debt results in the automatic discharge of a guarantor. Similarly, counsel points out the settlement or satisfaction of a debt by one joint obligor generally results in the automatic release of both joint obligors. Section 179 therefore serves the limited purpose of altering the result that would incur at law, indicating that the rule that the *BIA* generally is that there is no automatic release of third-party guarantors of co-obligors when a bankrupt is discharged.

58 Counsel submits that s. 62(3), which confirms that s. 179 applies to a proposal, was clearly intended to fulfil a very limited role — namely, to confirm that there is no automatic release of the specific types of co-obligors identified in s. 179 when a proposal is approved by the creditors and by the court. Counsel submits that it does not go further and preclude the creditors and the court from approving a proposal which contains the third-party release of the types of co-obligors set out in s. 179. I am in agreement with these submissions.

59 Specific considerations also apply when releasing directors of a debtor company. The *BIA* contains specific limitations on the permissible scope of such releases as set out in s. 50(14). For this reason, there is a specific section in the *BIA* proposal provisions outlining the principles governing such a release. However, counsel argues, the presence of the provisions outlining the circumstances in which a proposal can contain a release of claims against the debtor's directors does not give rise to an inference that the directors are the only third parties that can be released in a proposal. Rather, the inference is that there are considerations applicable to a release or compromise of claims against directors that do not apply generally to other third parties. Hence, it is necessary to deal with this particular type of compromise and release expressly.

60 I am also in agreement with the alternative submissions made by counsel in this area to the effect that if s. 62(3) of the *BIA* operates as a prohibition it refers only to those limitations that are expressly identified in the *BIA*, such as in s. 179 of the *BIA* and the specific limitations on the scope of releases that can benefit directors of the debtor.

61 Counsel submits that the Applicants' position regarding the proper interpretation of s. 62(3) of the *BIA* and its place in the scheme of the *BIA* is consistent with the generally accepted principle that a proposal under the *BIA* is a contract. See *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 (Ont. C.A.); *Employers' Liability Assurance Corp. v. Ideal Petroleum (1959) Ltd.* (1976), [1978] 1 S.C.R. 230 (S.C.C.); and *Society of*

Composers, Authors & Music Publishers of Canada v. Armitage (2000), 20 C.B.R. (4th) 160 (Ont. C.A.). Consequently, counsel submits that parties are entitled to put anything into a proposal that could lawfully be incorporated into any contract (see *Air Canada, Re* (2004), 2 C.B.R. (5th) 4 (Ont. S.C.J. [Commercial List])) and that given that the prescribed majority creditors have the statutory right under the *BIA* to bind a minority, however, this principle is subject to any limitations that are contained in the express wording of the *BIA*.

62 On this point, it seems to me, that any provision of the *BIA* which purports to limit the ability of the debtor to contract with its creditors should be clear and explicit. To hold otherwise would result in severely limiting the debtor's ability to contract with its creditors, thereby the decreasing the likelihood that a viable proposal could be reached. This would manifestly defeat the purpose of the proposal provisions of the *BIA*.

63 The Applicants further submit that creditors' interests — including the interests of the minority creditors who do not vote in favour of a proposal containing a third-party release — are sufficiently protected by the overriding ability of a court to refuse to approve a proposal with an overly broad third-party release, or where the release results in the proposal failing to demonstrate that it is for the benefit of the general body of creditors. The Applicants submit that the application of the *Metcalfe* criteria to the release is a mechanism whereby this court can assure itself that these preconditions to approve the Consolidated Proposal contained in the Release have been satisfied.

64 The Applicants acknowledge that there are several cases in which courts have held that a *BIA* proposal that includes a third-party release cannot be approved by the court but submits that these cases are based on a mistaken premise, are readily distinguishable and do not reflect the modern approach to Canadian insolvency law. Further, they submit that none of these cases are binding on this court and should not be followed.

65 In *Kern Agencies Ltd., (No. 2), Re* (1931), 13 C.B.R. 11 (Sask. C.A.), the court refused to approve a proposal that contained a release of the debtor's directors, officers and employees. Counsel points out that the court's refusal was based on a provision of the predecessor to the *BIA* which specifically provided that a proposal could only be binding on creditors (as far as relates to any debts due to them from the debtor). The current *BIA* does not contain equivalent general language. This case is clearly distinguishable.

66 In *Mister C's Ltd., Re* (1995), 32 C.B.R. (3d) 242 (Ont. Bktcy.), the court refused to approve a proposal that had received creditor approval. The court cited numerous bases for its conclusion that the proposal was not reasonable or calculated to benefit the general body of creditors, one of which was the release of the principals of the debtor company. The scope of the release was only one of the issues with the proposal, which had additional significant issues (procedural irregularities, favourable terms for insiders, and inequitable treatment of creditors generally). I agree with counsel to the Applicants that this case can be distinguished.

67 *Cosmic Adventures Halifax Inc., Re* (1999), 13 C.B.R. (4th) 22 (N.S. S.C.) relies on *Kern* and furthermore the Applicants submit that the discussion of third-party releases is technically *obiter* because the proposal was amended on consent.

68 The fourth case is *C.F.G. Construction inc., Re*, 2010 CarswellQue 10226 (C.S. Que.) where the Quebec Superior Court refused to approve a proposal containing a release of two sureties of the debtor. The case was decided on alternate grounds — either that the *BIA* did not permit a release of sureties, or in any event, the release could not be justified on the facts. I agree with the Applicants that this case is distinguishable. The case deals with the release of sureties and does not stand for any broader proposition.

69 In general, the Applicants' submission on this issue is that the court should apply the decision of the Court of Appeal for Ontario in *Metcalfe*, together with the binding principle set out by the Supreme Court in *Ted Leroy Trucking*, dictating a more liberal approach to the permissibility of third-party releases in *BIA* proposals than is taken by the Quebec court in *C.F.G. Construction Inc.* I agree.

70 The object of proposals under the *BIA* is to permit the debtor to restructure its business and, where possible, avoid the social and economic costs of liquidating its assets, which is precisely the same purpose as the *CCAA*. Although there are some differences between the two regimes and the *BIA* can generally be characterized as more "rules based", the thrust of the case law and the legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible, encouraging reorganization over liquidation. See *Ted Leroy Trucking*.

71 Recent case law has indicated that, in appropriate circumstances, third-party releases can be included in a plan of compromise and arrangement that is approved under the *CCAA*. See *Metcalfe*. The *CCAA* does not contain any express provisions permitting such third-party releases apart from certain limitations that apply to the compromise of claims against directors of the debtor company. See *CCAA* s. 5.1 and *Allen-Vanguard Corp., Re*, 2011 ONSC 733 (Ont. S.C.J.).

72 Counsel submits that although the mechanisms for dealing with the release of sureties and similar claimants are somewhat different in the *BIA* and *CCAA*, the differences are not of such significance that the presence of s. 62(3) of the *BIA* should be viewed as dictating a different approach to third-party releases generally from the approach that applies under the *CCAA*. I agree with this submission.

73 I also accept that if s. 62(3) of the *BIA* is interpreted as a prohibition against including the third-party release in the *BIA* proposal, the *BIA* and the *CCAA* would be in clear disharmony on this point. An interpretation of the *BIA* which leads to a result that is different from the *CCAA* should only be adopted pursuant to clear statutory language which, in my view, is not present in the *BIA*.

74 The most recent and persuasive example of the application of such a harmonious approach to the interpretation of the *BIA* and the *CCAA* can be found in *Ted Leroy Trucking*.

75 At issue in *Ted Leroy Trucking* was how to resolve an apparent conflict between the deemed trust provisions of the *Excise Tax Act* and the provisions of the *CCAA*. The language of the *Excise Tax Act* created a deemed trust over GST amounts collected by the debtor that was stated to apply "despite any other Act of Parliament". The *CCAA* stated that the deemed trust for GST did not apply under the *CCAA*, unless the funds otherwise specified the criteria for a "true" trust. The court was required to determine which federal provision should prevail.

76 By contrast, the same issue did not arise under the *BIA*, due to the language in the *Excise Tax Act* specifically indicating that the continued existence of the deemed trust depended on the terms of the *BIA*. The *BIA* contained a similar provision to the *CCAA* indicating that the deemed trust for GST amounts would no longer apply in a *BIA* proceeding.

77 Deschamps J., on behalf of six other members of the court, with Fish J. concurring and Abella J. dissenting, held that the proper interpretation of the statutes was that the *CCAA* provision should prevail, the deemed trust under the *Excise Tax Act* would cease to exist in a *CCAA* proceeding. In resolving the conflict between the *Excise Tax Act* and the *CCAA*, Deschamps J. noted the strange asymmetry which would arise if the *BIA* and *CCAA* were not in harmony on this issue:

> Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

78 It seems to me that these principles indicate that the court should generally strive, where the language of both statutes can support it, to give both statutes a harmonious interpretation to avoid the ills that can arise from "statute-shopping". These considerations, counsel submits, militate against adopting a strained reading of s. 62(3) of the *BIA* as

a prohibition against third-party releases in a *BIA* proposal. I agree. In my opinion, there is no principled basis on which the analysis and treatment of a third-party release in a *BIA* proposal proceeding should differ from a CCAA proceeding.

79 The Applicants submit that it logically follows that the court is entitled to approve the Consolidated Proposal, including the Release, on the basis that it is reasonable and calculated to benefit the general body of creditors. Further, in keeping with the principles of harmonious interpretation of the *BIA* and the *CCAA*, the court should satisfy itself that the *Metcalfe* criteria, which apply to the approval of a third-party release under the CCAA, has been satisfied in relation to the Release.

80 In *Metcalfe*, the Court of Appeal for Ontario held that the requirements that must be satisfied to justify a third-party release are:

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

81 These requirements have also been referenced in *Canwest Global Communications Corp., Re* (2010), 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) and *Angiotech Pharmaceuticals Inc., Re* (2011), 76 C.B.R. (5th) 210 (B.C. S.C. [In Chambers]).

82 No single requirement listed above is determinative and the analysis must take into account the facts particular to each claim.

83 The Applicants submit that the Release satisfies each of the *Metcalfe* criteria. Firstly, counsel submits that following the closing of the Asset Purchase Agreement in 2006, Budd Canada had no operating assets or income and relied on inter-company advances to fund the pension and OPEB requirements to be made by Budd Canada on behalf of KFL pursuant to the Asset Purchase Agreement. Such funded amounts total approximately $112.7 million in pension payments and $24.6 million in OPEB payments between the closing of the Asset Purchase Agreement and the Filing Date. In addition, TK Finance has been providing Budd Canada and KFL with the necessary funding to pay the professional and other costs associated with the *BIA* Proposal Proceedings and will continue to fund such amounts through the Proposal Implementation Date. Moreover, TK Canada and TK Finance have agreed to forego recoveries under the Consolidated Proposal on account of their existing secured and unsecured intercompany loans in the amount of approximately $120 million.

84 Counsel submits that the releases provided in respect of the Applicants' affiliates are the *quid pro quo* for the sacrifices made by such affiliates to significantly enlarge recoveries for the unsecured creditors of the Applicants, particularly the OPEB creditors and reflects that the affiliates have provided over $135 million over the last five years in respect of the pension and OPEB amounts and additional availability of approximately $49 million to allow the Applicants to discharge their obligations to their former employees and retirees. Without the Releases, counsel submits, the Applicants' affiliates would have little or no incentive to contribute funds to the Consolidated Proposal and to waive their own rights against the Applicants.

85 The Release in favour of Martinrea is fully discussed at paragraphs 121-127 of the factum. The Applicants submit that the third-party releases set out in the Consolidated Proposal are clearly rationally related, necessary and essential to the Consolidated Proposal and are not overly broad.

86 Having reviewed the submissions in detail, I am in agreement that the Released Parties are contributing in a tangible and realistic way to the Consolidated Proposal.

87 I am also satisfied that without the Applicants' commitment to include the Release in the Consolidated Proposal to protect the Released Parties, it is unlikely that certain of such parties would have been prepared to support the Consolidated Proposal. The releases provided in respect of the Applicants' affiliates are particularly significant in this regard, since the sacrifices and monetary contributions of such affiliates are the primary reason that the Applicants have been able to make the Consolidated Proposal. Further, I am also satisfied that without the Release, the Applicants would be unable to satisfy the borrowing conditions under the Amended and Restated Senior Secured Loan Agreement with respect to the Applicants having only certain permitted liabilities after the Proposal Implementation Date. The alternative for the Applicants is bankruptcy, a scenario in which their affiliates' claims aggregating approximately $120 million would significantly erode recoveries for the unsecured creditors of the Applicants.

88 I am also satisfied that the Releases benefit the Applicants and creditors generally. The primary non-affiliated Creditors of the Applicants are the OPEB Creditors and Creditors with Pension Claims, together with the CRA. The Consolidated Proposal, in my view, clearly benefits these Creditors by generating higher recoveries than could be obtained from the bankruptcies of the Applicants. Moreover, the timing of any such bankruptcy recoveries is uncertain. As noted by the Proposal Trustee, the amount that the Affected Creditors would receive in the event of the bankruptcies of the Applicants is uncertain both in terms 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.

TAB 6

2003 CarswellOnt 787
Ontario Superior Court of Justice

Laidlaw, Re

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

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

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

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

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

Farley J.

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

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

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues
Applicant debtors and others commenced proceedings under chapter 11 of United States Bankruptcy Code — Joint plan of reorganization for debtors was confirmed by U.S. judge — Debtors brought application for order pursuant to s. 18.6(2) of Companies' Creditors Arrangement Act recognizing and implementing order confirming plan and for order pursuant to s. 18.6(2) of Act recognizing and implementing plan in Canada — Application granted — Section 18.6(2) of Act provides court with authority to coordinate proceedings under Act with any foreign proceeding — Applicant debtors were entitled to relief under Act and U.S. proceedings had been recognized as foreign proceeding for purposes of Act — Global nature of plan of restructuring was appropriate consideration on application — Over 90% of revenues for debtors were produced by operations in United States — Ontario court had been apprised of developments relating to U.S. proceedings on regular basis — In these circumstances, full force and effect should be given in Canada to confirmation order and to plan of reorganization pursuant to s. 18.6(2) of Act.
Table of Authorities
Cases considered by *Farley J.*:
Algoma Steel Inc., Re, 2001 CarswellOnt 4640, 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) — referred to

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

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

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

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 173 — considered

s. 173(1)(o) — considered

s. 176(1)(b) — considered

s. 191 — considered

s. 191(2) — considered

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

Generally — referred to

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

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

s. 20 — referred to

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

***Farley J.*:**

1 The applicants sought an order as follows:

a. an order pursuant to section 18.6(2) of the *Companies' Creditors Arrangement Act* (the "CCAA") recognizing and implementing in Canada the Order (the "U.S. Confirmation Order") of the Honourable Judge Kaplan of the United States Bankruptcy Court for the Western District of New York (the "U.S. Court") providing for, *inter alia*, confirmation of the Third Amended Joint Plan of Reorganization of Laidlaw USA, Inc. and its Debtor Affiliates, as may be amended from time to time prior to the date of the U.S. Confirmation Order (the "POR");

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

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

d. an order extending the stay of proceedings.

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

PART II — THE FACTS

A. The Cross Border Reorganization

. . . . .

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

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

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

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

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

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

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

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

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

B. Single Claims Process

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

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

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

C. POR and Disclosure Statement

(a) Previous Versions of the POR and Disclosure Statement

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

(b) Initial Solicitation Process

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

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

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

(c) Amended POR and Disclosure Statement

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

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

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

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

(d) Amended Solicitation Process

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

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

D. Approval of POR

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

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

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

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

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

(b) the POR was proposed in good faith;

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

(d) the POR was feasible; and

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

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

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

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

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

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

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

(a) the Protocol has been implemented by both this Court and the U.S. Court;

(b) the U.S. Proceedings are foreign proceedings for the purposes of the CCAA;

(c) the stakeholders of the Applicants (and the other Debtors) have been subject to a single claims process which treats them equally regardless of the jurisdiction in which they reside;

(d) the global nature of the restructuring proposed by the POR;

(e) ample notice has been given of the existence of these proceedings and the U.S. Proceedings;

(f) over 90% of revenues for the Debtors are produced by operations in the United States; and

(g) this Court has been apprised of developments relating to the U.S. Proceedings on a regular basis.

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

(a) ordering and declaring that the U.S. Court has the jurisdiction to determine, compromise or otherwise affect the interest of claimants against, including creditors and shareholders of, the Applicants; and

(b) relieving the Applicants from the obligation to file a Plan of Compromise in Canada under the CCAA unless and until the proposed POR was rejected or refused by the U.S. Court.

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

6 The POR expressly contemplates that the Canadian Court would be asked for a s.18.6(2) order recognizing and implementing in Canada the Confirmation Order and the POR. In my view in the circumstances of this case that would

be a fair and reasonable result *vis-à-vis* all affected persons on either side of the U.S. — Canadian border in providing an equitable solution. See *Loewen Group Inc., Re* (2001), 32 C.B.R. (4th) 54 (Ont. S.C.J. [Commercial List]) for a case of quite similar circumstances.

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

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

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

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

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

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

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

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

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

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

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

Application granted.

TAB 7

1999 CarswellOnt 4151
Ontario Superior Court of Justice [Commercial List]

Royal Oak Mines Inc., Re

1999 CarswellOnt 4151, [1999] O.J. No. 4848, 14 C.B.R. (4th) 279, 93 A.C.W.S. (3d) 607

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

In the Matter of the Courts of Justice Act, R.S.O. 1990, C c-43, as Amended

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

In the Matter of a Plan of Compromise or Arrangement of Royal Oak Mines Inc., and the Applicants Listed on Schedule "A"

Application Under the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C.-36 as Amended and the Business Corporations Act, R.S.O. 1990, c.B. 16, as Amended

Farley J.

Judgment: November 22, 1999
Docket: 99-CL-3278

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.4 Approval by court
VI.4.a General principles

Headnote

Bankruptcy --- Proposal — Approval by court — General

Interim receiver of corporation brought motion for order to authorize interim receiver, on behalf of and in name of corporation, to make proposal pursuant to Bankruptcy and Insolvency Act — Motion granted — As no Companies' Creditors Arrangement Act plan had ever been rejected by corporation's creditors, corporation had ability to commence proceedings under Part III of Bankruptcy and Insolvency Act — There was no impediment to interim receiver's making such proposal pursuant to Bankruptcy and Insolvency Act — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, Part II — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Table of Authorities

Cases considered by *Farley J.*:

Cadillac Fairview Inc., Re (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]) — referred to
Sorsbie v. Tea Corp, [1904] 1 Ch. 12 (Eng. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Pt. III — considered
Business Corporations Act, R.S.O. 1970, c. 53
Generally — referred to
Business Corporations Act, R.S.O. 1990, c. B.16
s. 186 — considered

Business Corporations Act, 1982, S.O. 1982, c. 4
s. 185 — referred to
Canada Business Corporations Act, S.C. 1974-75-76, c. 33
Generally — referred to
Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 191 — considered

s. 191(1) "reorganization" (c) — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — considered

MOTION by interim receiver for order authorizing it to make proposal pursuant to *Bankruptcy and Insolvency Act.*

Endorsement. ***Farley J.*:**

1 PricewaterhouseCoopers Inc., the Interim Receiver of Royal Oak Mines Inc., moved for an order to authorize the Interim Receiver, on behalf of and in the name of Royal Oak, to make a proposal pursuant to the Bankruptcy and Insolvency Act. While Royal Oak originally sought protection under the Companies' Creditors Arrangement Act, it never proposed a plan of arrangement or compromise to its creditors under CCAA. *Ipso facto* there has never been a rejection of a CCAA plan by the Royal Oak creditors. Thus Royal Oak (as an insolvent debtor) has the ability to commence proceedings under Part III of the BIA by filing a proposal. The Interim Receiver now wishes to do so in order that the deal now struck (and approved) for Northgate can be improved for the benefit of the unsecured creditors and shareholders of Royal Oak by allowing a structured transaction with Royal Oak shares so that the tax losses may be accessed. I see no impediment to the Interim Receiver making such a BIA proposal on behalf of Royal Oak.

2 There are substantial tax losses in Royal Oak which might be utilized by Northgate indirectly as a share purchaser. It is not proposed that the Royal Oak shareholders actually vote on the transaction set out in the Northgate term sheet - whereby the unsecured creditors and the shareholders would participate in the ongoing but restructured fortunes of Royal Oak but to a relatively quite limited small degree. Of course, if the transaction were to remain an approved asset sale, then neither the unsecured creditors nor the shareholders would receive anything. One might also observe that the shareholders would have to appreciate that, when viewed as to the hierarchy of interests to receive value in a liquidation related transaction, they are at the bottom. Further in these particular circumstances there are, in relation to the available tax losses (which is in itself a conditional asset), very substantial amounts of unsecured debt standing on the shareholders' shoulders. That is, the shareholders, even assuming an ongoing operation achieving a turnaround to profitability without restructuring, would have to wait a long while before their interests saw the light of day.

3 I see no reason then why the proposal would not utilize the provisions of s. 186 of the OBCA since this "reorganization" provision contemplates *inter alia* "an order made under the Bankruptcy Act (Canada) [now BIA] approving a proposal". It is curious to note that s. 186(1) OBCA does not incorporate as does s. 191 CBCA that the Court order could also include "(c) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors" - which language would appear to encompass the CCAA. The CBCA language was introduced by S.C. 1974-75. While this was subsequent to the introduction of the OBCA in 1970, it was not until the overhaul of the OBCA by S.O. 1982 that what is now s. 186 (then s.185) was introduced.

4 In any event it is also desirable to keep in mind the question of whether the shareholders have a true interest to be protected (and voting) - i.e. and interest which given the existing financial fortunes of the corporation could be said to have some reasonable prospect of economic value. In that regard see my views in *Re Cadillac Fairview Inc.* (March 7, 1995), Doc. B28/95 (Ont. Gen. Div. [Commercial List]), at pp 11-16 and the cases cited therein, especially *Sorsbie v. Tea Corp*, [1904] 1 Ch. 12 (Eng. C.A.). In any event the shareholders will be notified by notice to their last known address that they may participate, if they wish, at the sanction hearing (assuming the structural plan is approved by the requisite majority of the creditors).

5 I am therefore of the view that the order requested is appropriate to grant.

6 Order to issue.

Motion granted.

TAB 8

2006 CarswellOnt 406
Ontario Superior Court of Justice [Commercial List]

Stelco Inc., Re

2006 CarswellOnt 406, [2006] O.J. No. 276, 14 B.L.R. (4th) 260, 17 C.B.R. (5th) 78

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: January 17, 18, 20, 2006
Judgment: January 20, 2006
Docket: 04-CL-5306

Counsel: Michael Barrack, James D. Gage, Geoff R. Hall for Applicants
Robert Thornton, Kyla Mahar for Monitor
Peter Jervis, George Glezos, Karen Kiang for Equity Holders
John Varley for Salaried Employees
David Jacobs for USW Locals 8782, 5328
Aubrey Kauffman for Tricap Management Ltd.
Kevin Zych, Rick Orzy for 8% and 10.4% Stelco Bondholders
Lawrence Thacker for Directors of Stelco
Sharon White for USW Local 1005
Ken Rosenberg for USW International
Kevin McElcheran for GE
Gale Rubenstein, Fred Myers for Superintendent of Financial Services
Derrick Tay for Mittal
David R. Byers, Sean Dunphy for CIT Business Credit as DIP and ABL Lender
V. Gauthier for BABC Global Finance
L. Edwards for EDS Canada Inc.
Peter Jacobsen for Globe & Mail
Paul Macdonald, Andy Kent for Sunrise, Appalloosa
Murray Gold, Andrew Hatnay for Salaried Retirees
Flaviano Stanc for himself

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

Business associations
VI Changes to corporate status
VI.3 Arrangements and compromises
VI.3.a With shareholders
VI.3.a.ii Reorganization

Headnote

Business associations --- Changes to corporate status — Arrangements and compromises — With shareholders — Reorganization

Corporation negotiated plan of arrangement and reorganization to present to shareholders for approval — Arrangement acknowledged that subsequent reorganization could result in cancellation of reorganized corporation's shares based on those shares' having no value — Shareholder group claimed that sufficient value in corporation existed to fully satisfy claims of affected and unaffected creditors and to provide some additional value to shareholders — All shareholders and creditors voted on and approved arrangement in excess of statutory two-thirds requirements — Corporation brought application for order sanctioning and approving arrangement — Group brought cross-motion for adjournment of approval of arrangement for 60 days — Motion dismissed — Plan was fair, reasonable and equitable regarding existing equity — Group had not presented credible evidence that existing equity had any value independent of proposed arrangement — Despite very comprehensive capital raising and asset sale process and with market well canvassed, no interested party had come forward to conclude another deal — Significant majority of shareholders had approved of arrangement with large quorum present — No creditor opposition to arrangement existed — Creditors were accounted for and had been involved in negotiations to create arrangement.

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

Corporation negotiated plan of arrangement and reorganization to present to shareholders for approval — Arrangement acknowledged that subsequent reorganization could result in cancellation of reorganized corporation's shares based on those shares' having no value — Shareholder group claimed that sufficient value in corporation existed to fully satisfy claims of affected and unaffected creditors and to provide some additional value to shareholders — All shareholders and creditors voted on and approved arrangement in excess of statutory two-thirds requirements — Corporation brought application for order sanctioning and approving arrangement — Group brought cross-motion for adjournment of approval of arrangement for 60 days — Motion dismissed — Plan was fair, reasonable and equitable regarding existing equity — Group had not presented credible evidence that existing equity had any value independent of proposed arrangement — Despite very comprehensive capital raising and asset sale process and with market well canvassed, no interested party had come forward to conclude another deal — Significant majority of shareholders had approved of arrangement with large quorum present — No creditor opposition to arrangement existed — Creditors were accounted for and had been involved in negotiations to create arrangement.

Table of Authorities

Cases considered by *Farley J.*:

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

Beatrice Foods Inc., Re (1996), 43 C.B.R. (4th) 10, 1996 CarswellOnt 5598 (Ont. Gen. Div. [Commercial List]) — referred to

Cable Satisfaction International Inc. v. Richter & Associés inc. (2004), 48 C.B.R. (4th) 205, 2004 CarswellQue 810 (C.S. Que.) — considered

Canadian Airlines Corp., Re (2000), 2000 ABQB 442, 2000 CarswellAlta 662, [2000] 10 W.W.R. 269, 20 C.B.R. (4th) 1, 84 Alta. L.R. (3d) 9, 9 B.L.R. (3d) 41, 265 A.R. 201 (Alta. Q.B.) — considered

Canadian Airlines Corp., Re (2000), 2000 ABCA 238, 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) — referred to

Laidlaw, Re (2003), 2003 CarswellOnt 787, 39 C.B.R. (4th) 239 (Ont. S.C.J.) — referred to

New Quebec Raglan Mines Ltd. v. Blok-Andersen (1993), 9 B.L.R. (2d) 93, 1993 CarswellOnt 173 (Ont. Gen. Div. [Commercial List]) — considered

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

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

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

Stelco Inc., Re (2004), 48 C.B.R. (4th) 299, 2004 CarswellOnt 1211 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2004), 2004 CarswellOnt 2936 (Ont. C.A.) — referred to

Stelco Inc., Re (2004), 338 N.R. 196 (note), 2004 CarswellOnt 5200, 2004 CarswellOnt 5201 (S.C.C.) — referred to

T. Eaton Co., Re (1999), 1999 CarswellOnt 4661, 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Business Corporations Act, R.S.A. 2000, c. B-9

Generally — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 191 — considered

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

Generally — referred to

CROSS-MOTION by shareholder group for adjournment of arrangement implementation for 60 days.

Farley J.:

1 The Applicants (collectively "Stelco") moved for:

> (a) a declaration that Stelco has complied with the provisions of the *Companies' Creditors Arrangement Act* ("CCAA") and the orders of this court made in this CCAA proceeding;
>
> (b) a declaration that the Stelco plan of arrangement pursuant to the CCAA and the reorganization of Stelco Inc. ("S") under the *Canada Business Corporations Act* ("CBCA") (collectively the "Plan") as voted on by the affected creditors of Stelco is fair and reasonable;
>
> (c) an order sanctioning and approving the Plan; and
>
> (d) an order extending the Stay Period and Stay Date in the Initial Order until March 31, 2006.

2 This relief was unopposed by any of the stakeholders except for various existing shareholders of S (who may also be employees or retirees of Stelco). In particular there was organized objection to the Plan, especially as in essence the Plan would eliminate the existing shareholders, by a group of shareholders (AGF Management Ltd., Stephen Stow, Pollitt & Co., Levi Giesbrecht, Joe Falco and Phil Dawson) who have styled themselves as "The Equity Holders" ("EH"). On December 23, 2005 the EH brought in essence a cross motion seeking the following relief:

> (a) An order extending the powers of the Monitor, Ernst & Young, in order to conduct a sale of the entire Stelco enterprise as a going concern through a sale of the common shares or assets of Stelco on such terms and conditions as are considered fair;
>
> (b) An order authorizing and directing the Monitor to implement and to take all steps necessary to complete and fulfill all requirements, terms, conditions and steps of such a sale;
>
> (c) An order authorizing and directing the Monitor to conduct the sale process in accordance with a plan for the sale process approved by the court;

(d) An order directing the Monitor to retain such fully independent financial advisors and other advisors as necessary to conduct this sale process;

(e) An order confirming that the powers granted herein to the Monitor supersede any provision of any prior Order of this Court made in the within proceedings to the extent that such provision of any prior order is inconsistent with or contradictory to this order, or would otherwise limit or hinder the power and authority granted to the Monitor;

(f) An order directing Stelco and its directors, officers, counsel, agents, professional advisors and employees, and its Chief Restructuring Officer, to cooperate fully with the Monitor with regard to this sale process, and to provide the Monitor with such assistance as may be requested by the Monitor or its independent advisors;

(g) In the alternative, an order suspending the sanctioning of the Proposed Plan of Arrangement, approved by the creditors on December 9, 2005, for a period of two months from the date of such order, so that the Monitor may conduct the independent sale process that may result in a more profitable outcome for all stakeholders, including the Equity Holders;

(h) In the further alternative, an order lifting the *Companies' Creditors Arrangement Act* stay of proceedings in respect of Stelco without approving the Plan of Arrangement, as approved by the creditors on December 9, 2005, pursuant to such terms as are just and are directed by court; and

(i) Such further and other relief as counsel may advise and this Honourable Court may permit.

3 In its factum, the EH requested that the court adjourn approval of the Plan for 60 days and direct the Monitor to conduct an independent sale process for the shares of S. In the attendances on January 17 and 18, 2006, the EH then asked that approval of the Plan be adjourned for 30 days in order to see if there were expressions of interest for the shares of S forthcoming in the interim.

4 I indicated that I would defer my consideration of the adjournment request until after I had had submissions on the motions before me as set out above. I also indicated that while there did not appear to be any concern by anyone including the EH as to the first two elements concerning CCAA plan sanctioning as discussed in *Algoma Steel Inc., Re* (2001), 30 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]) at p. 3:

> In a sanction hearing under the *Companies' Creditors Arrangement Act* ("CCAA") the general principles to be applied in the exercise of the court's discretion are:
>
> (a) There must be strict compliance with all statutory requirements and adherence to the previous orders of the court;
>
> (b) All materials filed and procedures carried out must be examined to determine if anything has been done or purported to be done which is not authorized by the CCAA; and
>
> (c) The Plan must be fair and reasonable.
>
> See *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.), affirmed *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada* (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at p. 201; *Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at p. 109; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 506; *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]), at pp. 172-3; *Canadian Airlines Corp., Re*, [2000] 10 W.W.R. 269 (Alta. Q.B.), leave to appeal dismissed, [2000] 10 W.W.R. 314 (Alta. C.A. [In Chambers]).

it would not be sufficient to only deal in this hearing with the third test of whether the Plan was fair and reasonable (including the aspect of "fair, reasonable and equitable" as discussed in *Sammi Atlas Inc., Re* [1998 CarswellOnt 1145 (Ont. Gen. Div. [Commercial List])]). Rather the court also had to be concerned as to whether the Plan was implementable. In other words, it would be futile and useless for the court to approve a plan which stood no reasonable prospect of being implemented. That concern of the court had been raised by my having been alerted by the Monitor in its 46th Report at paragraphs 8-9:

> 8. The Monitor has had discussions with the proposed ABL lenders, Tricap, the Province and Stelco regarding the status of the ABL Loan and the Bridge Loan. The Monitor has been advised that the parties are continuing to work at resolving issues that are outstanding as at the date of this Forty-Sixth Report. However, all of the parties remain optimistic that acceptable solutions to the outstanding issues will be found and implemented.
>
> 9. In the Monitor's view, the principal issues to be resolved include:
>
> > (a) the corporate structure of Stelco, which could involve the transfer of assets of some of the operations or divisions of the Applicants to new affiliates; and
> >
> > (b) satisfying the ABL lenders and Tricap as to the priority of the new financing.
>
> These issues need to be resolved primarily among the proposed ABL lenders, Tricap and Stelco and will also involve the Province insofar as they affect pension and related liabilities.

5 I was particularly disquieted by the lack of progress in dealing with these outstanding matters despite the passage of 39 days since the Plan was positively voted on December 9, 2005. I do appreciate that Christmas, Hanukkah and New Year's were celebrated in this interval and that there had been a certain "negotiation fatigue" leading up to the December 9th revisions to the Plan and that I have advocated that counsel, other professionals and litigation participants balance their lives and pay particular attention to family and health. However I find it unfortunate that there would appear to have been such a lengthy hiatus, especially when the workers at Stelco continued (as they have for the past two years while Stelco has been under CCAA protection) to produce steel in record amounts. I therefore demanded that evidence be produced forthwith to demonstrate to my satisfaction that progress was real and substantial so that I could be satisfied about implementability. As a side note I would observe that in the "normal" case, sanction orders are typically sought within two or three days of a positive creditor vote so that it is not unusual for documentation to be sorted out for a month before a plan is implemented with a closing.

6 The EH filed material to support its submission that the Plan is not fair, reasonable and equitable because it is alleged that there is currently sufficient value in Stelco to fully satisfy the claims of affected and unaffected creditors and to provide at least some value to current shareholders. The EH prefers to have a search for some entity to take out the current shareholders for "value". Fabrice Taylor, a chartered financial analyst with Pollit & Co. swore an affidavit on the eve of this hearing which was sent electronically to the service list on January 16, 2006 at approximately 7:30 p.m. In that affidavit, he states:

> 2. The Dofasco bidding war has highlighted a crucial fact about steel asset valuations, notably that strategic buyers place a much higher value on them than public market investors. Attached as Exhibit "1" is an article entitled "Restructuring of steel industry revives investors' interest", published in the Financial Times on December 14, 2005.
>
> 3. I, along with Murray Pollitt and a number of Stelco shareholders, have spent the past three months attempting to attract strategic buyers and/or equity investors in Stelco. These strategic buyers and equity investors are mostly international. Some had already considered buying Stelco or had made bids for the company but had stopped following the story some months ago. Others were not very familiar with Stelco.

4. Three factors hindered our efforts. First, Stelco is under CCAA protection, a complicated situation involving multiple players and interests (unions, politics, pensions) that is difficult to understand, particularly for foreigners. Second, there has not been enough time for these strategic buyers or equity investors to deepen their understanding or to perform due diligence. Finally, the Dofasco bid process, while providing emphatic evidence that steel assets are increasingly valuable, hinders certain strategic buyers and financial institutions interested in participating in Stelco because they are distracted and/or conflicted by the Dofasco sale. I have been advised by some of the participants in the Dofasco negotiations that they would be willing to carefully consider a Stelco transaction once the Dofasco sale has been resolved.

5. The Forty Fifth Report of the Monitor confirmed that Stelco had not received any offers in the last several months. The report does not answer the question of whether the company or its financial advisors have in fact attempted to attract any offers. I believe that Stelco would have received expressions of interest had the company made efforts to attract offers, or had the Dofasco sale been resolved earlier. I believe that the Monitor should be authorized, for a period of at least 60 days, to canvas interest in a sale of Stelco before the approval of the proposed plan of restructuring.

7 No satisfactory explanation was forthcoming as to why this affidavit, if it needed to be filed at all, was not served and filed by December 23, 2005, in accordance with the timetable which the EH and the other stakeholders agreed to. Certainly there is nothing in the affidavit which is such late breaking news that this deadline could not have been met, let alone that it was served mere hours before the hearing commenced on January 17, 2006. Aside from the fact that the financing arrangements forming the basis of the Plan contained "no shop" covenants which would make it inappropriate and a breach to try to attract other offers, the foregoing excerpts from the Taylor affidavit clearly illustrate that despite apparently diligent efforts by the EH, no one has shown any real or realistic interest in Stelco. Reading between the lines and without undue speculation, it would appear that the efforts of the EH were merely politely rebuffed.

8 Certainly Stelco is not Dofasco, nor is it truly a comparable (as opposed to a contrastor). Stelco has been a wobbly company for a long time. Further as I indicated in my October 3, 2005 endorsement, in the preceding 20 months under the CCAA protection, Stelco has become "shopped worn". The unusual elevation of steel prices in the past two years has helped Stelco avoid the looming liquidity crisis which it anticipated in its CCAA filing on January 29, 2004. However even this financial transfusion has not allowed it to become a healthy company or truly given it a burgeoning war chest to weather bad times the way that other steel companies (including some in Canada) have so benefited. The redness of the visage of Stelco is not a true indication of health and well being; rather it seems that it is rouge to mask a deep pallor.

9 I am satisfied on the evidence of Hap Stephen, the Chief Restructuring Officer of Stelco and of the Monitor that there has been compliance with all statutory requirements and adherence to previous orders of the court and further that nothing has been done or purported to be done that is not authorized by the CCAA.

10 The next question to be dealt with is whether the Plan is fair, reasonable and equitable. I was advised that creditors of the affected creditor classes representing approximately 90% in value of each class voted on the Plan. The Monitor reported at para. 19 of its 44th Report as to the results of the vote held December 9th as follows:

Class of Affected Creditors	Percentage in favour by Number	Percentage in favour by Dollar Value
Stelco	78.4%	87.7%
Stelwire	89.01%	83.47%
Stelpipe	94.38%	86.71%
CHT Steel	100%	100%
Welland Pipe	100%	100%

11 This favourable vote by the affected creditors is substantially in excess of the statutory two-thirds requirement. By itself that type of vote, particularly with such a large quorum present, would ordinarily be very convincing for a court

not interfering with the informed decisions of business people. With that guideline, plus the aspect that a plan need not be perfect, together with the lack of any affected creditor opposition to the Plan being sanctioned and the fact that the Plan including its ingredients and nature and amount of compromise compensation to be given to affected creditors having been exhaustively negotiated in hard bargaining by the larger creditor groups who are recognized as generally being sophisticated and experienced in this area, and the consideration of the elements in the next paragraph, it would seem to me that the Plan is fair, reasonable and equitable vis-à-vis the affected creditors and I so find. See *Sammi Atlas Inc., Re*, at p. 173; *T. Eaton Co., Re* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at p. 313; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p. 510.

12 I also think it helpful to examine the situation pursuant to the analysis which Paperny J. did in *Canadian Airlines Corp., Re* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.), leave to appeal refused (2000), 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]). That proceeding also involved an application pursuant to the corporate legislation, the *Business Corporations Act (Alberta)*, concerning the shares and shareholders of Canadian Airlines. In that case, Paperny J. found the following factors to be relevant:

> (a) the composition of the vote: claims must have been properly classified, with no secret arrangements to give an advantage to a creditor or creditors; approval of the plan by the requisite majority of creditors is most important (in the case before me of Stelco: the challenge to classification was dismissed; there was no suggestion of secret arrangements; and, as discussed above, the quorum and size of the positive vote were very high);
>
> (b) anticipated receipts in liquidation or bankruptcy: it is helpful if the Monitor or other disinterested person has prepared a liquidation analysis (in Stelco, the Monitor determined that on liquidation, affected creditor recovery would likely range from 13 to 28 cents on the dollar; it should also be observed that Stelco has engaged in extensive testing of the market as to possible capital raising or sale with the aid of established firms and professionals of great experience and had come up dry.);
>
> (c) alternatives to the proposed plan: it is significant if other options have been explored and rejected as unworkable (in Stelco; see comment in (b));
>
> (d) oppression of the rights of certain creditors (in Stelco, this was not a live issue as nothing of this sort was alleged);
>
> (e) unfairness to shareholders (in Stelco, this will be dealt with later in my reasons; however allow me to observe that the interests of shareholders becomes engaged if they are not so far underwater that there is a reasonable prospect in the foreseeable future that the fortunes of a company would otherwise likely be turned around so that they would not continue to be submerged); and
>
> (f) the public interest: the retention of jobs for employees and the support of the plan by the company's unions is important (in Stelco, the Plan does not call for reductions in employment; there is provision for continuation of the capital expenditure program and its funding; an important enterprise for the municipal and provincial levels of government would be preserved with continuing benefits for those communities; an important customer and supplier would continue in the industry and maintain competition; the USW International Union and its locals (except for local 1005) supported the Plan and indeed were instrumental in bringing Tricap Management Limited to the table (local 1005's position was that it did not wish to engage in the CCAA process in any meaningful way as it was content to rely upon its existing collective agreement which now still has several months to go before expiring).

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). See *Beatrice Foods Inc., Re* (1996), 43 C.B.R. (4th) 10 (Ont. Gen. Div. [Commercial List]) at para. 10-15; *Laidlaw, Re* (2003), 39 C.B.R. (4th) 239 (Ont. S.C.J.); *Algoma Steel Inc., Re* at para. 7; *Cable Satisfaction International Inc. v. Richter & Associés inc.* (2004), 48 C.B.R. (4th) 205 (C.S. Que.) at p. 217. The Dickenson Report, which articulated the basis for the reform of corporate law that resulted in the enactment of the CBCA, described the object of s. 191 as being:

> to enable the court to effect any necessary amendment to 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 (emphasis added): R.W.V. Dickenson, J.L. Howard, L. Getz, *Proposals for a New Business Corporations Law for Canada*, vol. 1 (Ottawa: Information Canada. 1971) at p. 124.

15 The fairness, reasonableness and equitable aspects of a plan must be assessed in the context of the hierarchy of interests recognized by insolvency legislation and jurisprudence. See *Canadian Airlines Corp., Re* at pp. 36-7 where Paperny J. stated:

> 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.*
>
> 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.
>
> 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.

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 Nexis 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 *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), leave to appeal dismissed [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal dismissed [2004 CarswellOnt 5200 (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.

18 If the existing equity has no true value at present, then what is to be gained by putting off to tomorrow (the ever present and continuous problem in these proceedings of manãna — which never comes) what should be done today. The EH speculate, with no concrete basis for foundation as demonstrably illustrated by the eve of hearing Taylor affidavit discussed above, that something good may happen. I am of the view that that approach was accurately described in court by one counsel as a desperation Hail Mary pass and the willingness of someone, without any of his own chips, in the poker game willing to bet the farm of someone else who does have an economic interest in Stelco.

19 I also think it fair to observe that in the determination of whether someone has an economic value, that analysis should be conducted on a reasonable and probable basis. In a somewhat different but applicable context, I observed in *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) at p. 3:

> The "highest price" is not the price which could be derived on the basis of the most optimistic and risky assumptions without any regard as to their likelihood of being realized. It also seems to me that prudence would involve a consideration that there be certain fall back positions. Even in betting on horses, the most savvy and luckiest punter will not continue to stake all his winnings of the previous race on the next (and so on). If he does, he will go home wearing the barrel before the last race is run.

Alternatively there is a saying: "If wishes were horses, then beggars would ride."

20 Unless I were to now dismiss the motion for sanctioning and approving the Plan because I found that it was not implementable and/or that it was not fair, reasonable and equitable to the existing shareholders (based upon the proviso that I did determine that the existing shareholders did have a valid present material equity of value), then I see no reason not to dismiss the motion of the EH concerning its request for an adjournment and its request for a further sale (or other related disposition) process. Allow me to observe that no matter how well intentioned the motion of the EH in that regard, I find that that request to be lacking in any valid substance. Rather, the evidence presented was in essence a chimera. I think it fair to observe that, with all the capital raising and sales processes to date which Stelco has undertaken in conjunction with its experienced and well placed professional advisers together with its Chief Restructuring Officer and the Monitor, the bushes have been exhaustively and well beaten as to any real possible interest. Despite three months of what one must presume to be diligent efforts, the EH have come up with nothing concrete. I do not find that the three factors mentioned by Taylor in his late-blooming affidavit of January 16th to be remotely close to convincing. The first two, if taken at face value, would lead one to the conclusion that no one has the time, interest or ability to take an interest in Stelco in any meaningful timeframe. The third presumes that the losing bidder for Dofasco, be it Arcelor or ThyssenKrupp, will almost automatically want Stelco — and at a price and upon terms which would result in present equity being attributed value. I must say in fairness that this is wishful thinking as neither of these warring bidders pursued any interest in Stelco during the previous processes. It is neither clear nor obvious why mere municipal proximity of Dofasco to Stelco's Hilton Works in Hamilton would now ignite any interest in Stelco.

21 I also think it fair to observe that not proceeding with the sanction hearing now and indeed starting a brand new search for someone who will think Stelco so worthwhile that it will offer such a large amount (with or without onerous conditions) is akin to someone coming into court when a receiver is seeking court approval on a sale — and that someone being allowed to know the price and conditions — and then being able to make an offer for a price somewhat higher. (I reiterate that here we do not even have an offer or a price.) I do not see that such a procedure would be consistent with the principles laid out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.). Given that the affected creditors have rather resoundingly voted in favour of the Plan, all in accordance with the provisions of the CCAA and the Court orders affecting the sanction, I would be of the view that if the existing equity has no value, then the EH's request in this respect would, if granted, be of significant detriment to the integrity of the insolvency system and regime. I would find that inappropriate to attempt to justify proceeding along that line.

22 Allow me to return to the pivotal point concerning the question of whether the Plan is fair, reasonable and equitable, vis-à-vis the existing equity. The EH retained Navigant Consulting which relied upon the views of Metal Bulletin Research ("MBR") which, *inter alia*, predicted a selling spot price of hot roll steel at $525 U.S. per ton. Navigant's conclusion in its December 8, 2005 report was that the value of residual shareholder equity was between $1.1 to $1.3 billion or a per share value of between $10.76 and $12.71. However, when Stelco pointed out certain deficiencies in this analysis, Navigant took some of these into account and reduced its assessment of value to between $745 million to $945 million for residual shareholder value on per share value of $7.29 to $9.24, using a discounted cash flow ("DCF") approach. Navigant tested the DCF approach against the EBITDA approach. It is interesting to note that on the EBITDA analysis approach Navigant only comes up to a conclusion that the equity is valued at $8 million to $83 million or $0.09 to $0.81 per share. If the Court were to accept that as an accurate valuation, or something at least of positive value even if not in that neighbourhood, then I would have to take into account existing shareholder interests in determining whether the Plan was fair, reasonable and equitable — and not only vis-à-vis the affected creditors but also vis-à-vis the interests of the existing shareholders given that at least some of their equity would be above water. I understand the pain and disappointment of the existing shareholders, particularly those who have worked hard and long with perhaps their life savings tied up in S shares, but regretfully for them I am not able to come to a conclusion that the existing equity has a true positive value.

23 The fight in the Stelco CCAA proceedings has been long and hard. No holds have been barred as major affected creditors have scrapped to maximize their recovery. There were direct protracted negotiations between a number of major affected creditors and the new equity sponsors under the Plan, all of whom had access to the confidential information of Stelco pursuant to Non Disclosure Agreements. These negotiations established a value of $5.50 per share for the *new* common shares of a *restructured* Stelco. That translates into an enterprise value (not an equity value since debt/liabilities must be taken into consideration) of $816.6 million for Stelco, or a recovery of approximately 65% for affected creditors. The parties engaged in these negotiations are sophisticated experienced enterprises. There would be no particular reason to believe that in the competition involved here that realistic values were ignored. Further, the affected creditors generally were rather resoundingly of the view by their vote that an anticipated 65% recovery was as good as they could reasonably expect.

24 The 45th Report of the Monitor had a chart of calculations to determine the level of recovery of affected creditors at various assumed enterprise values up to and including the top end of Navigant's range of enterprise value (as contrasted with residual equity value). At the high end of Navigant's range of revised enterprise value, $1.6 billion, the Monitor calculated that affected creditors would still not receive full recovery of their claims.

25 The EH cited the sale of the EDS Canada claim to Tricap as being at a premium as evidence in support of Navigant's conclusion. However, the fact was that this claim was purchased not at a premium, but rather at a discount. That would be confirmation of the opposite of which the EH has been contending.

26 Despite a very comprehensive capital raising and asset sale process, with the market alerted and well canvassed, and with the ability to conduct due diligence, no interested party came forwarded to conclude a deal. Even since the December

9, 2005 vote when the terms of the Plan were available, no interested party has come forward with any expression of interest which would attribute value to the existing shareholders.

27 Stelco's experts, UBS and BMO Nesbit Burns, both have given opinions that there is no value to the existing equity. Their expert opinions were not challenged by cross-examination. Both these advisors are large sophisticated institutions; both have extensive experience in the steel industry.

28 UBS calculated the enterprise value of Stelco as being in the range of $550 million to $750 million; BMO Nesbitt Burns at $650 million to $850 million. On that basis the unsecured creditors would receive less than full recovery of their claims, which would lead to the conclusion that there is no value for the existing shareholders. The Monitor commissioned an independent estimate of the enterprise value from its affiliate, Ernst & Young Orenda Corporate Finance Inc's Valuation Group. That opinion came in at $635 million to $785 million.

29 I would note that Farley Cohen, the principal author of the Navigant report, does not have experience in dealing with integrated steel companies. I find it unusual that he would have customized his approach in calculating equity value by not deducting the Asset Based Lenders loan. Brad Fraser of BMO Nesbitt Burns stated that such customization was contrary to the practice at his firms both present and past and that the Navigant's approach was internally inconsistent with respect thereto as to 2005 to 2009 cash flows as contrasted with terminal value. The Navigant report appears to have forecasted a high selling price for steel combined with low costs for imports such as coal and scrap, which would be contrary to historical complementary movements between steel prices and these inputs.

30 Navigant relies on an average price of $525 US per ton as provided by MBR. This is a single source as to this forecast. While a single analyst may come up with a forecast which is shown by the passage of time to be dead on accurate, it would seem to me to be more realistic and prudent to rely on the consensus approach of considering the views of a greater number of "representative" analysts, especially when prices appear volatile for the foreseeable future. That consensus approach allows for consideration of the way that each analyst looks at the market and the factors and weights to be given. The UBS opinion reviewed the pricing forecast of eight analysts and BMO Nesbitt Burns' ten analysts. Interestingly, MBR's choice of a price at the top of the band would seem at odds as the statements on the MBR website foreseeing downward pressure on steel prices in 2006 because of falling prices in China; although this inconsistency was pointed out, there was no response forthcoming.

31 Navigant estimated Stelco's financial performance for the last quarter of 2005 and made a significant upward adjustment. However, the actual experience would appear to indicate that such an adjustment would overstate Stelco's results by $124 million.

32 Navigant's DCF approach involved a calculation of Stelco's enterprise value by adding the present value of a stream of cash flow from the present to 2009 and the present value of the terminal value determined as at 2009 so that the terminal value represents the majority (60% approximately) of enterprise value as calculated by Navigant. MBR chose a 53-year average steel price despite significant changes over that time in the industry. However, coal and scrap costs were determined as at 2009. This produced the anomalous result that steel prices are rising while costs are falling. This would imply great structural difficulties (economically and functionally) in the steel industry generally and a lack of competition. A terminal value EBITDA margin for Stelco would then be implied at approximately 26% or some 11% higher than the EBITDA margin actually achieved by Stelco in the first quarter of 2005, the most profitable quarter in the history of Stelco.

33 Interestingly, since Navigant's approach in fact would decrease calculated value, UBS and BMO Nesbitt Burns used a weighted average cost of capital ("WACC") for Stelco in the range of 10% to 14%; Navigant used 24%. A higher WACC will result, all other things being equal, in a lower enterprise value. Navigant considered that there should be a 10% to 15% company-specific premium because of the risks associated with Stelco vis-à-vis the higher steel prices forecast by MBR. This would appear to imply that there was recognition that either MBR was aggressive in its forecasting or that price volatility would caution one to use consensus forecasting. Colin Osborne, a senior executive of Stelco, with

considerable experience in the steel industry provided direct evidence on the substantial differences between each of Stelco, AK Steel, U.S. Steel and Algoma. Mr. Cohen acknowledged in cross-examination that these differences made Dofasco a more valuable company than Stelco. As set out at para. 74 of the Stelco Factum:

> 74. The specific difference identified by Mr. Osborne which made Dofasco unique include but are not limited to:
>
> (a) non-union, flexible work environment (vs. Stelco, Algoma, AK Steel and U.S. Steel);
>
> (b) legacy costs which are very low due to non-conventional profit sharing, which limits liability (vs. Stelco, AK Steel, Algoma and U.S. Steel);
>
> (c) high historical cap-ex spend per ton (vs. Stelco, Algoma and U.S. Steel);
>
> (d) a flexible steelmaking stream in terms of a hybrid EAF and blast furnace BOF stream in Hamilton and a mini-mill operation in the U.S. (vs. Stelco, Algoma, U.S. Steel and AK Steel which are all blast furnace based steel makers);
>
> (e) a value added product mix focused on coated products and tubing (vs. Stelco and Algoma which focus on hot roll); and
>
> (f) a strong raw material position with excess iron ore and self-sufficiency in coke (Algoma, Stelco and AK Steel all have dependence to various degrees on either iron ore or coke or both).

Dofasco and Stelco are not in my view fungible. There are incredible differences between these two enterprises, to the disadvantage of Stelco.

34 The reply affidavit of Mr. Fraser of BMO Nesbitt Burns calculated the effect of all of the acknowledged corrections to the initial Navigant report and other adjustments. The result of this exercise was a conclusion by him that there was no value available for existing shareholders. This, along with all the other affidavits provided on the Stelco side, was not cross-examined on.

35 While not referred to in the Factum of EH, there were a number of quite serious allegations raised in material filed by the EH against management of Stelco concerning bias and manipulation. Mr. Osborne responded to each of these allegations; he was not cross-examined. I find it unfortunate that such allegations appear to have been made on an unsubstantiated shotgun approach.

36 The position of the EH is that certain of the features of the Plan should be assumed as transportable directly and without change into a scenario where some insolvency rescuer emerges on the scene as the equivalent of a White Knight, one it would seem which has been awakened from slumber. I am of the view that presumes too much. For example, I take it that the Province would not automatically accept this potential newcomer without question; nor would it likely relish the resumption of weeks of hard bargaining. I would think it unwise, impudent and high stakes poker (with other peoples' money) to speculate as did Taylor in para. 41 of his December 23, 2005 affidavit:

> 41. Were Stelco to emerge from CCAA protection and were the province to carry out its threat to revoke Stelco's entitlement to the benefit of section 5.1 the end result would likely be a liquidation of the company. The Province would be responsible for a substantial portion of Stelco's pension promise. It would clearly not be in the Province's self-interest to force Stelco into liquidation. It was, in other words, an obvious bluff. Yet the notion of calling this bluff does not appear to have crossed management's mind.

This should be contrasted with the views of the Monitor in its 44th Report at para. 61:

> 61. It should also be noted that the Pension Plan Funding Arrangements and the $150 million New Province Note embodied in the Approved Plan were agreed to by the Province only in the context of the terms of the Approved Plan

and, in particular, the capital structure, liquidity and other elements contemplated therein. The Province has advised that its proposed financing and the Pension Plan Funding Arrangements should not be assumed to be available if any of the elements of the Approved Plan are changed.

37 The end result is that given the above analysis, I have no hesitation in concluding that it would be preferable to rely upon the analysis of UBS, BMO Nesbitt Burns and Ernst & Young Orenda, both as to their direct views as to the enterprise value of existing Stelco and as to their criticism of the Navigant and MBR reports concerning Stelco. Therefore, I conclude that the existing shareholders cannot lay claim to there being any existing equity value. Given that conclusion, it would be inappropriate to justify cutting in these existing shareholders for any piece of the emergent restructured Stelco. If that were to happen, especially given the relative values and the depth of submersion of existing equity, then it would be unfair, unreasonable and inequitable for the affected creditors.

38 That then leaves the remaining question: Does it appear likely that the Plan will be implementable? I have been advised on Wednesday, January 18th that I would receive executed term sheets (which would address the issues raised by the Monitor discussed above) by 5 p.m., Friday, January 20th.

39 The motion and adjournment request of the EH is dismissed.

40 There was a request to extend the stay to March 31, 2006. I am of the view that it would be sufficient and desirable to extend the stay (subject, of course, to further extension) to March 3, 2006.

41 I have received the term sheets together with the Monitor's 48th Report by the 5 p.m. January 20th deadline and find them satisfactory as demonstrating to my analysis and satisfaction that the Plan is implementable as discussed above, subject to a comeback provision if anyone wishes to dispute the implementability issue (the onus remaining on Stelco). My decision today re: implementability should in no way be taken as deciding any corporate reorganization issue or anything of that or related nature. I therefore sanction and approve the Plan.

Motion dismissed.

TAB 9

IN THE MATTER OF THE PROPOSAL OF TELEPANEL SYSTEMS INC., OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Dec. 20/05 Court File No. 31-448752

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at TORONTO

MOTION RECORD

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Solicitors for Telepanel Systems Inc.

SUPERIOR COURT OF JUSTICE / COUR SUPÉRIEURE DE JUSTICE
FILED / DÉPOSÉ
DEC 19 2005
REGISTRAR - GREFFIER TORONTO

Dec 20, 2005. Order to issue as per my fiat, unopposed. [illegible]
I have the proposal should be approved as it meets the 3 part test. In that regard I note the unanimous acceptance by the secured & unsecured creditors. The old equity was so overwhelmingly submerged that it was either on the bottom of the ocean and thus the s. 191 CBCA order is appropriate; see Laidlaw.
[signature]

Doc#475703v1

Court File No. 31-448752

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF the Proposal of Telepanel Systems Inc., of the City of Toronto, in the Province of Ontario

FACTUM OF TELEPANEL SYSTEMS INC.

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Court File No. 31-448752

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF the Proposal of Telepanel Systems Inc., of the City of Toronto, in the Province of Ontario

FACTUM OF TELEPANEL SYSTEMS INC.

PART I - NATURE OF MOTION

1. This factum is filed in support of:

(a) the Application of Mintz & Partners Limited, the Trustee acting in re the proposal of Telepanel Systems Inc. ("TSI" or the "Company") for an order approving the Amended Proposal dated December 1, 2005 (the "Amended Proposal") duly accepted by the creditors of the Company at the meeting of the Company's creditors held on December 1, 2005;

(b) the motion of the Company for an order (i) amending its articles of incorporation pursuant to Section 191 of the *Canada Business Corporations Act*, R.S.C. 1985, c-45, as amended ("CBCA") in accordance with the terms of the Amended Proposal, with effect on the Effective Date, as defined in the Amended Proposal, and in the sequence provided therein; (ii) authorizing the Company to take such steps as are necessary or required to implement the transactions contemplated by the Amended Proposal, including, without limitation, filing the articles of reorganization, *inter alia*: (i) deleting the authorized capital of the Company, including all of the authorized common shares and any other equity of any kind and all the rights, privileges, restrictions and conditions attaching thereto, and canceling all of the existing and outstanding common shares of the Company and any other equity of any kind; (ii) creating a new unlimited number of new common shares (the "New Common Shares") one of which will be acquired by NRT Technology Corporation ("NRT"),

all at the time and in the sequence provided in the Amended Proposal; and (c) such further and other ancillary relief as counsel may advise and as may be approved by the Court.

PART II - FACTS

Telepanel

1. Telepanel is a public company incorporated under the laws of Canada on June 9, 1982. Telepanel traded under the symbol TLS on the Toronto Stock Exchange until June 25, 2003, when the Ontario Securities Commission temporarily cease traded the Company's shares by reason of the Company's failure to file audited financial statements for the year ended January 31, 2003, which order was extended by further order dated July 7, 2003. Telepanel also trades under the symbol TLSXF on the Over the Counter Bulletin Board in the United States

Affidavit of Chris Skillen sworn November 14, 2005 (the "Skillen Affidavit")
Motion Record, Tab 3, paragraphs 3-4, Exhibit "A"

2. The authorized capital of Telepanel is an unlimited amount of common shares, of which approximately 29,000,000 were issued and outstanding as at November 1, 2005. It is estimated that there are approximately 4,200 Telepanel shareholders.

Skillen Affidavit, paragraph 5

The Telepanel Business

3. Telepanel develops, manufactures and supplies electronic liquid crystal display ("LCD") modules which are attached to store shelf edges to display product pricing and certain promotional information. The Telepanel system enables retailers to change the information displayed at the store shelf through the use of a central computer and a unique radio frequency communications technology that links information on the retailer's store shelves to that in its electronic checkout scanning system.

Skillen Affidavit, paragraph 6

4. The Company historically generated revenue from (i) the initial installation of the Telepanel system; (ii) the sale to customers of additional LCD modules used to expand the system and to replenish existing supply; (iii) software fees; and (ix) customer service fees, as required.

Skillen Affidavit, paragraph 8

5. Telepanel currently has installations at approximately 60 supermarkets and warehouse chains in North America.

Skillen Affidavit, paragraph 9

6. Due to market conditions for electronic shelf pricing, the Company was unable to raise the funding necessary to maintain operations at desired levels and, beginning in 2003, was required to reduce its expenditures and staffing to permit it to operate within available cash levels. In June, 2005, as part of its efforts to reduce cash expenditures, Telepanel moved its operations to the premises of NRT, which has offered to acquire Telepanel, as discussed below, and Telepanel's operations are continuing from those premises.

Skillen Affidavit, paragraphs 10-11

Telepanel's Financial Position

7. Telepanel has never been a profitable company, and generated losses of over $5 million for the years 2000 through 2002, when the last audited financials were prepared. Telepanel has continued to experience similar losses in subsequent years. These losses were incurred despite continued attempts to finance, including a series of bridge loans obtained in 2001 through Telepanel's directors, institutional lenders and investment bankers.

Skillen Affidavit, paragraphs 13-14, Exhibit "B"

8. As at November 14, 2005, Telepanel's outstanding debts stood at approximately $22,081,008, made up of $20,316,681 in secured bridge loans and other secured financing, and $1,726,327 in unsecured debts. Telepanel is unable to meet its obligations as they become due and payable.

Skillen Affidavit, paragraphs 15-17

Marketing Efforts

9. In early November, 2004, Telepanel approached the leading market participants with an invitation to make offers for the operations, property and assets of Telepanel, including all patents, trade secrets, inventory, customer lists, know-how, drawings and future product designs. It was Telepanel's expectation at that time that bidding would start at approximately US$2.5 million. In fact, no offers were received by Telepanel in connection with the auction process.

Skillen Affidavit, paragraphs 18-19, Exhibits "C" and "D"

10. Telepanel also worked with EquiGenesis Corp., ("EquiGenesis") to develop a limited partnership structure through which Telepanel would receive the funding it required to continue its operations. Discussions with EquiGenesis and the Canada Revenue Agency ("CRA") continued until April 2005, at which point it became apparent that CRA would not approve the proposed arrangement.

Skillen Affidavit, paragraph 20

11. In May of 2005, Telepanel contacted Jan Forssjö at Pricer AB, one of Telepanel's competitors with an offer to sell the Telepanel system to Pricer AB for approximately $1.5 million. No agreement was ever reached with Pricer AB.

Skillen Affidavit, paragraph 21, Exhibit "E"

The Proposal

12. In October 2004, Telepanel had entered into discussions with NRT, which resulted in NRT making an offer to acquire the Company through a proposal proceeding under the *Bankruptcy and Insolvency Act* (the "BIA"), including a reorganization of the capital structure of Telepanel under section 191 of the CBCA. The formal offer, dated November 4, 2005, provides that NRT will subscribe, or cause its designated subsidiary or affiliate to subscribe for new common shares to be issued in the stock of Telepanel for $1 million. All existing issued and outstanding shares are to be cancelled prior to the issuance of the new shares.

Skillen Affidavit, paragraphs 20, 22-23, Exhibit "F"

13. Telepanel accepted the Offer since (i) it provides for significant consideration to be paid by NRT, (ii) no other offers were received, and (iii) Telepanel cannot continue to operate indefinitely in its current financial position. The Offer provides the only means by which there will be some recovery for Telepanel's creditors and Telepanel will be able to continue to operate.

Skillen Affidavit, paragraph 24

14. Telepanel appointed Mintz & Partners Limited ("Mintz") as proposal trustee, and filed a proposal on November 14, 2005, which proposal was subsequently amended.

15. Part 10 of the Amended Proposal provides that the articles of incorporation of Telepanel will be amended, *inter alia*: (i) to delete the authorized capital of Telepanel including all the authorized Common Shares; and (ii) to create an unlimited number of New Common Shares. Pursuant to section 10.2, no shareholder will be entitled to any payment or other compensation with respect to the cancellation of its Common Shares or otherwise. Pursuant to paragraph 10.4 of the Amended Proposal, shareholders shall not have any rights of dissent under section 190 of the CBCA with respect to the Amended Proposal. This is consonant with the terms of section 191(7) of the CBCA, which specifically provides that shareholders shall not have such rights of dissent in the context of a proposal under the BIA.

Skillen Affidavit, paragraphs 26-28, Exhibit "G"

16. There is no value in the existing shares. Even secured creditors of Telepanel will be incurring significant losses.

Skillen Affidavit, paragraph 27

17. On November 17, 2005, the Company sought directions of this Honourable Court with respect to the type or extent of notice to shareholders of the proposed reorganization of its share structure pursuant to the terms of the Amended Proposal. Mr. Justice Campbell granted an Order that the Company post a notice substantially in the form annexed thereto on its website located at www.telepanelsystems.com, and on the SEDAR website located at www.sedar.com, from the date of the Order to the Effective Date of the Amended Proposal. The notice was posted on the Company's website and on SEDARs website on November 18, 2005 and remains on these websites.

Affidavit Chris Skille, sworn December 15, 2005 (the "Supplementary Skillen Affidavit) Motion Record, tab 2, paragraphs 4-6, Exhibit "A"

18. The Amended Proposal was overwhelming accepted by the secured and unsecured creditors of the Company at the meeting of creditors held on December 1, 2005.

Trustees Report to Court dated December 8, 2005

PART III - LAW

19. The Court before it can approve a proposal must be satisfied: (a) that the terms are reasonable; (b) that the terms are calculated to benefit the general body of creditors; (c) that the proposal is made in good faith; and (d) that the formalities of the BIA have been complied with.

BIA, section 59
Houlden & Morwetz, the 2006 Annotated Bankruptcy and Insolvency Act, pages 246 -252

20. Section 191(2) of the CBCA provides, *inter alia*, that where a corporation is subject to an order approving a proposal filed under the BIA, its articles may be amended by such order to effect any change that might lawfully be made by an amendment under section 173 of the CBCA.

CBCA, section 191(2)

21. Section 191(2) of the CBCA gives to the Court substantive, not simply procedural, powers to amend the articles of a CBCA corporation.

Beatrice Foods Inc., Re (1996) 43 C.B.R. (4th) 10 (Ont. Ct J. (Gen. Div.) – [Commercial List])

22. Section 173 of the CBCA provides that, subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to effect certain listed changes, including creation of a new class of shares. Section 173(o) of the CBCA provides that the articles of a corporation may by special resolution be amended to add, change or remove any other provision that is permitted by this Act to be set out in the articles.

CBCA, section 173

23. Section 173 is supported by section 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.

CBCA, section 176(1)(b)

Beatrice Foods Inc., Re, supra

24. Pursuant to section 191(7) of the CBCA, a shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under section 191.

CBCA, section 191(7)

25. The object of section 191 is to enable the Court to effect any necessary amendment of the articles of the corporation in order to achieve the objective of reorganization without having to comply with all of the formalities of the CBCA, particularly shareholder approval of the proposed amendment.

Canadian Airlines Corp, Re (2000) 20 C.B.R. (4th) 1 (Alta. Q. B.)

26. The cancellation of a corporation's share capital may be effected by Court Order and without shareholder approval where the shares have no value. As stated by Paperny J. in *Canadian Airlines Corp, Re.*:

> 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...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.

Canadian Airlines Corp., Re, supra

Algoma Steel Inc., Re (2001) 30 C.B.R. (4th) 1 (Ont. S. C. J. – [Commercial List])

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

27. To require a meeting and vote of shareholders regarding a reorganization pursuant to section 191, which expressly removes shareholder dissent rights to such a reorganization, would frustrate the object of section 191.

Canadian Airlines Corp., Re, supra

PART IV - ORDER SOUGHT

28. Telepanel therefore requests (i) an Order substantially in the form of Order attached to the Notice of Motion herein, approving the Amended Proposal of the Company dated December 1, 2005; (ii) amending the articles of incorporation of the Company pursuant to Section 191 of the CBCA; (iii) authorizing the Company to take such steps as are necessary or required to implement the transactions contemplated by the Amended Proposal; and (iv) for ancillary relief

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: December 19, 2005

Harvey Chaiton

Karine De Champlain

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SCHEDULE "A" – CASES

1. *Beatrice Foods Inc., Re* (1996) 43 C.B.R. (4th) 10 (Ont. Ct. J. (Gen. Div.) – [Commercial List])
2. *Canadian Airlines Corp, Re* (2000) 20 C.B.R. (4th) 1 (Alta. Q. B.)
3. *Algoma Steel Inc., Re* (2001) 30 C.B.R. (4th) 1 (Ont. S. C. J. – [Commercial List])
4. *Laidlaw, Re* (2003) 39 C.B.R. (4th) 239 (Ont. S. C. J.)

SCHEDULE "B" – STATUTES

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 59
2. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 191
3. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 173
4. *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 176

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.

unable to pay its liabilities as they become due; or

(*b*) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.

R.S., 1985, c. C-44, s. 190; 1994, c. 24, s. 23; 2001, c. 14, ss. 94, 134(F), 135(E).

Definition of "reorganization"

191. (1) In this section, "reorganization" means a court order made under

(*a*) section 241;

(*b*) the *Bankruptcy and Insolvency Act* approving a proposal; or

(*c*) any other Act of Parliament that affects the rights among the corporation, its shareholders and creditors.

Powers of court

(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.

Further powers

(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.

Articles of reorganization

(4) After an order referred to in subsection (1) has been made, articles of reorganization in the form that the Director fixes shall be sent to the Director together with the documents required by sections 19 and 113, if applicable.

Certificate of reorganization

(5) On receipt of articles of reorganization, the Director shall issue a certificate of amendment in accordance with section 262.

Effect of certificate

(6) A reorganization becomes effective on the date shown in the certificate of amendment and the articles of incorporation are amended accordingly.

No dissent

(7) A shareholder is not entitled to dissent under section 190 if an amendment to the articles of incorporation is effected under this section.

R.S., 1985, c. C-44, s. 191; 1992, c. 27, s. 90; 2001, c. 14, s. 95.

PART XV
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;

(*b*) change the province in which its registered office is situated;

(*c*) add, change or remove any restriction on the business or businesses that the corporation may carry on;

(*d*) change any maximum number of shares that the corporation is authorized to issue;

(*e*) create new classes of shares;

(*f*) reduce or increase its stated capital, if its stated capital is set out in the articles;

(*g*) 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;

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

(*i*) 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 thereof;

(*j*) 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 thereof;

(*k*) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series;

(*l*) revoke, diminish or enlarge any authority conferred under paragraphs (*j*) and (*k*);

(*m*) increase or decrease the number of directors or the minimum or maximum number of directors, subject to sections 107 and 112;

(*n*) add, change or remove restrictions on the issue, transfer or ownership of shares; or

(*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).

Constraints on shares

174. (1) Subject to sections 176 and 177, a distributing corporation, any of the issued shares of which remain outstanding and are held by more than one person, may by special resolution amend its articles in accordance with the regulations to constrain

(*a*) the issue or transfer of shares of any class or series to persons who are not resident Canadians;

(*b*) the issue or transfer of shares of any class or series to enable the corporation or any of its affiliates or associates to qualify under any prescribed law of Canada or a province

(i) to obtain a licence to carry on any business,

(ii) to become a publisher of a Canadian newspaper or periodical, or

respect to a corporation that constrains the issue, transfer or ownership of its shares prescribing

(*a*) the disclosure required of the constraints in documents issued or published by the corporation;

(*b*) the duties and powers of the directors to refuse to issue or register transfers of shares in accordance with the articles of the corporation;

(*c*) the limitations on voting rights of any shares held contrary to the articles of the corporation;

(*d*) the powers of the directors to require disclosure of beneficial ownership of shares of the corporation and the right of the corporation and its directors, employees and agents to rely on such disclosure and the effects of such reliance; and

(*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.

Validity of acts

(7) An issue or a transfer of a share or an act of a corporation is valid notwithstanding any failure to comply with this section or the regulations.

R.S., 1985, c. C-44, s. 174; 1991, c. 45, s. 554, c. 47, s. 722; 1994, c. 21, s. 125; 2001, c. 14, ss. 84, 134(F).

Proposal to amend

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 137, make a proposal to amend the articles.

Notice of amendment

(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, where applicable, shall state that a dissenting shareholder is entitled to be paid the fair value of their shares in accordance with section 190, but failure to make that statement does not invalidate an amendment.

R.S., 1985, c. C-44, s. 175; 2001, c. 14, s. 135(E).

Class vote

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

(a) increase or decrease any maximum number of authorized shares of such class, or increase any maximum number of authorized shares of a class having rights or privileges equal or superior to the shares of such class;

(*b*) effect an exchange, reclassification or cancellation of all or part of the shares of such class;

(*c*) add, change or remove the rights, privileges, restrictions or conditions attached to the shares of such 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, or rights to acquire securities of a corporation, or sinking fund provisions;

(*d*) increase the rights or privileges of any class of shares having rights or privileges equal or superior to the shares of such class;

(*e*) create a new class of shares equal or superior to the shares of such class;

(*f*) make any class of shares having rights or privileges inferior to the shares of such class equal or superior to the shares of such class;

(*g*) effect an exchange or create a right of exchange of all or part of the shares of another class into the shares of such class; or

(*h*) constrain the issue, transfer or ownership of the shares of such class or change or remove such constraint.

Exception

(2) Subsection (1) does not apply in respect of a proposal to amend the articles to add a right or privilege for a holder to convert shares of a class or series into shares of another class or series that is subject to a constraint permitted under paragraph 174 (1)(*c*) but is otherwise equal to the class or series first mentioned.

Deeming provision

(3) For the purpose of paragraph (1)(*e*), a new class of shares, the issue, transfer or ownership of which is to be constrained by an amendment to the articles pursuant to paragraph 174(1)(*c*), that is otherwise equal to an existing class of shares shall be

deemed not to be equal or superior to the existing class of shares.

Limitation

(4) The holders of a series of shares of a class are entitled to vote separately as a series under subsection (1) only if such series is affected by an amendment in a manner different from other shares of the same class.

Right to vote

(5) Subsection (1) applies whether or not shares of a class or series otherwise carry the right to vote.

Separate resolutions

(6) 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 thereon as a class or series have approved such amendment by a special resolution.

R.S., 1985, c. C-44, s. 176; 2001, c. 14, s. 134(F).

Delivery of articles

177. (1) Subject to any revocation under subsection 173(2) or 174(5), after an amendment has been adopted under section 173, 174 or 176 articles of amendment in the form that the Director fixes shall be sent to the Director.

Reduction of stated capital

(2) If an amendment effects or requires a reduction of stated capital, subsections 38(3) and (4) apply.

R.S., 1985, c. C-44, s. 177; 2001, c. 14, s. 85.

Certificate of amendment

178. On receipt of articles of amendment, the Director shall issue a certificate of amendment in accordance with section 262.

1974-75-76, c. 33, s. 172.

Effect of certificate

179. (1) An amendment becomes effective on the date shown in the certificate of amendment and the articles are amended accordingly.

Rights preserved

(2) No amendment to the articles affects an existing cause of action or claim or liability to prosecution in favour of or against the corporation or its directors or officers, or any civil, criminal or administrative action or proceeding to which a corporation or its directors or officers is a party.

1974-75-76, c. 33, s. 173.

Restated articles

180. (1) The directors may at any time, and shall when reasonably so directed by the Director, restate the articles of incorporation.

Delivery of articles

(2) Restated articles of incorporation in the form that the Director fixes shall be sent to the Director.

Restated certificate

(3) On receipt of restated articles of incorporation, the Director shall issue a restated certificate of incorporation in accordance with section 262.

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#31-448752

IN THE MATTER OF THE PROPOSAL OF

TELEPANEL SYSTEMS INC.
OF THE CITY OF TORONTO,
IN THE PROVINCE OF ONTARIO

Report of Trustee on Proposal

(section 58(d) of the **Bankruptcy and Insolvency Act**)

Mintz & Partners Limited ("MPL"), the Trustee acting in re the Proposal of Telepanel Systems Inc. ("TSI" or the "Debtor"), an insolvent company, hereby reports to the Court as follows:

1. That the above-named Debtor did lodge with MPL, a Proposal, which was filed with the Official Receiver on the 14th day of November, 2005, a true copy of which is attached hereto as Exhibit "A" to this Report.

2. That a copy of TSI's cash-flow statement for the period November 1, 2005 to January 31, 2006 (note the documents incorrectly read 2005) and related reports pursuant to Section 50.4(2) of the **Bankruptcy and Insolvency Act** ("BIA") were filed with the Official Receiver on the 14th day of November, 2005, true copies of which are attached hereto as Exhibit "B" to this Report.

3. That on the 18th day of November, 2005, the Trustee gave notice to the Debtor, to the Superintendent of Bankruptcy and to every known creditor affected by the Proposal and whose names and addresses are included in the Affidavit attached hereto as Exhibit "C" to this Report of the calling of a meeting of creditors to be held on the 1st day of December, 2005 to consider the Proposal.

4. That with the Notice was included the Condensed Statement of Assets and Liabilities of the Debtor setting out the Debtor's assets and liabilities as at November 14, 2005, a list of creditors affected by the Proposal and showing the amounts of their claims, according to the Debtor's records, a copy of the Proposal, a form of proof of claim and proxy in blank, and a voting letter. True copies of the Notice, the Condensed Statement of Assets and Liabilities and the list of creditors are included in Exhibit "C" to this Report.

5. That prior to the said meeting of creditors, the Trustee caused to be made a detailed and careful enquiry into the liabilities of the Debtor, the Debtor's assets and apparent value thereof

and the causes of the Debtor's insolvency. A true copy of the Trustee's report ("Trustee's Report") which was mailed to the creditors together with the documentation set out in paragraphs 3 and 4 of this Report is included in Exhibit "C" to this Report.

6. That on the 21st day of November, 2005, the Trustee sent a letter ("Letter") to every known creditor affected by the Proposal indicating that, as set out in the Trustee's Report, the Debtor intended at the General Meeting of Creditors to make certain amendments to the Proposal to correct inadvertent errors and enclosing therewith an Amended Voting Letter, to be used by Creditors if they wished to vote by voting letter on the Proposal as it was to be amended. A copy of the Affidavit of Mailing in respect of the Letter (including the Letter) is attached hereto as Exhibit "D" to this Report.

7. That on the 29th day of November 2005, an advertisement advising of TSI's Proposal and the General Meeting of Creditors appeared in the Globe and Mail newspaper.

8. That at the General Meeting of Creditors held on the 1st day of December, 2005 ("General Meeting"), which was chaired by the Trustee, the Trustee tabled:

a) the Trustee's report pursuant to Section 50 (5) of the BIA ("Supplementary Report"), a copy of which is attached hereto and marked as Exhibit "E" to this Report; and

b) the Debtor's Amended Proposal containing the amendments described in the Letter, a copy of which is attached hereto as Exhibit "F" to this report.

9. At the General Meeting, the Amended Proposal was accepted by the required majority in both number and dollar value of each of the Secured Creditors class and the ordinary unsecured creditors class entitled to vote at the meeting, as follows:

	In Favour of Proposal	Against Proposal	% In Favour
# of Secured Creditors	13	0	100%
$ of Secured Creditors	1,335,695	0	100%
# of Preferred and Unsecured Creditors	10	0	100%
$ of Preferred and Unsecured Creditors	12,694,842	0	100%

A copy of the minutes of the General Meeting is attached hereto and marked as Exhibit "G" to this report.

10. That at the General Meeting Mr. Phillip Kurtz was duly appointed an Inspector in the Amended Proposal.

11. That the Trustee is of the opinion that:

a) the estimated realizable value of the assets of the Debtor (all of which are encumbered) based on the Debtor's Condensed Statement of Assets and Liabilities as at November 14, 2005 and other information obtained by the Trustee (as further set out in the Trustee's Report) are as follows:

		Estimated Realizable Value at November 14, 2005	
		Low	High
i)	Cash	$ -	$ -
ii)	Accounts receivable	12,500	18,750
iii)	Inventory	5,000	10,000
iv)	Technology/Patents	-	150,000
v)	Investment in Subsidiary Company	-	-
	Estimated Gross Realizations	**$ 17,500**	**$ 178,750**

b) The liabilities of the Debtor are as follows:

	As declared by the Debtor	Filed with the Trustee to December 1, 2005
Secured	$ 20,316,681	$ 1,356,330
Preferred	38,000	-
Unsecured	1,726,327	12,755,749
Total	**$ 22,081,008**	**$ 14,112,079**

12. That the Trustee is further of the opinion that:

a) based on information advised by the Debtor, the causes of the insolvency of the Debtor are as follows:

i) continued operating losses; and
ii) inability to obtain financing;

b) based on the scope of the Trustee's investigations as set out in the Trustee's Report, the conduct of the Debtor is not subject to censure.

13. That the Trustee is further of the opinion that the Debtor's Amended Proposal is an advantageous one for TSI's creditors since as set out in the Trustee's Report, the Trustee estimates that in a bankruptcy, there would be no realizations available for TSI's unsecured creditors.

14. That on the 2nd day of December, 2005, the Trustee caused to be sent to the Superintendent, the Debtor and to every creditor of the above-named Debtor who has proved his claim, a notice of the time and place of the hearing of the application to the Court to approve the Amended Proposal. A true copy of the affidavit of mailing, which includes a copy of the notice, is attached hereto and marked as Exhibit "H" to this Report.

15. That on the 8th day of December, 2005, the Trustee forwarded by overnight courier to the Superintendent a copy of this report.

16. That based on the information set out herein, the Trustee's Report and the Supplementary Report, the Trustee is of the opinion that the Amended Proposal is advantageous to the Debtor's unsecured creditors and will allow the unsecured creditors to attempt to maximize the return from the Debtor's indebtedness to them.

17. That based on the information set out herein, the Trustee's Report and the Supplementary Report, the Trustee recommends to the Court that the Amended Proposal be approved.

Dated at North York, Ontario this 8th day of December, 2005.

MINTZ & PARTNERS LIMITED
Trustee re: the Proposal of
Telepanel Systems Inc.

Per:

Daniel R. Weisz, CA, CIRP
Senior Vice President

DRW/kk/ap

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Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE PROPOSAL OF
TELEPANEL SYSTEMS INC.
of the City of Toronto
in the Province of Ontario

PROPOSAL TO CREDITORS

Telepanel Systems Inc., an insolvent corporation, hereby submits the following Proposal pursuant to the provisions of the *Bankruptcy and Insolvency Act* (Canada).

PART 1
INTERPRETATION

Definitions

1.1. In this Proposal, the following terms have the meanings herein set out:

(a) "Administrative Fees and Expenses" means the proper fees and expenses of the Trustee (including, without limitation, the fees and expenses of its legal counsel) incidental to the preparation and facilitation of the Proposal and any amendments thereto, including, without limitation, fees incurred by the Trustee in administering the Proposal, legal and consulting fees of TSI before and following execution, acceptance and approval of this Proposal and in connection with the preparation of this Proposal, and advice to TSI in connection therewith;

(b) "BIA" means the *Bankruptcy and Insolvency Act* (Canada), R.S.C. 1985, c. B-3, as amended;

(c) "Business Day" means a day, other than a Saturday or Sunday, on which banks are generally open for business in Toronto, Ontario;

(d) "CBCA" means the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, as amended;

(e) "Claim" means any indebtedness, liability, action, cause of action, suit, debt, due, account, bond, covenant, contract, counterclaim, demand, claim, right and obligation of any nature whatsoever of TSI to any Person, whether liquidated, unliquidated, fixed, contingent, matured, unmatured, legal, equitable, secured, unsecured, present, future, known or unknown and whether by guarantee, surety

or otherwise, incurred or arising or relating to the period prior to the Filing Date, or based in whole or in part on facts, contracts or arrangements which occurred or existed prior to the Filing Date, together with any other claims provable in bankruptcy had TSI become bankrupt on the Filing Date, including without limitation, claims arising from arrears under leases of real and personal property, the abandonment of any premises or the repudiation, disclaimer or termination of any lease, license, contract, agreement, arrangement or contract of employment on or prior to the Filing Date;

(f) "Common Shares" means the existing authorized, issued and outstanding common shares of TSI;

(g) "Consideration" means the sum of $1,000,000 to be paid by NRT to the Trustee upon the successful completion of the Subscription Agreement in accordance with the provisions thereof;

(h) "Court" means the Ontario Superior Court of Justice, in Bankruptcy and Insolvency;

(i) "Court Approval Order" means the final order of the Court approving this Proposal, including the Reorganization, in accordance with section 60 of the BIA and as authorized by section 191 of the CBCA;

(j) "Creditor Distribution Fund" means the amount obtained by the following calculation:

[Gross Distribution Fund] - [total amounts paid for Administrative Fees and Expenses]

(k) "Creditors" means the Secured, Preferred and Unsecured Creditors of TSI and for greater certainty does not include Subsequent Creditors in respect of only the amounts described in section 6.1 hereof;

(l) "Effective Date" means the next Business Day following (i) the expiry of the appeal period with respect to the Court Approval Order, or (ii) in the event of an appeal of the Court Approval Order, the final disposition thereof dismissing such appeal and the expiry of the appeal period in respect of such disposition, provided that the Effective Date shall be no later than December 29, 2005 unless TSI and NRT otherwise agree in writing;

(m) "Filing Date" means November 10, 2005, the date on which TSI filed this Proposal with the Official Receiver in Toronto, Ontario;

(n) "Gross Distribution Fund" means the Consideration when received by the Trustee as set out in section 3.4(d) hereof;

(o) "Inspectors" means any persons appointed or elected as Inspectors of TSI pursuant to Part 11 of this Proposal;

(p) "Maturity Date" means the date on which all payments to Creditors have been made, provided that no default has occurred under this Proposal that has not been cured or waived;

(q) "New Common Shares" means all the new common shares to be issued in the capital stock of TSI, as described in Schedule "A" hereto;

(r) "NRT" means NRT Technology Corporation and includes any designated subsidiary or affiliate of NRT which subscribes for the New Common Shares in accordance with the Subscription Agreement;

(s) "Person" means any individual, partnership, joint venture, association, trust, corporation, unincorporated organization, government or any agency or instrumentality thereof, or any other entity howsoever designated or constituted;

(t) "Preferred Creditors" means those Persons with unsecured Claims provable pursuant to the BIA against TSI as of the Filing Date whose Claims are entitled to be paid in priority to the claims of ordinary Unsecured Creditors as provided in section 136 of the BIA;

(u) "Proposal" means this Proposal of TSI under the BIA, as amended or supplemented from time to time with the consent of NRT, and includes the Schedules;

(v) "Proposal Period" means the period between the Filing Date and the Maturity Date;

(w) "Proven Claim" means a provable claim pursuant to the BIA against TSI as of the Filing Date of a Creditor in respect of its Claim which has been proven in accordance with the provisions of the BIA;

(x) "Reorganization" means the creation and issuance of the New Common Shares, the cancellation of the Common Shares and the other amendments to TSI's articles of incorporation described in section 10.1;

(y) "Secured Creditors" means those Persons who are listed in Schedule "C" hereto or the schedules thereto holding a mortgage, pledge, charge, lien or security interest, whether perfected or unperfected, on or against the property of TSI or any part thereof as security for a Proven Claim;

(z) "Shareholders" means those Persons who are holders of Common Shares or any other equity of any kind of TSI;

(aa) "Subscription Agreement" means the agreement dated November 4, 2005 between NRT and TSI, as the same may be amended from time to time, respecting the subscription by NRT for the New Common Shares;

(bb) "Subsequent Creditors" means Persons who provide goods and services to TSI subsequent to the Filing Date to and including the Effective Date, and employees of TSI employed subsequent to the Filing Date to and including the Effective Date;

(cc) "TSI" means the debtor, Telepanel Systems Inc., an insolvent corporation, with head office in Markham, Ontario;

(dd) "Trustee" means Mintz & Partners Limited, a licensed trustee, of Toronto, Ontario, the trustee acting in re the Proposal of TSI; and

(ee) "Unsecured Creditors" means those Persons with ordinary unsecured Claims (including contingent Claims found to be provable) provable pursuant to the BIA against TSI as at the Filing Date which are not secured under or pursuant to sections 2 and 136 of the BIA or preferred under or pursuant to section 136 of the BIA.

Headings

1.2. The division of this Proposal into parts, paragraphs and subparagraphs and the insertion of headings herein, is for convenience of reference only and is not to affect the construction or interpretation of this Proposal. Unless otherwise provided in this Proposal, references herein to parts, paragraphs and subparagraphs are references to parts, paragraphs and subparagraphs of this Proposal.

Number, etc.

1.3. In this Proposal, where the context requires, a word importing the singular includes the plural and vice versa, and a word importing gender includes the masculine, feminine and neutral genders.

Date for Action

1.4. In the event that any date on which any action is required to be taken hereunder is not a Business Day, such action will be required to be taken on the next succeeding day that is a Business Day.

Time

1.5. All times expressed in this Proposal are local time in Toronto, Ontario.

Successors and Assigns

1.6. As of the Effective Date, this Proposal will be binding upon and will enure to the benefit of TSI and all persons named or referred to herein including, without limitation, the Creditors and Shareholders, and their heirs, administrators, executors, personal representatives, successors and assigns.

Schedules

1.7. The following are the Schedules attached hereto and incorporated by reference and deemed to be part hereof:

Schedule "A" — New Common Shares

Schedule "B" — New Stated Capital

Schedule "C" — Distributions to and Assessed Values of Claims of Secured Creditors

Accounting Principles

1.8. Any accounting terms not otherwise defined herein have the meanings assigned to them in accordance with generally accepted Canadian accounting principles, consistently applied.

PART 2
PURPOSE AND EFFECT OF PROPOSAL

Purpose of Proposal

2.1. The purpose of this Proposal is to effect the Reorganization and a compromise of Claims against TSI to permit the disposition of TSI as a going concern to NRT or its designated subsidiary or affiliate pursuant to the Subscription Agreement, for the benefit of Creditors. The Proposal is an intrinsic part of the Subscription Agreement pursuant to which NRT has agreed to acquire TSI on a going concern basis. NRT will subscribe for and acquire the New Common Shares and pay the Consideration, which will then be distributed to Creditors, after payment of Administrative Fees and Expenses, in accordance with the provisions of this Proposal. This Proposal is being filed in the expectation that Creditors will derive greater benefit from this Proposal and the continued operation of TSI than they would recover in a bankruptcy. Accordingly, this Proposal is intended to provide a fair recovery to all Creditors and to provide TSI with the financial stability to continue its business operations from and after the Effective Date.

Effect of Proposal

2.2. This Proposal restructures the affairs of TSI and amends the terms of any and all agreements between TSI and the Creditors or the Shareholders existing as at the Effective Date to the extent affected by this Proposal, and provides the essential terms on which all Claims and the interests of the Shareholders will be fully and finally resolved and settled. During the Proposal Period, the provisions of sections 65.1 and 69.1 of the BIA shall be in effect. Without limiting the generality of the foregoing, during the Proposal Period all Creditors will be stayed from commencing or continuing any proceeding or remedy against TSI or any of

its property or assets in respect of a Claim including, without limitation, any proceeding or remedy to recover payment of any monies owing to Creditors, to recover or enforce any judgment against TSI in respect of a Claim or to commence any formal proceedings against it in respect of a Claim other than as provided for under this Proposal.

Persons Affected

2.3. This Proposal will, as of the Effective Date, be binding on TSI and all Creditors, Shareholders and other persons named or referred to herein in the manner provided for in this Proposal and the BIA.

Perform Terms of Proposal

2.4. TSI covenants and agrees to fulfill its obligations under the terms of this Proposal.

PART 3
RESTRUCTURING OF TSI

Subscription

3.1. TSI and NRT have entered into the Subscription Agreement.

3.2. A condition to the Subscription Agreement is that TSI implement this Proposal to its Creditors, including the Reorganization, pursuant to the BIA and as authorized by the CBCA, as contemplated herein.

3.3. Pursuant to the terms of the Subscription Agreement, upon the successful completion thereof in accordance with its terms, NRT will pay the Consideration to the Trustee for distribution to the Creditors, after payment of Administrative Fees and Expenses, in accordance with this Proposal.

Steps in the Implementation of the Proposal and Completion of the Subscription Agreement

3.4. Subject to the satisfaction or waiver of the conditions precedent set out in Part 12 hereof, the following steps will occur, and be deemed to occur, sequentially in the following order, on the Effective Date:

(a) TSI shall be released from all the Claims of Creditors, which shall be fully and finally compromised in accordance with the provisions of the BIA and this Proposal;

(b) articles of reorganization effecting the Reorganization, as more fully described in section 10.1, will be filed by TSI;

(c) a certificate of amendment reflecting the amendments to the articles of incorporation of TSI effected by the articles of reorganization shall be issued by the Director under the CBCA; and

(d) the Subscription Agreement will be completed in accordance with its terms, provided that all conditions thereto have been satisfied or (where waivable) waived, whereupon, among other things, the New Common Shares shall be acquired by, and share certificates in respect thereof shall be issued by TSI to, NRT against payment of the Consideration to the Trustee.

3.5. In voting to approve the Proposal, the Creditors are also voting to approve the above steps, including for greater certainty the Reorganization.

PART 4
CLASSES OF CREDITORS AND VOTING

Classes

4.1. There shall be two classes of Creditors consisting of:

Class 1	Secured Creditors
Class 2	Preferred Creditors and Unsecured Creditors including, without limitation, landlords of any real property leases in respect of all their Claims including Claims arising out of disclaimers by TSI pursuant to section 65.2 of the BIA

Voting

4.2. For the purposes of voting on this Proposal, the Creditors in Class 1 and Class 2 shall vote separately as two classes.

4.3. The Shareholders shall not be entitled to vote on this Proposal.

PART 5
PREFERRED CLAIMS AND MANDATORY PAYMENTS

Administrative Fees and Expenses

5.1. For the purposes of this Proposal, Administrative Fees and Expenses shall be paid out of the Gross Distribution Fund in priority to all Claims of the Creditors.

Preferred Creditors

5.2. Proven Claims of Preferred Creditors as of the Filing Date shall be paid in full, without interest, out of the Creditor Distribution Fund, in priority to claims of ordinary Unsecured Creditors, as follows:

(a) Proven Claims as of the Filing Date of Her Majesty in right of Canada or a province of a kind that could be subject to a demand under section 224(1.2) of the *Income Tax Act* (Canada) or under any substantially similar provision of provincial legislation, as described in section 60(1.1) of the BIA, shall be paid out of the Creditor Distribution Fund within six months after the date of the Court Approval Order;

(b) Proven Claims as of the Filing Date of former or current employees of TSI payable in priority under section 136(1)(d) of the BIA shall be paid out of the Creditor Distribution Fund immediately after the Effective Date; and

(c) Proven Claims as of the Filing Date of other Preferred Creditors will be paid out of the Creditor Distribution Fund as soon as possible after the Effective Date.

PART 6
SUBSEQUENT CREDITORS

Payments to Subsequent Creditors

6.1. Amounts owed by TSI to Subsequent Creditors for goods, services and employment actually provided to TSI subsequent to the Filing Date, to and including the Effective Date, will be paid by TSI in the ordinary course of business according to normal credit terms out of cash-on-hand or revenues received by TSI.

PART 7
LANDLORD DISCLAIMER CLAIMS

7.1. In the case of any lease of real property disclaimed by TSI pursuant to section 65.2 of the BIA, the landlord affected by the disclaimer may file a proof of claim for an amount equal to the lesser of:

(a) the aggregate of

(i) the rent provided for in the lease for the first year of the lease following the date on which the disclaimer becomes effective, and

(ii) fifteen per cent of the rent for the remainder of the term of the lease after that year, and

(b) three years' rent.

PART 8
TREATMENT OF SECURED CREDITORS

Satisfaction of Claims

8.1. The Claims of Secured Creditors will be compromised and satisfied as follows:

(a) As soon as practicable after the Effective Date, each Secured Creditor with a Proven Claim shall receive from the Creditor Distribution Fund payment by the Trustee of the percentage of the Creditor Distribution Fund shown next to that Secured Creditor's name in Schedule "C" or, where applicable, the percentage of the applicable foregoing percentage shown next to that Secured Creditor's name in Schedule "C-1" or "C-2", in full satisfaction of its Claim, provided that the Secured Creditors shall not receive on account of their Claims more than 100 cents on the dollar without interest.

8.2. TSI proposes that the assessed value of the security held by each Secured Creditor in respect of its Claim, within the meaning of section 50.1(2) of the BIA, shall be as shown next to that Secured Creditor's name in Schedule "C" or, where applicable, Schedule "C-1" or "C-2".

PART 9
TREATMENT OF UNSECURED CREDITORS

Satisfaction of Claims

9.1. The Claims of Unsecured Creditors will be compromised and satisfied as follows:

(a) As soon as practicable after the Effective Date, each Unsecured Creditor with a Proven Claim shall receive from the Creditor Distribution Fund, after payment therefrom of Proven Claims of Secured Creditors and Proven Claims of Preferred Creditors and in priority to the distribution under subparagraph (b) hereof, payment by way of dividend from the Trustee of an amount equal to the first $500 of its Proven Claim. In the case of an Unsecured Creditor whose Proven Claim does not exceed $500, that Unsecured Creditor will receive a payment by way of dividend from the Trustee equal to the amount of its Claim and the foregoing dividend shall be in full satisfaction of its Claim;

(b) As soon as practicable after the Effective Date, each Unsecured Creditor with a Proven Claim greater than $500 shall receive from the Creditor Distribution Fund, after payment therefrom of Proven Claims of Secured Creditors and Proven Claims of Preferred Creditors in accordance with this Proposal and all amounts referred to in subparagraph (a) hereof, payment by way of dividend from the Trustee of its pro rata share of such Creditor Distribution Fund, based on the

amount of Proven Claims of Unsecured Creditors, which, together with the $500 payment by way of dividend received from the Trustee under subparagraph (a) hereof, shall constitute full satisfaction of its Claim, provided that the Unsecured Creditors shall not receive on account of their Claims more than 100 cents on the dollar without interest.

PART 10
SHAREHOLDERS

Articles of Reorganization

10.1. On the Effective Date, the articles of incorporation of TSI will be amended pursuant to articles of reorganization in the following sequence:

(a) to delete the number of directors and to provide that there will be such number of directors between a minimum of 1 and a maximum of 10, as determined from time to time by resolution of the directors;

(b) to delete the authorized capital of TSI including all the authorized Common Shares and any other equity of any kind and all the rights, privileges, restrictions and conditions attaching thereto, and to cancel all the Common Shares and any other equity of any kind; and

(c) to create an unlimited number of New Common Shares and to provide that the rights, privileges, restrictions and conditions attaching to the New Common Shares shall be as set out in Schedule "A".

10.2. No Shareholder will be entitled to any payment or other compensation with respect to the cancellation of its Common Shares or otherwise.

Stated Capital

10.3. The aggregate stated capital for the purposes of the CBCA of the New Common Shares issued pursuant to this Proposal will be as set out in Schedule "B".

No Dissent Rights

10.4. The Shareholders shall not have any rights of dissent under section 190 of the CBCA in respect of this Proposal.

PART 11
INSPECTORS

Appointment of Inspectors

11.1. At the statutory meeting of Creditors to consider this Proposal, such Creditors may appoint up to five Inspectors (who shall have no personal liability to TSI, the Creditors or Shareholders) whose powers shall be:

(a) to advise the Trustee from time to time on any matter the Trustee may refer to them;

(b) to advise the Trustee regarding the admission or disallowances of Creditors' proofs of claim where the Trustee requests such assistance;

(c) to approve on behalf of the Creditors of TSI any decision of the Trustee relating to any matter not contained in this Proposal which the Trustee may refer to them from time to time, including any extension of time of payment required under this Proposal; and

(d) to waive any default in the performance of this Proposal. The Trustee shall notify the Inspectors of any default of which the Trustee becomes aware and the Trustee shall hold a meeting of Inspectors following such notice for the purpose of obtaining the instructions of the Inspectors with respect to such a default and the steps to be taken.

Decisions of Inspectors

11.2. Any decision, direction or act of the Inspectors may be referred to the Court by the Trustee and the Court may confirm, revoke or vary the decision, direction or act of the Inspectors and make such other order as it thinks just.

PART 12
CONDITIONS PRECEDENT

12.1. The arrangements set out in this Proposal will not take effect unless the conditions set forth below are satisfied or (if capable of waiver) waived by TSI and the Trustee on or before the Effective Date:

(a) the Court Approval Order shall have been made and the appeal period therefrom shall have expired or, in the event of an appeal, such appeal shall have been finally dismissed and the appeal period from such dismissal shall have expired;

(b) no order or decree restraining or enjoining the consummation of the transactions contemplated by this Proposal will have been issued;

(c) all agreements or instruments necessary to effect the intention and purpose of this Proposal shall have been received by TSI in a form satisfactory to them;

(d) all approvals and consent to the Proposal that may be required, including the acceptance thereof by both classes of Creditors in accordance with the BIA, shall have been obtained by TSI or the Trustee;

(e) any disclaimers of leases delivered by TSI shall be effective, all applications for any declaration pursuant to section 65.2(2) of the BIA shall have been withdrawn or dismissed and, if dismissed, a final order shall have been entered and shall be in effect dismissing such application and the appeal period from such dismissal shall have expired; and

(f) any claim by a landlord under a lease disclaimed by TSI pursuant to section 65.2(1) of the BIA to participate in this Proposal in respect of any claim of the landlord arising out of this Proposal or the disclaimer of the lease, other than as provided in section 7.1 of this Proposal, shall have been disallowed in full, such disallowance shall have been final and conclusive and a final order shall have been entered and shall be in effect dismissing any appeal from any such disallowance and the appeal period from such dismissal shall have expired.

PART 13
GENERAL

Acceptance of this Proposal

13.1. By the acceptance of this Proposal (including the Reorganization) and its approval by the Court, the Creditors and Shareholders shall be deemed to have accepted and consented to all matters, things, and procedures provided for herein, including in the case of the Creditors the full and final compromise of their Claims in accordance with section 62(2) of the BIA and in the case of the Shareholders the full and final release of their rights and interests as holders of the Common Shares and otherwise.

13.2. By acceptance of this Proposal (including the Reorganization) and its approval by the Court, the Creditors and Shareholders shall be deemed to have released all of their claims against any person who is or was, at any time, a director of TSI that arose on or before the Filing Date and that relate to Claims where such directors (or any of them) are by law liable in their capacity as directors for such Claims.

Consents, Waivers and Agreements

13.3. On the Effective Date, all Creditors and Shareholders will be deemed to have consented and agreed to all of the provisions of this Proposal (including the Reorganization) in its entirety. For greater certainty, each such Creditor and Shareholder will be deemed to have waived any default by TSI of any provision, express or implied, in any agreement existing between the Creditor or Shareholder

and TSI that has occurred on or prior to the Effective Date, and to have agreed that, to the extent that there is any conflict between the provisions of any such agreement and the provisions of this Proposal, the provisions of this Proposal take precedence and priority and the provisions of any such agreement are amended accordingly.

Further Actions

13.4. TSI, the Creditors and the Shareholders will execute and deliver all such documents and instruments and do all such acts and things as may be necessary or desirable to carry out the full intent and meaning of this Proposal and to give effect to the transactions contemplated hereby.

Effect of Payment

13.5. Creditors will accept the payment of the amounts set out in the applicable provisions of this Proposal in complete satisfaction of all their Claims and all mortgages, charges, security interests, encumbrances, liens, writs of seizure and sale, certificates of pending litigation, executions or any other similar charges, actions or proceedings in respect of such Claims will as of the Effective Date have no effect in law or in equity against TSI and the property, assets or undertaking of TSI and will be discharged, dismissed or vacated, as the case may be, at no expense to TSI, by each holder thereof no later than 10 Business Days after the Effective Date, or failing same, by order of the Court made without notice to such holder.

Distributions

13.6. Distributions required to be made under this Proposal to any class of Creditors may be made by way of a single or several distributions. In the case of any interim distribution, the Trustee shall comply with the provisions of section 148(2) of the BIA.

13.7. Superintendent's levy shall be deducted by the Trustee from all distributions to Creditors hereunder in accordance with the provisions of section 147 of the BIA.

Performance

13.8. All obligations of TSI under this Proposal will commence as of the Effective Date. All terms of this Proposal will take effect as of the Effective Date. All obligations of TSI under this Proposal will be fully performed for the purposes of section 65.3 of the BIA upon the Trustee receiving the Consideration.

Compromise Effective for all Purposes

13.9. The payment, compromise or other satisfaction of Claims and the treatment of Shareholders under this Proposal shall be binding upon the Creditors holding the Claims and upon the Shareholders, their heirs, executors, administrators,

successors and assigns, for all purposes and in the case of any Claim shall also be effective to relieve any third party directly or indirectly liable for such Claim, whether as guarantor, indemnitor, tenant, director, joint convenantor, principal or otherwise.

13.10 The provisions of Sections 91-101 of the BIA shall not apply to this Proposal.

PART 14
THE TRUSTEE

Trustee's Role

14.1. Mintz & Partners Limited, of Toronto, Ontario, shall be the Trustee under this Proposal and the following provisions shall apply to the Trustee:

(a) The Trustee under this Proposal is acting as Trustee and not in its personal capacity and shall not be responsible or liable for any obligations of TSI.

(b) All monies and other consideration payable under the terms of this Proposal shall be paid over to the Trustee who shall make all payments in accordance with the terms of this Proposal.

(c) Upon making all payments in accordance with the terms of this Proposal, and all other conditions and requirements being fulfilled, the Trustee shall be entitled to be discharged.

(d) The Proposal Trustee will apply to the Court for the Court Approval Order forthwith upon acceptance of this Proposal by both classes of Creditors in accordance with the BIA.

Proofs of Claim

14.2. All Creditors will be required to submit a proof of claim to the Trustee and the face amount thereof will govern for the purpose of voting at the meeting of Creditors to be held to consider this Proposal, unless otherwise disputed or disallowed by the chair of the meeting. Thereafter, the Trustee will examine all proofs of claim and may require further evidence and support of the Claim or the security therefor. The provisions of section 135 of the BIA will apply to all proofs of claim submitted by Creditors.

PART 15
RELEASE

15.1. Upon the Effective Date, TSI, each and every present and former director of TSI and NRT (collectively, the "Released Parties") shall be released and discharged from any and all demands, claims, actions, causes of action, counterclaims, suits,

debts, sums of money, accounts, covenants, damages, judgments, expenses, executions, options, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Creditor or Person may be entitled to assert, in the case of the Released Parties other than NRT, as of the Filing Date, and, in the case of NRT, as of the Effective Date, including without limitation, any and all Claims in respect of the potential statutory liabilities of the present or former directors of TSI, and any and all Claims relating to any obligations of TSI where the present or former directors are or may be by law liable in their capacity as directors for the payment of such obligations, and provided that nothing herein shall release or discharge any of the present or former directors of TSI from the exceptions set out in section 50(14) of the BIA.

PART 16
MODIFICATION

16.1. TSI may propose amendments to this Proposal at any time prior to the conclusion of the meeting of Creditors, provided that any such amendment does not reduce the rights and benefits given to the Creditors or either class of them pursuant to this Proposal before such amendment, and any and all such amendments shall be deemed to be a part of and incorporated into this Proposal.

DATED at Toronto, in the Province of Ontario, this 14 day of November, 2005.

TELEPANEL SYSTEMS INC.

Per: _____

Authorized Signing Officer

SCHEDULE "A"

Unlimited number of new common shares

SCHEDULE "B"

New Stated Capital - $1,000,000

SCHEDULE "C"

Secured creditor	**Assessed Value of Security**	**Total Percentage of Creditor Distribution Fund (before deduction of Superintendent's Levy)**
The VenGrowth Investment Fund Inc.	$245,000.00	32.15%
Royal Bank of Canada (Royal Bank Capital Partners Division)	$25,000.00	3.28%
Directors (as listed and further specified in Schedule C-1)	$83,550.00	10.96% (aggregate to all directors)
First Associates (as listed and further specified in Schedule C-2)	$211,100.00	27.70% (aggregate to all investors)
151797 Canada Ltd.	$112,500.00	14.76%

SCHEDULE "C-1"

Name of Director	Assessed Value of Security	Total Percentage of the percentage for Directors shown in Schedule "C" (before deduction of Superintendent's Levy)
Joe Riz	$ 15,701.47	18.793
Bob Aders	15,701.47	18.793
Don Paterson	11,948.63	14.301
Barry Reiter	7,995.90	9.570
Chris Skillen	21,698.39	25.971
Rob Zwartendijk	7,505.67	8.984
Garry Wallace	2,998.46	3.588

SCHEDULE "C-2"

Name of Investor	Assessed Value of Security	Total Percentage of the percentage for First Associates shown in Schedule "C" (before deduction of Superintendent's Levy)
Jeffrey Stone III	$102,932.49	48.784
Ken Olsho	13,730.16	6.509
Wayne Latta	2,499.10	1.184
John Wilson	2,499.10	1.184
Carolyn Sutton	2,499.10	1.184
Ronald Mandziak	2,499.10	1.184
Donald Wilson	2,499.10	1.184
Steven Roche	2,499.10	1.184
Clifford Hunt	2,499.10	1.184
Peter Girouard	2,499.10	1.184
Brian Spragg	2,499.10	1.184
Philip Benson	21,863.32	10.363
David Baird	2,499.10	1.184
Alexander Ambroz	2,499.10	1.184
Sander Shalinsky	2,499.10	1.184
Angelo Culmonie	4,998.21	2.370
Jon Van De Ven	2,499.10	1.184
Michael Kaylor	4,998.21	2.370
Smallwood Asset Management	2,499.10	1.184
Ross Fidler	24,991.05	11.845
Green Ventures Holding	2,499.10	1.184

IN THE MATTER OF THE PROPOSAL OF TELEPANEL SYSTEMS INC.
of the City of Toronto in the Province of Ontario

Court File No:

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

PROPOSAL

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North York, Ontario
M3C 4G4

Daniel Weisz
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Mintz & Partners Limited

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Estate # 31-448752

To the creditors of Telepanel Systems Inc.

On November 14, 2005 ("Filing Date"), Telepanel Systems Inc. ("TSI" or the "Company") lodged a Proposal, which Proposal was filed with the Official Receiver pursuant to Part III of the **Bankruptcy and Insolvency Act** (the "Act"). Mintz & Partners Limited is the Trustee under the Proposal.

Enclosed are the following documents:

- Notice of Proposal to Creditors indicating the date, time and place of the meeting of creditors to vote on the Proposal;
- a copy of the Proposal;
- a Condensed Statement of Telepanel Systems Inc.'s ("TSI" or the "Company") assets and liabilities as at November 14, 2005;
- a listing of TSI's creditors as at November 14, 2005;
- proof of claim form;
- voting letter; and
- general proxy.

The following is an outline of the background and financial position of TSI including relevant information that should be of assistance to the creditors in considering their position with respect to the Proposal.

Section A - Introduction and Background

TSI was incorporated under the laws of Canada on June 9, 1982 under the name "Telepanel Inc." On October 29, 1986, the Company amalgamated with Westsun Petroleums & Minerals Ltd., and on July 10, 1989, the articles of the company were amended to change the name of the company to Telepanel Systems Inc.

TSI is a public company. Pursuant to an Order of the Ontario Securities Commission dated June 25, 2003, trading in the securities of TSI was temporarily ceased. The temporary order was extended by further Order dated July 7, 2003.

This is Exhibit "A" referred to in the A[illegible] of [illegible]
Sworn [illegible] this [illegible] day of [illegible] 2005
A Commissioner, etc.

DANIEL RAPHAEL WEISZ, a Commissioner, etc., Province of Ontario, for Mintz & Partners Limited, Trustee in Bankruptcy.
[illegible] 17, 2007.

The Company has one subsidiary company, Telepanel S.A.R.L., a French corporation. TSI has advised that this subsidiary is not operating and presently has no assets.

Telepanel develops, manufactures and supplies Electronic Shelf Labelling ("ESL") systems for use in the retail industry, in particular, the supermarket sector. According to TSI, it was never profitable. As at the date of the Proposal, the Company was carrying on operations at a reduced level as a result of insufficient working capital and equity in the Company.

As a result of the Company's losses from operations and inability to raise capital funding (discussed in Section C), and in conjunction with an offer by NRT Technology Corporation ("NRT") dated November 4, 2005, the Company lodged on November 14, 2005 the Proposal with the Trustee, which Proposal was filed with the Official Receiver on November 14, 2005.

The Proposal provides for the reorganization of the capital structure of the Company under the Canada Business Corporations Act (the "Reorganization") and a compromise of Claims against TSI to permit the disposition of TSI as a going concern to NRT or its designated subsidiary or affiliate. The Reorganization of TSI will, among other things, result in NRT acquiring TSI on a going concern basis. The Proposal restructures the affairs of TSI and amends the terms of any and all agreements between TSI and the Creditors and its Shareholders. The Proposal also provides the essential terms on which all Claims of Creditors and the interests of the Shareholders will be settled or dealt with.

Capitalized terms in this report have the meanings described in the Proposal.

Section B - Summary of Proposal

This section contains a brief summary of the Proposal, the terms of which would be effective if:

i) all classes of creditors entitled to vote on the Proposal vote for the acceptance of the Proposal by a majority in number and two thirds in value of each class of creditors present, personally or by proxy, at the general meeting of creditors and voting on the resolution; and

ii) the Proposal is approved by the Court, in accordance with the provisions of the Act.

The Proposal provides for the following:

1. The existence of the following two classes of creditors for the purpose of voting on the Proposal:

   i) Class 1: Secured Creditors; and

   ii) Class 2: Preferred Creditors and Unsecured Creditors, including, without limitation, landlords of any real property leases in respect of all their Claims including Claims arising out of disclaimers of leases by TSI.

   Shareholders are not entitled to vote on the Proposal.

2. The Proposal provides for the Reorganization of TSI including the creation and issuance of the New Common Shares, the cancellation of the existing Common Shares and other amendments to TSI's articles of incorporation. If the Proposal is accepted by both classes of Creditors, the Court will be asked to approve the Reorganization at the time for the application for approval of the Proposal. The Reorganization is described in more detail in the Proposal.

3. The Gross Distribution Fund is $1,000,000.00 which is to be paid by NRT to the Trustee in accordance with the Subscription Agreement upon the completion of the Reorganization of the Company and satisfaction or waiver of all conditions to the implementation of the Proposal and to the Subscription Agreement. The Reorganization and the Subscription Agreement are scheduled to be completed by December 29, 2005.

4. Administrative Fees and Expenses include the:

   i) proper fees and expenses of the Trustee (including, without limitation, the fees and expenses of its legal counsel) incidental to the preparation and facilitation of the Proposal and any amendments thereto, including, without limitation, fees incurred by the Trustee in administering the Proposal; and

   ii) the legal fees and consulting fees of TSI before and following execution, acceptance and approval of the Proposal and in connection with the preparation of the Proposal, and advice to TSI in connection therewith.

The Administrative Fees and Expenses are to be paid out of the Gross Distribution Fund in priority to all Claims of Creditors.

5. The Creditor Distribution Fund is the Gross Distribution Fund less amounts paid for Administrative Fees and Expenses.

6. Proven Claims as at the Filing Date of Her Majesty in right of Canada or a province of a kind that could be subject to a demand under Section 224(1.2) of the **Income Tax Act** (Canada) or under any substantially similar provision of provincial legislation shall be paid out of the Creditor Distribution Fund within six months after the date of Court approval of the Proposal.

7. Proven Claims as at the Filing Date of former or current employees of TSI payable in priority under section 136(1)(d) of the Act shall be paid out of the Creditor Distribution Fund immediately after the Effective Date.

8. Proven Claims as of the Filing Date of other Preferred Creditors will be paid out of the Creditor Distribution Fund as soon as possible after the Effective Date.

9. Secured Creditors with a Proven Claim shall receive from the Creditor Distribution Fund payment by the Trustee of a dividend equal to the percentage of the Creditor Distribution Fund shown next to that Secured Creditor's name in Schedule "C" of the Proposal (or in Schedule C-1 or C-2 of the Proposal, as applicable), as soon as practicable after the Effective Date, in full satisfaction of its Claim as a Secured Creditor, provided that the Secured Creditors shall not receive on account of their Claims more than 100 cents on the dollar without interest. TSI's proposed assessed value of the security held by each Secured Creditor in respect of its Claim, within the meaning of section 50.1(2) of the Act, is as shown next to that Secured Creditor's name in Schedule "C" (or in Schedule C-1 or C-2, as applicable) of the Proposal.

10. Following payments of the Secured Claims and Preferred Claims referred to in paragraphs 6 to 9 of this report, Unsecured Claims as at the Filing Date are to be dealt with as follows:

    a) each Unsecured Creditor will receive from the Creditor Distribution Fund, as soon as practicable after the Effective Date, payment of a dividend from the Trustee of an amount equal to the lesser of $500 and the amount of its Proven Claim; and

b) Unsecured Creditors with Proven Claims exceeding $500 shall receive from the Creditor Distribution Fund, following the payments in sub paragraph a) above, as soon as practicable after the Effective Date, payment of a dividend from the Trustee of its pro rata share of the Creditor Distribution Fund, based on the amount of Proven Claims of Unsecured Creditors.

11. Distributions from the Creditor Distribution Fund shall be in full satisfaction of Claims of Creditors against the Company as at the Filing Date.

12. Upon acceptance of this Proposal (including the Reorganization) and its approval by the Court, the Creditors and Shareholders will be deemed to have accepted and consented to all matters provided for in the Proposal, including in the case of Creditors, the full and final compromise of their Claims, and in the case of the Shareholders, the full and final release of their rights and interests as holders of the Common Shares and otherwise.

13. Claims arising in respect of goods, services and employment provided to the Company subsequent to the Filing Date, to and including the Effective Date, will be paid by TSI in the ordinary course of business according to normal credit terms out of cash-on-hand or revenues received by TSI.

14. In the case of any lease of real property disclaimed by TSI pursuant to section 65.2 of the Act, the landlord affected by the disclaimer may file a proof of claim for an amount equal to the lesser of:

i) the aggregate of

a) the rent provided for in the lease for the first year of the lease following the date on which the disclaimer becomes effective, and

b) fifteen per cent of the rent for the remainder of the term of the lease after that year, and

ii) three years' rent.

15. Upon the Effective Date, each and every present and former director of TSI and NRT will be released from any claims as at the Filing Date (and in the case of NRT as of the Effective Date) where the present or former directors (or any of them) are by law liable in their capacity as directors for such Claims in respect of the potential statutory liabilities of TSI, and for any claims where the present or former directors may be liable in their capacity as directors.

16. Payments made by the Trustee to Creditors pursuant to the Proposal shall be made by the Trustee net of the Superintendent's Levy required to be paid pursuant to Section 147 of the Act.

17. The implementation of the Proposal is conditional upon the fulfillment (or if capable of waiver) of all of the conditions referred to in paragraph 12.1 of the Proposal.

18. At the meeting to consider the Proposal, the Creditors my appoint up to five Inspectors whose powers shall be as outlined in Paragraph 11.1 of the Proposal.

19. The obligations of TSI under the Proposal will be fully performed for the purposes of Section 65.3 of the Act upon the Trustee receiving the Consideration under the Subscription Agreement.

20. The provisions of Sections 91-101 of the Act do not apply to this Proposal.

The Trustee has been advised by the Company that at the General Meeting of Creditors, TSI will make the following amendments to the Proposal, to correct inadvertent errors. The amendments are:

i) in Paragraph 1.1 (m), the Filing Date will be amended to November 14, 2005;

ii) in Paragraph 1.1 (cc), the head office of the Company will be changed to Toronto, Ontario; and

iii) in Paragraph 8.1 (a), the sixth line will be amended to read "..... in full satisfaction of its Claim as a Secured Creditor".

The description of the Proposal in this report is a summary only and is only provided for the assistance of the Creditors. In the event there is any inconsistency between this report and the Proposal, the terms of the Proposal shall govern.

Creditors are advised to read the Proposal.

Section C - Financial Position and Causes of Difficulties

The Company has informed the Trustee that its financial difficulties resulted from:

i) continued operating losses; and

ii) inability to raise financing.

Section D - Interim Receiver

Not applicable.

Section E - Identification and Evaluation of Assets

According to the Condensed Statement of Assets and Liabilities of the Company as at November 14, 2005 ("Condensed Statement"), TSI's assets consist of the following:

	Balance per Condensed Statement
Cash	$ -
Accounts receivable	25,000
Inventory	50,000
Technology/Patents	150,000
Investments in subsidiary company	-
Total	$ 225,000

A summary of the above assets (based on information provided by the Company) and the Trustee's estimated liquidation values thereof in the event of a bankruptcy, are set out below:

Cash

At November 14, 2005, the Company is in an overdraft position.

Accounts Receivable

The Company estimates its accounts receivable as at November 14, 2005 to be approximately $25,000. Although the Company believes that this amount is collectible, in a bankruptcy, customers may raise claims for offset. Therefore, for purposes of this report, the Trustee estimates that the realizable value of the accounts receivable may be between 50% - 75% of the accounts receivable balance or between $12,500 and $18,750.

Inventory

The Company estimates that it has approximately $50,000 of inventory at November 14, 2005, primarily comprised of remaining display modules. The Company has advised that a portion of the inventory is located in China and some may be considered obsolete. In addition, there may be amounts owing to the company in China currently holding the inventory and therefore a Trustee may not be able to obtain possession of that inventory in a bankruptcy. Due to the nature and location of the inventory and costs of taking possession, the Trustee arbitrarily estimates the inventory to have a realizable value of between $5,000 and $10,000 in a liquidation scenario.

Technology/Patents

The Company had various patents relating to its technology. The Company has informed the Trustee that in November, 2004, TSI attempted to sell the technology to various potential purchasers in the industry. At that time, no offers were received. The Company has informed the Trustee that in view of the passage of time since the development of the technology, and subsequent advances in the technology, TSI estimates the realizable value of the technology/patents to be approximately $150,000. The Trustee has not attempted to value the technology/patents and reports solely on TSI's estimate of value.

Investment in Subsidiary Company

As set out earlier herein, TSI owns the shares of Telepanel S.A.R.L. According to the Company, Telepanel S.A.R.L. is not operating and has no assets. Accordingly, in the event of a bankruptcy of the Company, there would be no realizations for TSI from this subsidiary.

Summary

In summary, the estimated realizations in a liquidation scenario would range between the following:

-	Low	High
Cash	$ -	$ -
Accounts Receivable	12,500	18,750
Inventory	5,000	10,000
Technology/Patents *	-	150,000
Investments in subsidiary companies	-	-
Total	$ 17,500	$ 178,750

Information on encumbrances against the Company's assets is set out below in Section G.

Section F - Conduct of the Debtor

The Trustee has, at the date of this report, been provided with certain of the Company's bank statements. As a result, the Trustee has not completed a review of the bank statements to identify whether there were any payments to related and unrelated parties in the twelve months and three months, respectively, prior to the date of the Proposal which may be considered to be preferences and subject to review.

The Company has informed the Trustee that due to its overdraft position it has conducted its banking through the personal account of Mr. Chris Skillen, acting CEO of Telepanel, since August 2005 and that all its cash transactions are effected through this account and recorded accordingly in its books and records.

Mr. Skillen has informed the Trustee that to the best of his knowledge, TSI has not entered into any transactions since November 1, 2004, which may be considered to be preference transactions or reviewable transactions.

Section G - Creditors' Claims

According to the Condensed Statement and information provided by TSI to the Trustee, the Company's Creditors consist of:

Creditor classification	Amount outstanding as at November 14, 2005
Secured Creditors (Note 1)	$ 20,316,681
Canada Revenue Agency (Note 2)	38,000
Preferred Creditors (Note 3)	-
Unsecured Creditors (Note 4)	1,726,327
Total	$ 22,081,008

Notes:

1. According to the Company, the amounts owed to the Company's Secured Creditors and TSI's assessed value of their security for purposes of the Proposal are:

Name of creditor (listed in no particular order)	Notes	Amount owed	Assessed Value of Security
The Vengrowth Investment Funds Inc. ("Vengrowth)	a	$ 12,026,197	$ 245,000
Royal Bank Capital	b	7,006,731	25,000
Directors	b, c	324,656	83,550
First Associates	b, d	659,097	211,100
151797 Canada Inc.	b	300,000	112,500
		$ 20,316,681	$ 677,150

(a) Vengrowth's security consists of, among other things, a General Security Agreement over all of the Company's assets.

In order to assess the validity and enforceability of Vengrowth's security, the Trustee obtained a legal opinion from Torkin Manes Cohen Arbus LLP ("Torkin Manes"), independent counsel retained by the Trustee. Torkin Manes' opinion is that, subject to standard qualifications, Vengrowth's security has been validly perfected under the **Personal Property Security Act (Ontario)** and would be enforceable as against a Trustee in Bankruptcy.

(b) In view of the quantum of Vengrowth's claim against TSI according to the Company's records, the apparent value of Telepanel's assets, and the opinion on Vengrowth's security obtained by the Trustee, the Trustee has not sought an opinion on this secured creditor's security.

(c) The names of the individuals included as Directors, and the Company's assessed value of their respective security for purposes of the Proposal, are set-out in Schedule C-1 of the Proposal.

(d) The names of the individuals included as First Associates, and the Company's assessed value of their respective security for purposes of the Proposal, are set out in Schedule C-2 of the Proposal.

2. As at November 14, 2005, the Company estimates its obligation on account of source deductions to be approximately $38,000.

3. The Company has informed the Trustee that there are no amounts owing to Creditors having claims pursuant to Section 136(1)(d) of the Act. The Company has also informed the Trustee that on June 30, 2005, the Company's lease for its premises was terminated by the landlord.

4. The Unsecured Creditors represent trade accounts payable of the Company outstanding at November 14, 2005 including amounts owed to employees which do not constitute claims having a priority under section 136(1)(d) of the Act. This amount does not include the unsecured portion of the claims held by the Secured Creditors.

Section H - Previous Business Dealings with the Company

The undersigned Trustee confirms that Mintz & Partners LLP was the auditor of TSI with respect to TSI's financial statements for the year ended January 31, 2002. The Trustee further confirms that he does not have any knowledge of any conflict of interest situation arising from the acceptance of this appointment as Trustee under the Proposal.

Section I - Informal Meetings with Major Creditors

The Trustee has not met with any major creditors.

Section J - Remuneration of Trustee re: Proposal

Payment of the Trustee's fees and disbursements is provided for in the Proposal.

MPL has received a $10,000 deposit from Mr. Skillen. In addition, MPL has entered into an agreement with NRT, among others, with respect to the funding of a portion of the Trustee's fees and disbursements. In accordance with such agreement and the Subscription Agreement, any amounts funded by NRT will be credited against the consideration payable by NRT under the Subscription Agreement.

Section K - Cash-flow statements prepared by TSI

In accordance with the Act, the Trustee reviewed the cash-flow statements and assumptions for the period November 1, 2005 to January 31, 2006 that were prepared by TSI ("Cash-flow") and which were filed with the Official Receiver. In reviewing the Cash-flow, including the hypothetical and probable assumptions used to compile the Cash-flow, nothing has come to the Trustee's attention which leads the Trustee to believe that the hypothetical and probable assumptions used by the Company in the preparation of the Cash-flow are inconsistent with the purpose of the Cash-flow.

Section L - Statement of Estimated Realizations

Proposal Accepted

If the Company's Proposal is accepted by the creditors and approved by the Court, and assuming NRT completes its subscription for the shares of TSI, the Trustee estimates that the Creditor Distribution Fund will be:

Proposal Fund	$ 1,000,000
Less: estimated Administrative Fees and Expenses (Note 1)	(200,000)
Less: source deductions claim	(38,000)
Estimated Creditor Distribution Fund	**$ 762,000**

The distribution to the Secured Creditors and Unsecured Creditors is therefore estimated as follows:

i) **Secured Creditors**

According to the Proposal, the Secured Creditors will receive their share of the Creditor Distribution Fund as more particularly set out in Schedule C of the Proposal (and if applicable, Schedules C-1 and C-2).

As set out in Schedule "C" to the Proposal, 88.85% of the Creditor Distribution Fund is to be paid to the Secured Creditors.

ii) **Unsecured Creditors**

The portion of the Estimated Creditors Distribution Fund available for Unsecured Creditors is approximately $85,000, calculated as follows:

Estimated Creditors Distribution Fund		$ 762,000
Less: amount to be paid to Secured Creditors (88.85%)		(677,000)
Less: amount to be paid to Preferred Creditors		-
Available for distribution		$ 85,000
Estimated quantum of Unsecured Creditors Claims		
Amount per Condensed Statement (Note 2)		$ 1,726,300
Add: claims of Secured Creditors	$ 20,316,600	
Less: assessed value of Security pursuant to Proposal	(677,000)	19,639,600
Total claims of Unsecured Creditors (Note 2)		$ 21,365,900
Estimated Distribution to Unsecured Creditors per dollar of proven claim (Note 3)		398%

Notes:

1. The Administrative Fees and Expenses include the Trustee's fees and disbursements, including legal fees and disbursements, as well as TSI's legal and consulting fees. The consulting fees are payable to Mr. Skillen, who has advised the Trustee that the consulting fees are for managing the Company and effecting the transaction with NRT. Mr. Skillen has also advised the Trustee that the consulting fees (including disbursements) are estimated to be $96,000 plus GST.

   The Administrative Fees and Expenses of $200,000 is an estimate only. The actual Administrative Fees and Expenses could be higher than $200,000. If higher, the quantum of the Creditor Distribution Fund would be lower.

2. This amount represents the amount owing to the Unsecured Creditors and is subject to variation in the event that amounts included in Proofs of Claim filed by the Company's creditors and admitted by the Trustee are different from the amounts included in the Company's listing of creditors as at November 14, 2005.

3. This calculation does not take into account that pursuant to the Proposal, the first $500 of ordinary unsecured creditors' claims are paid in full.

Proposal Not Accepted

If the Proposal is not accepted by the Creditors, TSI would become bankrupt on December 1, 2005 and the Company's assets would vest with the Trustee in Bankruptcy, subject to the rights of the Company's Secured Creditors. In the event of a bankruptcy of the Company, it is likely that one of the Company's Secured Creditors would take possession of and realize on the Company's assets. The estimated realizable value of the Company's assets in a liquidation scenario is outlined in Section E of this report.

In the event of the Company's bankruptcy, and assuming TSI's assets and liabilities as at December 1, 2005 would be substantially the same as the Company's assets and liabilities as at November 14, 2005, the Trustee estimates that based on the information set out in Section E and information contained in this report, the realizations that would be available for distribution to the Company's Preferred Creditors and Unsecured Creditors would be $Nil calculated as follows:

	Estimated Realizable Value	
	Low	High
Cash	-	-
Accounts Receivable	12,500	18,750
Inventory	5,000	10,000
Technology/Patents (Notes 1, 5)	-	150,000
Investment in Subsidiary Company	-	-
Estimated Gross Realizations	**17,500**	**178,750**
Less: Source deductions (Note 2)	(38,000)	(38,000)
Less: Claims of Secured Creditors	(20,316,681)	(20,316,681)
Less: Estimated professional fees of Receiver and Manager and Trustee in Bankruptcy	(200,000)	(100,000)
Less: Claims of Preferred Creditors (Note 3)	-	-
Available for Distribution (Notes 4, 5, and 6)	$ Nil	$ Nil

Notes:

1. For purposes of this report, the estimated "high" realizable value of the technology/patents has been based on the Company's estimate.

2. For purposes of this analysis, the full amount of the Company's estimated source deductions liability is reflected.

3. The Company has informed the Trustee that it is not indebted to any Creditors who would have priority unsecured claims pursuant to Section 136(1) of the Act.

4. This amount does not consider any preference or settlement transactions of the Company that may be challengeable in a bankruptcy.

5. As set out earlier herein, the Trustee has not attempted to obtain an independent valuation of the technology and patents. However, in view of the validity and enforceability of Vengrowth's security as against a Trustee in Bankruptcy and the Company's stated indebtedness to Vengrowth of approximately $12,000,000, the realizations from the technology and patents would have to be in excess of this amount (before consideration of the validity of the claims of the other Secured Creditors of the Company) before there would be any distribution to the Preferred Creditors and Unsecured Creditors.

6. The Trustee understands that TSI has non-capital income tax loss carryforwards of approximately $15,000,000. The Trustee has not considered the income tax loss carryforwards as an asset for purposes of this analysis since, in the event of a bankruptcy of TSI, the income tax loss carryforwards would not have any value unless a proposal was filed and accepted by Creditors and approved by the Court. The Trustee has not taken any steps to independently verify the income tax loss carryforwards and has relied upon advice of TSI with respect to same.

Section M – Recommendation

Based on the Company's assets as at November 14, 2005, and the information set out herein including the Company's estimate of the realizable value of its assets, the Trustee is of the view that the amount available for distribution to the Company's Preferred Creditors and Unsecured Creditors would be higher if the Proposal is accepted by the Company's Creditors and approved by the Court than in a bankruptcy scenario.

Accordingly, the Trustee recommends that the Proposal be accepted by the Company's Preferred Creditors and Unsecured Creditors in order to allow them to attempt to maximize their return from the Company's indebtedness to them.

The Trustee is not in a position to make a recommendation to the Secured Creditors, or any of them, as the Trustee has not attempted to assess each Secured Creditor's position in relation to the other Secured Creditors, nor has the Trustee independently valued their security.

Section N - Procedures for Dealing with Proposal and Completing a Proof of Claim

In completing the proof of claim form submitted herewith, **creditors should only include amounts outstanding as at November 14, 2005.**

It is expressly noted and should be clearly understood that Mintz & Partners Limited, in its capacity as Trustee, assumes no personal liability for any claims against the Company before, on or after the filing of the Proposal.

Creditors may attend, in person or by proxy, the meeting to consider the Proposal which will be held at the Office of the Official Receiver, 25 St. Clair Avenue East, Suite 600, Toronto, Ontario on the 1st day of December, 2005 at 11:00 o'clock in the morning.

Please note that in order for your vote to count in connection with the Proposal, it is necessary that you complete and submit the enclosed documents at this time.

Creditors who do not wish to attend or to be represented at the meeting but who wish to vote, may forward their proofs of claim, and voting letters to the Trustee so as to be received prior to the meeting. If you have any questions on the Proposal or this report, please contact Ms. Karen Kimel (416-644-4460) of the Trustee's office or the undersigned.

Dated at North York, Ontario, the 18th day of November, 2005.

MINTZ & PARTNERS LIMITED
Trustee re the Proposal of
Telepanel Systems Inc.

Per:

Daniel R. Weisz, CA, CIRP
Senior Vice President

DRW/KK/ap

::ODMA\PCDOCS\MINTZ\204071\1

Estate #31-448752

IN THE MATTER OF THE PROPOSAL OF
TELEPANEL SYSTEMS INC.
OF THE CITY OF TORONTO,
IN THE PROVINCE OF ONTARIO

Additional Information to Trustee's Report to Creditors pursuant to Section 50(5) of the Bankruptcy and Insolvency Act

This is additional information to the Trustee's report dated November 18, 2005 (the "Circular"), which was previously circulated to creditors of Telepanel Systems Inc. ("TSI" or the "Company"), as follows:

A) Financial position and causes of difficulties

The Circular outlines the financial position of TSI and the matters that gave rise to its financial difficulties.

B) Identification and valuation of assets

A description of TSI's assets, as set out on TSI's Condensed Statement of Assets and Liabilities as at November 14, 2005, including estimates of the assets' realizable values, was included with the Circular.

C) Conduct of the debtor

In the Circular, the Trustee set out that the Trustee has not completed a review of the Company's bank statements to identify payments which may be considered to be preferences. The Trustee advises at this time that it has not been provided with any additional bank statements and, therefore, the Trustee has not completed its review.

D) Developments since the Proposal

The Circular disclosed that the Trustee had been advised by the Company that the Company intended to make certain amendments to the Proposal to correct inadvertent errors. In order to clarify for creditors that they should be voting on the Proposal filed by the Company as it was to be amended, on November 21, 2005, the Trustee wrote a letter to creditors reiterating the amendments to be made to the Proposal. The Trustee enclosed with a copy of the November 21, 2005 letter an Amended Voting Letter, which incorporated the aforementioned amendments to the Proposal, to be used by Creditors if they wished to vote by voting letter on the Proposal as it was to be amended.

E) **Post-proposal debts**

According to TSI, the Company's post-proposal trade debts are being paid in the ordinary course of business and on terms established between the Company and its respective creditors.

F) **Creditors claims**

The claims, as at November 14, 2005, of the Company's creditors are as follows:

Creditor classification	Amount Per Company As at November 14, 2005	Per Proofs of Claim filed as of 9:00 a.m. December 1, 2005
Secured Creditors (Note 1)	$ 20,316,681	$ 783,205
Source Deductions (Note 2)	38,000	-
Preferred Creditors	-	-
Unsecured Creditors (Note 3)	1,726,327	550,291
	$ 22,081,008	$ 1,333,496

Notes:

1. The Secured Creditors are comprised of The Vengrowth Investment Funds Inc. ("Vengrowth") and other Secured Creditors. According to the Company, the Company is indebted to Vengrowth in the amount of $12,026,197. In the Circular, the Trustee noted that it had received an opinion from Torkin Manes Cohen Arbus LLP that, subject to standard qualifications, Vengrowth's security has been validly perfected under the Personal Property Security Act (Ontario) and would be enforceable against a Trustee in Bankruptcy. As disclosed in the Circular, in view of the quantum of Vengrowth's claim against TSI according to the Company's records, the apparent value of Telepanel's assets, and the opinion on Vengrowth's security obtained by the Trustee, the Trustee has not sought an opinion on the security held by the other Secured Creditors.

2. As at November 14, 2005, the Company estimates its obligation on account of source deductions to be approximately $38,000.

3. This amount is the total as per the Company's list of creditors as at November 14, 2005 provided to the Trustee by TSI.

G) **Previous business dealings with the Company**

In the Circular, the Trustee confirmed that Mintz & Partners LLP was the auditor of TSI with respect to TSI's financial statements for the year ended January 31, 2002. The Trustee inadvertently did not disclose that Mintz & Partners LLP is listed as a creditor of Telepanel for $43,362.00.

H) **Cash-flow statements prepared by TSI**

Based on verbal information provided by Mr. Skillen, the net actual cash flow for the period November 14, 2005 to November 28, 2005 is below the amount projected.

I) **Statement of Estimated Realizations**

Proposal Accepted

The Circular sets out the Trustee's estimate of the dividend distribution to Creditors if the Proposal is accepted by TSI's creditors and approved by the Court, based on the assumptions set out in the Circular.

If the Proposal is accepted by TSI's creditors, the Trustee will, in accordance with the Act, make an application to the Court for approval of the Proposal.

Proposal Not Accepted

If the Proposal is not accepted by the Company's creditors at this General Meeting of Creditors, TSI would become bankrupt on December 1, 2005 and the Company's assets would vest with the Trustee in Bankruptcy, subject to the rights of the Company's Secured Creditors.

In the event of TSI's bankruptcy and as set out in the Circular, the Trustee estimates that there will be no funds available for distribution to the Company's Preferred Creditors and Unsecured Creditors.

J) Recommendation

Based on the Company's assets as at November 14, 2005, and the information set out herein and in the Circular including the Company's estimate of the realizable value of its assets, the Trustee is of the view that the amount available for distribution to the Company's Preferred Creditors and Unsecured Creditors would be higher if the Proposal is accepted by the Company's Creditors and approved by the Court than in a bankruptcy scenario.

Accordingly, the Trustee recommends that the Proposal be accepted by the Company's Preferred Creditors and Unsecured Creditors in order to allow them to attempt to maximize their return from the Company's indebtedness to them.

As set out in the Circular, the Trustee is not in a position to make a recommendation to the Secured Creditors, or any of them, as the Trustee has not attempted to assess each Secured Creditor's position in relation to the other Secured Creditors, nor has the Trustee independently valued their security.

Dated at North York, Ontario, this 1st day of December, 2005.

MINTZ & PARTNERS LIMITED
Trustee re the Proposal of
Telepanel Systems Inc.

Per: 

Daniel R. Weisz, CA, CIRP
Senior Vice President

DRW/KK/ap

::ODMA\PCDOCS\MINTZ\208440\1

IN THE MATTER OF THE PROPOSAL OF DIGITAL UNDERGROUND MEDIA INC., A COMPANY INCORPORATED PURSUANT TO THE LAWS OF THE PROVINCE OF ONTARIO, WITH A HEAD OFFICE IN THE CITY OF VANCOUVER, IN THE PROVINCE OF BRITISH COLUMBIA

District of Ontario
Division No. 09 -Toronto
Court File No. 31-2295766
Estate No. 31-2295766

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceedings commenced at Toronto

BRIEF OF AUTHORITIES OF DIGITAL UNDERGROUND MEDIA INC.

(Motion returnable November 14, 2017)

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