Case Name:

Air Canada (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as amended
AND IN THE MATTER OF a plan of Compromise or Arrangement of Air Canada and those subsidiaries listed on Schedule "A"
APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2006] O.J. No. 5070

28 C.B.R. (5th) 317

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Court File No. 03-CL-4932

Ontario Superior Court of Justice
Commercial List

P.A. Cumming J.

Heard: December 12, 2006.
Judgment: December 20, 2006.

(61 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Motion by Air Canada for declaration that monetary penalty imposed by Minister of Transport for noise regulation violation was a claim under Claims Procedure and Sanction Orders issued by court under Companies' Creditors Arrangement Act -- Minister failed to make a claim within time limit set out in Claims Procedure Order -- Motion allowed -- Monetary Penalty was a claim -- Monetary Penalty not an excepted claim -- Sanction Order forever extinguished Minister's right to enforce Monetary Penalty against Air Canada.

Insolvency law -- Claims -- Provable claims -- Motion by Air Canada for declaration that monetary penalty imposed by Minister of Transport for noise regulation violation was a claim under Claims Procedure and Sanction Orders issued by court under Companies' Creditors Arrangement Act -- Minister failed to make a claim within time limit set out in Claims Procedure Order -- Motion allowed -- Monetary Penalty was a claim -- Monetary Penalty not an excepted claim -- Sanction Order forever extinguished Minister's right to enforce Monetary Penalty against Air Canada.

Motion by Air Canada for declaration that monetary penalty imposed by Minister of Transport was a claim for purpose of Claims Procedure and Sanction Orders issued by court under Companies' Creditors Arrangement Act -- Penalty imposed due to alleged breach by Air Canada of noise abatement procedures and noise control requirements -- Air Canada subsequently applied for protection under Companies' Creditors Arrangement Act -- Minister failed to make a claim within time limit set out in Claims Procedure Order -- Pursuant to Procedure Order, failure to file proof of claim in accordance with order forever barred creditor from making claims against Air Canada -- HELD: Motion allowed -- Monetary Penalty was a claim -- Definition of "claim" in Claims Procedure Order was broad -- Fact that claim was contingent, unliquidated or disputed did not change character of claim as one provable under Bankruptcy and Insolvency Act -- Minister of Transport should have made claim in accordance with direction of Claims Procedure Order -- Monetary Penalty not an excepted claim -- Section 178 of Bankruptcy and Insolvency Act did not apply to proceedings under Companies' Creditors Arrangement Act -- Even if s. 178 applied, taking into consideration administrative nature of offence in question and fact that Minister issuing penalty was not a court, Monetary Penalty was not an excepted claim under s. 178(1)(a) -- Sanction Order forever extinguished Minister's right to enforce Monetary Penalty against Air Canada and that Sanction Order permanently stayed all proceedings with respect to Monetary Penalty.

Statutes, Regulations and Rules Cited:

Aeronautics Act, R.S.C. 1985, c. A-2, s. 7.3, s. 7.5, s. 7.6(2), s. 7.7, s. 7.92, s. 8.2

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 2, s. 12(1), s. 121(1), s. 178(1), s. 178(1)(a), s. 178(2)

Canada Business Corporations Act, R.S.C. 1985, c. C-44, s. 91

Canadian Aviation Regulations, SOR/96-433, s. 602.105(c)

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 12

Counsel:

Katherine Kay and Danielle Royal, for Air Canada

Jacqueline Dais-Visca, for the Attorney General of Canada

REASONS FOR DECISION

P.A. CUMMING J.:--

The Motion

1 Air Canada moves for a declaration that a Monetary Penalty of $25,000.00 assessed by the Minister of Transport is a "claim" for the purposes of the Claims Procedure and Sanction Orders issued by this Court under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). This motion raises important issues of first instance as to the impact, if any, of orders made by this Court under the authority of the *CCAA* upon monetary penalties imposed by the Minister of Transport and as to the respective authority of this Court and the federal administrative tribunal regime relating to aviation regulations and noise abatement.

2 For the reasons that follow, the motion is allowed.

Background

3 On December 19, 2001, the Minister of Transport issued an Assessment of Monetary Penalty (the "Monetary Penalty") against Air Canada under s. 7.7 of the *Aeronautics Act*, R.S.C. 1985, c. A-2. The Minister alleged that on or about December 23, 2000, an Air Canada aircraft landed at Montreal International Airport (Dorval) at approximately 3:41 a.m. in contravention of the noise abatement procedures and noise control requirements in s. 602.105(c) of the *Canadian Aviation Regulations*, SOR/96-433 (the "noise abatement regulations"). A review hearing was commenced before the Transportation Appeal Tribunal of Canada ("TATC") on October 1, 2002 and concluded after four days of hearings on February 18, 2003.

4 On April 1, 2003 Air Canada applied in this Court for protection from its creditors under the *CCAA*, which resulted, *inter alia*, in an immediate stay of all proceedings.

5 This Court issued its Claims Procedure Order on September 18, 2003, which sets forth the process by which creditors' claims would be determined. Paragraph 8 of that Order provides that any creditor who does not file a proof of claim before the claims bar date is "... forever barred from making or enforcing any Claim against [Air Canada] and the Claim shall be forever extinguished."

6 The TATC proceeding remained stayed pending the currency of the stay. The Minister of Transport and Transport Canada did not make a claim in the *CCAA* proceedings even though they had timely notice of the Claims Procedure Order.

7 This Court issued a Sanction Order on August 23, 2004, which provided in paragraph 10 that a creditor who did not file a proof of claim in accordance with the claims procedure is "forever barred from making any Claim against [Air Canada] ... and that such Claim is forever extinguished."

8 Air Canada emerged from *CCAA* protection on September 30, 2004. On December 10, 2004 the TATC sought written arguments in respect of the December 19, 2001 Monetary Penalty.

9 On June 2, 2005 Transport Canada and the Canadian Transportation Agency filed a motion in this Court for directions and a declaration regarding the issue of whether regulatory penalties were "claims" for the purpose of the Sanction Order. This motion has since been abandoned and on November 28, 2005 the Minister of Transport filed submissions with the TATC requesting that the TATC determine:

> What effect, if any, does the *CCAA* Sanction Order have on the jurisdiction of the TATC to issue a Review determination, including the jurisdiction to issue a Certificate pursuant to 8(b) of the *Aeronautics Act* if the fine is not paid?

10 The TATC rendered an interim decision on May 16, 2006 holding that the effect of any orders pursuant to the *CCAA* is not a question that needs to be answered. However, the decision by the TATC resulting from the merits review of the Monetary Penalty against Air Canada (the so-called "Merits Decision") was issued the same day. Tribunal member Mr. Michel Boulianne determined:

> I uphold the Minister's decision and the monetary penalty of $25,000 assessed for flight 630. The said monetary penalty is to be made payable to the Receiver General for Canada and must be received by the Transportation Appeal Tribunal of Canada within fifteen days of service of this determination.

11 Air Canada has a pending application for judicial review in the Federal Court in respect of both TATC decisions and has advised the Federal Court that in Air Canada's view the Ontario Superior Court of Justice is the proper forum to determine the issue of whether a Monetary Penalty assessed for a regulatory violation is a "claim" which ought to have been dealt with in the *CCAA* Claims Procedure.

Preliminary Issue Relating to the Jurisdiction of this Court

12 After some considerable deliberation, the Attorney General of Canada concedes that this Court as a Superior Court can determine whether the Monetary Penalty assessed by the Minister of Transport is a "claim" for the purposes of the *CCAA* and the Claims Procedure and Sanction Orders. However, the Attorney General opposes this Court's jurisdiction to judicially review the May 16, 2006 decisions of the TATC.

13 I do not understand Air Canada's motion before this Court to be an application for judicial review of the TATC's decisions. Air Canada is seeking a declaration that the Monetary Penalty is a "claim" that is extinguished by the Sanction Order and that all proceedings related to the "claim" (ie. the Monetary Penalty) are permanently stayed. As such, the correctness of the TATC's decision as to the merits is not before me and I make no ruling regarding that decision, provided however, these Reasons for Decision will impact upon the claimed continuing existence and *enforceability* of the Monetary Penalty.

The First Issue - Is the Monetary Penalty a "Claim" for the Purposes of the *CCAA*?

14 The first issue raised by the motion is whether the Monetary Penalty assessed by the Minister of Transport in respect of Air Canada's alleged failure to abide by the noise abatement regulations is a "claim" for the purposes of the *CCAA* and the Claims Procedure and Sanction Orders.

The Law

15 Paragraph 2(h) of the Claims Procedure Order provides:

> "Claim" means any right of any Person against one or more of the Applicants in connection with <u>any indebtedness, liability or obligation of any kind of one or more of the Applicants owed to such Person</u> and any interest accrued thereon or costs payable in respect thereof, whether liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, unsecured, present, future, known or unknown, by guarantee, surety or otherwise, and whether or not such right is executory or anticipatory in nature, including the right or ability of any Person to advance a claim for contribution or indemnity or

> otherwise with respect to any matter, action, cause or chose in action, whether existing at present or commenced in the future, which indebtedness, liability or obligation is based in whole or in part on facts existing prior to April 1, 2003, or a Restructuring Claim; provided however, that "Claim" shall not include an Excluded Claim; [Emphasis added]

16 The Sanction Order incorporates the definition of "Claim" set out in the Consolidated Plan of Reorganization, Compromise and Arrangement for Air Canada (the "Plan") developed in the *CCAA* proceeding. That definition is virtually the same as the broad definition in the Claims Procedure Order, with certain minor differences that are immaterial to this motion.

17 Section 12 of the *CCAA* provides that determinations as to whether any unsecured indebtedness, liability or obligation is a "claim" within the meaning of the *CCAA* are made by reference to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). Subsection 12(1) of the *BIA* provides:

> 12.(1) For the purposes of the Act, "claim" means any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the Bankruptcy and Insolvency Act.

18 Subsection 121(1) of the *BIA* sets forth which claims are deemed provable in bankruptcy:

> 121.(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

Analysis

A. The Attorney General's Submissions

19 The Attorney General makes four key submissions in support of his assertion that the Monetary Penalty is not a "claim". First, at paragraphs 10 and 11 of his supplementary factum, the Attorney General asserts that the Crown is not acting in a commercial capacity when it is enforcing sanctions against an "offender" like Air Canada. Therefore, since it is not "attempting to make money ... the Crown can not be said to be acting as a 'creditor', or to have a 'claim' which would be subject to the CCAA." The Attorney General cautions this Court not to "strain" to find ways to permit an offender to escape the consequences of its regulatory misconduct. In support of this submission, the Attorney General cites the decisions of the Saskatchewan Court of Queen's Bench in *Milner Greenhouses Ltd. v. Saskatchewan*, [2004] S.J. No. 264 at paras. 24-29 (Q.B.) [*Milner*], and the Ontario Court of Appeal in *Transport North American Express Inc. v. New Solutions Financial Corp.* (2002), 60 O.R. (3d) 97 at para. 31 (C.A.) [*Transport*].

20 The Ontario Court of Appeal's decision in *Transport* dealt with a loan agreement that contravened the criminal interest rate provisions of the *Criminal Code*. The Court of Appeal overturned the trial judge's decision to "notionally sever" the offending provisions of the loan agreement to reduce the interest rate to a non-criminal rate. At para. 31, the Court of Appeal recited the principle that courts should not strain to avoid the application of the *Criminal Code* or assist those who strain to do so. The Supreme Court of Canada overturned this decision ([2004] S.C.J. No. 9), however the majority did not explicitly dispute the aforementioned statement of principle.

21 The *Transport* decision is distinguishable. The motion before this Court does not involve the *Criminal Code*. Nor can the motion at hand be construed as an attempt to circumvent the provisions of the *Aeronautics Act* and its regulations (see my related comments below). Rather, this motion concerns the legitimate question as to whether the Monetary Penalty is a "claim" for the purposes of the *CCAA*.

22 The *Milner* case also does not assist the Attorney General. In that case it was found that a *CCAA* stay does not stay the *prosecution* of a quasi-criminal regulatory offence, but does stay the *enforcement* of any orders resulting from a successful prosecution. The Court held at para. 30 that if the Crown successfully prosecuted Milner Greenhouses and a fine was imposed, "the Crown would have to line up with Milner's other creditors [in the *CCAA* proceedings]." The Court in *Milner* therefore acknowledges that the Crown, when seeking to *enforce* a quasi-criminal fine, is a "creditor" for the purposes of the *CCAA*.

23 Even if it is assumed that the breach of the noise abatement regulations is a quasi-criminal offence (an assumption with which I ultimately disagree), the *Milner* decision supports Air Canada's submission that the Monetary Penalty that the Minister of Transport is seeking to *enforce* against Air Canada is a "claim" and that the Minister of Transport is a "creditor" within the meaning of the *CCAA*.

24 The Attorney General's second submission, at para. 12 of his supplementary factum, is that the Monetary Penalty is not a claim provable in bankruptcy because there is no "obligation" on Air Canada to pay the penalty until a tribunal or court makes a finding that Air Canada breached the noise abatement regulations and affirms the Monetary Penalty. I reject this submission.

25 The Attorney General did not provide, and I am not aware of, any authority to support the proposition that a debt or liability subject to review or appeal can *never* be a claim provable in bankruptcy. If the Attorney General's submission were correct, a judgment creditor, for example, would never have a provable claim where the judgment debtor appeals the judgment and thereafter files for bankruptcy. This cannot have been the intention of Parliament. In my view, the Monetary Penalty can be a claim provable in bankruptcy notwithstanding the fact that it was subject to an unresolved review by the TATC when Air Canada applied for *CCAA* protection.

26 The Attorney General's third submission, at paras. 13 and 14 of his supplementary factum, is that the interpretation of the term "claim" in the *CCAA* must be informed by the scheme, object and intention of Parliament, and it cannot be Parliament's intention that companies can use the *CCAA* as a "free pass" or "pardon" for offences committed prior to electing *CCAA* protection.

27 With respect, this submission mischaracterizes the *CCAA* process. Interpreting the term "claim" as including penalties issued by the Crown (like the Monetary Penalty in this case) does not give companies subject to such penalties a "free pass". The Minister of Transport was entitled to file the Monetary Penalty with the Claims Officer as a "claim", and to have it validated. The Minister would also have been entitled to vote on any subsequent Plan and to receive a part of the distribution under that Plan. If the Plan was rejected, the *CCAA* stay would be lifted and the Minister would be free to bring proceedings against Air Canada to enforce the Monetary Penalty. While the Crown may not always be able to collect the entire penalty under the *CCAA* process, this hardly justifies labeling the process as a "pardon" system for companies.

28 The Attorney General's fourth submission, at paras. 15 and 16 of his supplementary factum, is that decisions of this Court and the Supreme Court of Canada state that the *CCAA* process does not affect a regulatory body's ability to pursue remedies after a company emerges from court protection.

29 First, the Attorney General submits that Farley J., in *Re Air Canada (Regulator's Order)* (21 July 2003), Toronto 03-CL-4932 at paras. 18, 29 (Ont. Super. Ct.), stated that the "temporal" *CCAA* stay did not prejudice federal regulators' ability to pursue remedies once Air Canada emerged from court protection. Second, the Attorney General submits that the Supreme Court of Canada, in *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.*, [2006] S.C.J. No. 1 at paras. 1, 45 [*Canadian Airlines*], held that *CCAA* restructuring does not "usurp the jurisdiction of a regulatory body to discharge its regulatory mandate to issue decisions, record offences, and ultimately enforce their decisions."

30 I do not agree with this submission. First, Farley J.'s statement in *Regulator's Order* was that after Air Canada emerged from Court protection it would have to deal with "each and every then *unresolved* Regulator matter" (emphasis added). This cannot be taken to mean that no Regulator matters were to be dealt with in the Claims Procedure. In fact, several regulators did file claims, and these claims were resolved prior to Air Canada's emergence from Court protection. Second, I do not agree that the *Canadian Airlines* case stands for the proposition put forward by the Attorney General. That case involved a judicial review of the Canadian Human Rights Tribunal's decision, [1998] C.H.R.D. No. 8, that female flight attendants were not subject to discrimination because they were paid less than the male mechanics and pilots. That decision was overturned by the Federal Court of Appeal, [2004] F.C.J. No. 483, and remitted back to the Tribunal. The Supreme Court of Canada upheld the Federal Court of Appeal's decision. The *Canadian Airlines* case does not in any way address the *CCAA* and its impact on federal regulators.

B. Air Canada's Submissions

31 Air Canada submits that the Monetary Penalty is a "claim". It points out that the definition of "claim" in the Claims Procedure Order is broad. It submits that the fact that a claim is contingent, unliquidated or disputed does not change the character of a claim as one provable under the *BIA* so long as the claim is not too remote or speculative. Air Canada submits that given the factual situation at hand, it is clear that a contingent obligation arose on the part of Air Canada prior to the *CCAA* filing and the date of the stay. It submits that liability for the alleged penalty arose on or about December 23, 2000 when the Air Canada plane landed at Montreal's Dorval airport allegedly in contravention of the noise abatement regulations. Finally, Air Canada says the fact that the TATC had not yet upheld the imposition of the Monetary Penalty as of the date of the *CCAA* stay does not change the character of the Monetary Penalty as a claim provable in bankruptcy.

Disposition in respect of the First Issue

32 I agree with and accept the submissions of Air Canada. I would only add that while it could be said that Air Canada's liability for the Monetary Penalty first arose on December 23, 2000, in my view that liability only became an "obligation" when the Minister of Transport issued the Monetary Penalty on December 19, 2001. Such a liability is not too remote or speculative and is therefore a provable claim under the *BIA*.

33 For the reasons outlined above, I conclude that the Monetary Penalty is a "claim" for purposes of the *CCAA* and the Claims Procedure and Sanction Orders. The Minister of Transport could and should have made a claim in accordance with the direction of the Claims Procedure Order.

The Second Issue - Is the Monetary Penalty an "Excepted Claim" under the *BIA*?

34 The second issue is whether the Monetary Penalty is an "excepted claim" under the *BIA*. The Attorney General submits that if this Court concludes that the Monetary Penalty is a "claim", it is an excepted claim by operation of ss. 178(1) and (2) of the *BIA*.

35 I cannot accept this submission. In my view, s. 178 of the *BIA* does not apply. The *CCAA* refers to the *BIA* solely for the purpose of determining what is or is not a "claim". The *CCAA* does not require a Court to determine whether a "claim" is an "excepted claim" under s. 178 of the *BIA*. Nor does the *CCAA* itself contain a provision analogous to s. 178 of the *BIA*.

36 During oral submissions the Attorney General argued that both the *BIA* and *CCAA* must be read harmoniously together. The Attorney General suggested that Parliament could not have intended to provide for "excepted claims" under the *BIA* but not under the *CCAA* because this would allow companies to voluntarily proceed under the *CCAA* and compromise claims that would otherwise be exempted under the *BIA*. I disagree.

37 The processes established under the *BIA* and *CCAA* are distinct and separate. It is plain from the text of the *CCAA* that Parliament did not intend the *CCAA* to create an "excepted claims" process mirroring the one found in the *BIA*. If it had intended otherwise, Parliament would have included provisions analogous to s. 178 of the *BIA* in the *CCAA*, or would have expressly directed that s. 178 of the *BIA* should be considered, just as it expressly directed in s. 12 of the *CCAA* that reference should be made to the *BIA* to determine what is or is not a "claim".

38 Even if I were to conclude that s. 178 of the *BIA* does apply, I would find that the Monetary Penalty is not an excluded claim.

39 A central purpose of the *BIA* is to encourage the rehabilitation of an honest but unfortunate debtor and permit his or her reintegration into society by obtaining a discharge from the continued burden of financial obligations that cannot be met. Debts that survive a bankruptcy as a result of s. 178(1), therefore, are exceptions to the normative policy objective of rehabilitation.

40 The limited exceptions set out in s. 178(1) of the *BIA* were discussed in *Simone* v. *Daley*, [1999] O.J. No. 571 at paras. 29-30 (C.A.). The Court of Appeal adopted the analysis of Master Funduk in *Jerrard v. Peacock* (1985), 57 C.B.R. (N.S.) 54 at 62-3 (Alta. Q.B., Master), who said that the excepted claims are "the kinds of claims which society (through the legislators) considers to be of a quality which outweighs any possible benefit to society in the bankrupt being released of these obligations."

41 The Attorney General specifically argues that the Monetary Penalty is an excepted claim under s. 178(1)(a) and is therefore not a provable claim in bankruptcy. The relevant provisions provide as follows:

> **Debts not released by order of discharge**
>
> 178.(1) An order of discharge does not release the bankrupt from
>
> (a) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence, or any debt arising out of a recognizance or bail; ...

...

> 178.(2) Claims released - Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.

42 The jurisprudence and academic commentary have interpreted the meaning of "fine" or "penalty" in s. 178(1)(a) as fines or penalties imposed for offences against the state in either a criminal or quasi-criminal context. See Hon. L.W. Houlden, Hon. G.B. Morawetz and J. Sarra, *The 2007 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Carswell, 2006) at 777; *R. v. Fitzgibbon*, [1990] 1 S.C.R. 1005 at para. 28; *Buland Empire Development Inc. v. Quinto Shoes Imports Ltd.* (1999), 11 C.B.R. (4th) 190 at para. 19 (Ont. C.A.) [*Buland*]; *Simone* v. *Daley, supra* at paras. 29-30.

43 In my view, a Monetary Penalty imposed by the Minister of Transport for a regulatory infraction does not constitute a criminal or quasi-criminal fine or penalty.

44 Regulatory infractions are different from criminal offences. Regulatory proceedings attempt to regulate behaviour in specific areas of activity, whereas criminal offences seek to punish "morally reprehensible" acts. *Canadian Aviation Regulation* s. 602.105(c) relates to noise operating criteria and is punishable by a monetary penalty designed to regulate behaviour. Violations of noise abatement regulations relating to air traffic do not involve the morally or socially reprehensible behaviour intrinsic to criminal offences. See *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1302-1303; *R. v. Wholesale Travel Group Inc.* [1991] 3 S.C.R. 154 at para. 125. By contrast, there are hybrid offences set forth in ss. 7.3 through 7.5 of the *Aeronautics Act* that fall under the subtitle of "Prohibitions, Offences and Punishment". Subsection 7.6(2) of the *Aeronautics Act* provides that the summary conviction procedure is not applicable with respect to the contravention of a "designated provision" such as the noise abatement regulation.

45 The Attorney General referred to the decision in *Vancouver (City) v. Alliston*, [2003] B.C.J. No. 781 (Prov. Ct.). In that case, the British Columbia Provincial Court held at paras. 19-22 that a parking fine was an excepted claim under s. 178(1)(a) of the *BIA*, even though such a fine does not engage public morality like criminal and quasi-criminal fines. This decision does not reflect the law in Ontario as clearly set out by the Ontario Court of Appeal in *Buland* and *Simone* v. *Daley, supra*, and for this reason I do not follow it.

46 Even if I were to find that *Alliston* were applicable, that decision does not change the requirement under s. 178(1)(a) that a "court" must issue the fine or penalty. In my opinion the Minister of Transport is not a "court"; therefore, the Monetary Penalty is not a "fine or penalty ... imposed by a court" under s. 178(1)(a).

47 Section 2 of the *BIA* defines the word "court", but that definition is not applicable to s. 178(1)(a). No authority for the precise meaning of the word "court" in s. 178(1)(a) was brought to my attention. However, guidance can be taken from the interpretation of "court" in other statutes.

48 In *Ontario (Ombudsman) v. Ontario (Health Discipline Board)* (1979), 104 D.L.R. (3d) 597 (C.A.), the Court of Appeal had to determine whether the Health Disciplines Board was a "court" for the purposes of s. 14(a) of the *Ombudsman Act*, S.O. 1975, c. 42, which said, "This Act does not apply ... to judges or to the functions of any court." The Court of Appeal concluded that the Board was not a "court". Justice Morden, at p. 612, said, "There is little doubt as to the normal scope of the word 'court' and I do not think that it embraces administrative tribunals, even those exercising powers with a substantial judicial component."

49 In Decision No. 534/90I (1991), 17 W.C.A.T.R. 187, the Workers' Compensation Appeals Tribunal was interpreting the word "court" in s. 24 of the *Canadian Charter of Rights and Freedoms*. At p. 211 of the decision, the Tribunal made the following general comments regarding the plain meaning of the word "court", which I would adopt:

> We would also note that as a matter of plain-meaning reading, the word "court" cannot be fairly taken to include "tribunal". Nowhere in other English-language legal contexts does one see administrative tribunals referred to as "courts". Indeed, it is a trite principle of Canadian administrative law that the most important distinguishing feature of the administrative tribunals is that they are not "courts".

50 Both of these decisions support the conclusion that the plain and ordinary meaning of the word "court" in s. 178(1)(a) of the *BIA* does not include an administrative tribunal such as the TATC and does not encompass the Minister of Transport who imposed the Monetary Penalty in the first instance. This interpretation is bolstered by the general recognition (with the sole exception of the *Alliston* decision) that fines and penalties imposed by an administrative body for regulatory infractions are different in kind from those imposed by a court for criminal or quasi-criminal offences.

51 This would be the end of the matter except for one further argument raised by the Attorney General during oral submissions. It was pointed out that on June 12, 2006 the TATC had issued a certificate, pursuant to s. 7.92 of the *Aeronautics Act*, in the amount of the Monetary Penalty after Air Canada refused to pay the penalty, and that this certificate was registered with the Quebec Superior Court on August 2, 2006. According to s. 8.2 of the *Aeronautics Act*, when such a certificate is so registered it "has the same force and effect, and proceedings may be taken in connection with it, as if it were a judgment in that court". The Attorney General submits that this makes the Monetary Penalty one "imposed by a court" for the purposes of s. 178(1)(a).

52 I reject this submission. I agree with Air Canada's assertion that a Court-registered certificate that is statutorily treated "*as if* it were a judgment in that court" is not equivalent to a fine or penalty actually *imposed* by a court. The Attorney General conceded at the hearing that the Superior Court does not scrutinize a certificate when it is registered. This is in stark contrast to the consideration given by a Court when it is deciding to exercise its power to impose a fine or penalty.

Disposition in respect of the Second Issue

53 I conclude that s. 178 of the *BIA* does not apply to proceedings under the *CCAA*. Even if s. 178 were applicable, taking into consideration the administrative nature of the offence in question (a noise infraction) and the fact that the body issuing the penalty (the Minister of Transport) is not a "court", in my view the Monetary Penalty is not an "excepted claim" under s. 178(1)(a) of the *BIA*.

Overall Disposition

54 I conclude that the Monetary Penalty is a "claim" for the purposes of the *CCAA* and the Claims Procedure and Sanction Orders.

55 Paragraphs 9 and 10 of the Sanction Order provide:

9. THIS COURT ORDERS that, upon the Implementation Date, each Affected Unsecured Claim shall be settled, compromised and released in accordance with the Plan, and the ability of an Unaffected Unsecured Creditor to proceed against [Air Canada] in respect of an Affected Unsecured Claim shall be forever discharged and restrained, and <u>all proceedings with respect to, in connection with or relating to such Affected Unsecured Claims are hereby permanently stayed</u> ... (Emphasis added)

10. THIS COURT ORDERS that, without limiting the Claims Orders, a Creditor that did not ... file a Proof of Claim in accordance with the provisions of the Claims Orders shall be and is hereby forever barred from making any Claim against the Applicants and shall not be entitled to any distribution under the Plan, and that such Claim is forever extinguished.

56 Paragraph 1 of the Sanction Order incorporates the definitions listed in the Plan. The Plan defines "Creditor" as "any Person having a Claim". The Plan also defines "Affected Unsecured Creditor" as a "holder of an Affected Unsecured Claim", and defines "Affected Unsecured Claim" as "all Claims of any Person". Since the Minister of Transport is unquestionably the holder of a claim, paragraphs 9 and 10 of the Sanction Order apply to him.

57 By operation of these two paragraphs, I conclude that the Sanction Order forever extinguishes the Minister of Transport's right to enforce the Monetary Penalty against Air Canada, and that the Sanction Order permanently stays all proceedings "with respect to, in connection with or relating to" the Monetary Penalty.

58 The consequence of this conclusion is that the certificate issued by the TATC and registered with the Quebec Superior Court is a nullity.

59 An Order will issue in accordance with these Reasons for Decision.

60 For greater certainty, I state that the Sanction Order does not require the Minister of Transport to expunge the administrative record of Air Canada's violation of the noise abatement regulations on December 23, 2000. Thus, for example, this decision in no way prohibits the Minister of Transport from considering Air Canada's prior infraction of the noise abatement regulations when determining the quantum of penalty in the event of any future noise abatement regulation infraction by Air Canada.

Costs

61 I may be spoken to as to costs.

P.A. CUMMING J.