COURT FILE NUMBER	1001-13659
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c. C-36, AS AMENDED AND IN THE MATTER OF PETROFLOW ENERGY LTD.
DOCUMENT	**BRIEF OF THE APPLICANTS, LOUIS G. SCHOTT and PETROFLOW ENERGY LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE McLAWS LLP Barristers and Solicitors 3400 Petro-Canada Centre 105-6th Avenue SW Calgary, Alberta T2P 3Y7 Attention: G. Scott Watson Telephone: (403) 294-7038 Facsimile: (403) 265-8263 File Number: **68789-3/GSW**

INTRODUCTION

1. We have been asked by the Plan proponent to seek preliminary advice and direction on whether this is a plan which meets the threshold jurisdictional issue of being a plan of arrangement consistent with the Companies' Creditors Arrangement Act, RSC 1985, c. C-36.

The Debtors

2. Petroflow was incorporated pursuant to the laws of Canada, as Atlantic Gold Mines Limited on July 26, 1994. Its registered office is located at 3400, 150 6th Ave SW, Calgary, Alberta, T2P 3Y7. Petroflow's principal place of business is Tulsa, Oklahoma; it maintains its headquarters and business records there. At present, Petroflow is a

reporting issuer under the securities laws of British Columbia, Alberta and Ontario and the securities of Petroflow have been cease traded by the British Columbia Securities Commission, the Alberta Securities Commission and the Ontario Securities Commission.

3. Petroflow is the parent company of North American Petroleum Corporation USA ("NAPCUS") and directly owns 100% of its equity interests. NAPCUS was incorporated pursuant to the laws of the State of Delaware in April 2005, with its principal place of business in Tulsa, Oklahoma. Its registered office is located at 1209 Orange Street, Wilmington, Delaware, 19801.

4. NAPCUS has one wholly owned subsidiary: Prize Petroleum, LLC ("Prize"). Prize is an Oklahoma limited liability company (incorporated pursuant to the laws of the state of Oklahoma in September 2006) with its principal place of business in Tulsa, Oklahoma. Its registered office is located at 1800 Canyon Park Circle, Suite 201, Edmond, Oklahoma, 73013.

5. Petroflow's assets consist almost exclusively of its equity interests in NAPCUS.

6. Petroflow, NAPCUS, and Prize are hereinafter referred to collectively as "the Debtors".

History of the Proceedings

7. On May 25, 2010, each of NAPCUS and Prize filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code ("Chapter 11"). Concurrently, NAPCUS and Prize filed a motion seeking joint administration of the Chapter 11 proceedings pursuant to Rule 1015(b) of the Federal Bankruptcy Procedure.

8. On May 28, 2010, the U.S. Court entered an order directing the joint administration and procedural consolidation of the Chapter 11 proceedings.

9. After filing under Chapter 11, the Debtors and their advisors subsequently determined that in order to fully restructure the Debtors' debt obligations and strengthen their going forward operations, Petroflow should also file protection under Chapter 11. Accordingly, on August 20, 2010, Petroflow filed a voluntary petition with the U.S. Court under Chapter 11.

10. By way of a Joint Motion filed August 20, 2010, the Debtors, as debtor and debtor in possession, requested entry of an order, pursuant to section 105(a) of the Bankruptcy Code, directing that certain orders entered in respect of the First Filed Petition be made applicable to Petroflow (the "Joint Motion"). The Order on the Joint Motion was filed under Certification of Counsel with the U.S. Court on September 10, 2010 and the requested order was entered on September 10, 2010.

11. By Order of Romaine J, dated September 17, 2010, the Chapter 11 proceedings with respect to Petroflow were recognized as a "foreign main proceeding" under s. 47 of the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ("*CCAA*"). Since that time, Petroflow has appeared before Romaine J. periodically seeking recognition and enforcement in Canada of Orders made by the United States Bankruptcy Court in relation to this matter.

12. In late June, the Debtors filed a Joint Chapter 11 Plan ("Plan") and the disclosure statement for the Plan ("Disclosure Statement") with the United States Bankruptcy Court. Under Chapter 11 procedures, the Plan remains open to amendments for a period of 30 days before it is considered by the Court and sent out to creditors. The hearing to consider the Disclosure Statement is set for July 29, 2011. Once the Plan has been approved by the United States Bankruptcy Court, it is anticipated that Petroflow will seek to have the Plan recognized and enforced in Canada by this honourable Court.

Summary of the Plan

13. The Plan before the United States Bankruptcy Court contemplates that only one entity ("Reorganized NAPCUS") will emerge from the Chapter 11 proceedings, and that the Debtors will otherwise be wound up.

14. The Plan recognizes 5 classes of interest-holders in the Debtors, each of which is entitled to different treatment.

15. Class 1 creditors are secured creditors. At the option of the Debtors or Reorganized NAPCUS, their claims will either be reinstated and rendered unimpaired, paid in full, or the secured creditors will receive the collateral securing their claims. Under the

Bankruptcy Code, the claims of the Class 1 creditors are classified as unimpaired, and they are deemed to have accepted the Plan; they will not be entitled to vote on the Plan.

16. Holders of Class 2 claims, other priority claims, are to be paid in cash for the full amount of their claims under the Plan. These claims are also considered unimpaired, and the claimants in this class are deemed to have accepted the Plan without a vote.

17. Class 3 creditors, Petroflow's general unsecured creditors, are to receive convertible preferred stock in Reorganized NAPCUS of a value equal to their claims. They will be entitled to vote on the Plan.

18. NAPCUS's general unsecured creditors make up Class 4. They are entitled, at their election, either to receive convertible preferred stock in Reorganized NAPCUS for the full amount of their claims, or to be paid in cash for their claims, so long as the aggregate claims receiving cash do not exceed $500 000. These creditors are also entitled to vote on the Plan.

19. Class 5 members are comprised of the current shareholders of Petroflow. Under the Plan, they would be divided into two groups, known as Class 5A and Class 5B. Petroflow has only one shareholder class at present.

20. Class 5A members are those who currently hold more than 250,000 common shares in Petroflow. Upon the Effective Date of the Plan, members of Class 5A will be issued one Reorganized NAPCUS share for each Petroflow share held.

21. Members of Class 5B, those who currently hold less than 250,000 Petroflow common shares, are not entitled to receive shares in Reorganized NAPCUS on the Effective Date of the Plan, and their shares in Petroflow will be cancelled. At a Determination Date (as defined in the Plan) to be no more than two years following the Effective Date of the Plan, however, these former Petroflow shareholders will be entitled to receive, at the option of Reorganized NAPCUS, either one Reorganized NAPCUS share per cancelled Petroflow share, or the fair value of same in cash, provided that, if an Acquisition Event (as defined in the Plan) occurs, members of Class 5 shall receive consideration of the

B

same form and amount that is payable to holders of Reorganized NAPCUS common stock.

JURISDICTIONAL ISSUE

22. On the assumption that the Plan is approved by the United States Bankruptcy Court, is this Plan consistent with the *CCAA*, giving this Court has jurisdiction to recognize and enforce the Plan in Canada?

LAW & ANALYSIS

23. The *CCAA* provides broad jurisdiction to the Court to make whatever orders are appropriate to facilitate the reorganization of a debtor corporation:

> 11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

24. Part IV of the *CCAA*, which deals with cross-border insolvencies, also provides the Court with broad discretion to grant orders once a foreign proceeding has been recognized:

> **49.** (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order
>
> (*a*) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);
>
> (*b*) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's

property, business and financial affairs, debts, liabilities and obligations; and

(*c*) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

(2) If any proceedings under this Act have been commenced in respect of the debtor company at the time an order recognizing the foreign proceeding is made, an order made under subsection (1) must be consistent with any order that may be made in any proceedings under this Act.

25. In the present case, no *CCAA* proceedings were commenced with respect to Petroflow before the order recognizing the American Proceedings was granted by Romaine J. on September 17, 2010. A plain reading of the statute indicates that s. 49(2) does not apply to limit the Court's ability to recognize foreign orders and foreign plans.

26. Both recent case law in this area and commentators, however, appear to have read in the requirement that any orders granted under Part IV of the *CCAA* must be consistent with relief that would otherwise be available in proceedings commenced under the *CCAA*: *Re Probe Resources Ltd* 2011 BCSC 552 at para 40 **[TAB 1]**; *Houlden and Morawetz Bankruptcy and Insolvency Analysis* N§221 **[TAB 2]**. & Tevium

27. It could be argued that requiring a plan of reorganization developed and approved through a foreign main proceeding to conform to the *CCAA* is contrary to the stated purposes of Part IV of the *CCAA*, which are set out in s. 44:

44. The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(*a*) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(*b*) greater legal certainty for trade and investment;

(*c*) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(*d*) the protection and the maximization of the value of debtor company's property; and

(*e*) the rescue of financially troubled businesses to protect investment and preserve employment.

28. Where a foreign main proceeding has been recognized, the Canadian Court has acknowledged that the foreign court is the most appropriate forum to address the issues that arise from the insolvency proceedings. In these circumstances, the role of the Canadian Court is reduced to facilitating the orderly administration of the foreign proceeding and its application in Canada. In *Re Xerium Technologies Inc.*, 2010 ONSC 4395, para 23 **[TAB 3]**, the court referred to an "obligation" to grant the relief sought in an ancillary order once a Chapter 11 proceeding had been recognized as a foreign main proceeding.

29. That said, Part IV of the *CCAA* also clearly grants the Court residual jurisdiction to deal with applications and orders related to a foreign main proceeding:

61. (1) Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

(2) Nothing in this Part prevents the court from refusing to do something that would be contrary to public policy.

30. When these provisions are taken together, the likely result is that a plan of arrangement approved in a recognized foreign main proceeding is subject to less scrutiny than one developed under the *CCAA*, but the court retains jurisdiction to consider whether the plan is inconsistent with the *CCAA* or contrary to public policy. This approach is in line with the approach in *Re Xerium Technologies Inc, supra*, where a foreign plan was recognized and enforced without exhaustively reviewing whether it was "fair and reasonable" as required for a plan of arrangement to be approved under the *CCAA*.

31. The Applicant submits that, whether the test is one of public policy or the more stringent test of whether the plan of arrangement is one that could be approved under the *CCAA* as being the fair and reasonable, the Plan before the United States Bankruptcy Court, as proposed, is permissible.

32. Most of the Plan's provisions are unremarkable; only its proposed treatment of Class 5A and Class 5B interest-holders raises concerns about fairness. It is appropriate for the Court to consider fairness to shareholders in assessing whether a plan of arrangement is fair and reasonable: *Re Canadian Airlines Corp*, 2000 ABQB 442 at para 96 **[TAB 4]**. In the present case, the Applicant submits that, although the proposed treatment of shareholders under the Plan is admittedly unusual, it is not unfair.

33. There is some precedent for treating members of a single shareholder class differently in the context of plans of arrangement under business corporations legislation. In *Re St. Lawrence & Hudson Railway Co.* [1998] OJ No 3934 **[TAB 5]**, the Ontario Court of Justice considered a plan of arrangement under the *Canada Business Corporations Act,* RSC 1985 c. C-44 ("*CBCA*"). Under the proposed plan, two small railway companies would be amalgamated with St. Lawrence & Hudson Railway. The majority shareholder in the two smaller corporations, Canadian Pacific Railway, would receive shares in St. Lawrence & Hudson Railway in return for its stock. The minority shareholders were offered the option of cash for their shares, or to take stock in Canadian Pacific Ltd. Some minority shareholder objected that members of the same shareholder class could not be treated differently under the plan.

34. In approving the plan, Blair J stated that treating shareholders equitably and proportionately did not necessarily mean treating them all in the same fashion. He found that the plan, as proposed, met the test for fairness and reasonableness under the *CBCA*, the same criteria used to evaluate *CCAA* plans.

35. Similarly, cases applying the *CCAA* have permitted members of the same creditor class to be treated differently under a plan of arrangement: *Re Wandlyn Inns Ltd.* [1992] NBJ No . 681 **[TAB 6]**; *Re Sammi Atlas Inc.* [1998] OJ No. 1089 **[TAB 7]**. [illegible]

36. The Applicant recognizes that the cases cited above involve situations in which the differentially-treated shareholders or creditors participated in a vote that endorsed the plan, which is not provided for in this case. An assessment of the reasoning behind the division of the members of Class 5, however, and the protections provided to Class 5B in the Plan show that it is not unfair under the circumstances.

37. Petroflow is a reporting issuer in certain jurisdictions of Canada and has had its securities cease traded. As successor to that corporation, Reorganized NAPCUS will automatically also be a reporting issuer under the securities laws of certain Canadian provinces upon emergence. This poses a number of difficulties.

38. First, Petroflow has not filed financial statements for the year ending 2009, nor for any quarter or annual period since then. At the end of its first quarter of operation, Reorganized NAPCUS would be obligated, as a reporting issuer, to produce comparative financial statements within 60 days of the end of the quarter. In essence, Reorganized NAPCUS would be forced to re-create certain of the financial statements that Petroflow has failed to file within a very short timeline, or risk being cease traded for failure to comply with its reporting duties. The costs associated are large, and would risk placing the new company back in an insolvent position. Additionally, the main investor that the Debtors expect to support Reorganized NAPCUS upon emergence has expressed unwillingness to invest if the funds will be used to pay large auditing bills, rather than develop the operations of the company.

39. The matter is further complicated by the recent adoption of International Financial Reporting Standards ("IFRS") in Canada. In contrast to many reporting issuers that have spent years preparing for this radical change in the manner of financial reporting, Petroflow has taken no steps to implement the new standards. Requiring Reorganized NAPCUS to complete the transition within a short time-frame is unrealistic. Converting to IFRS is associated with large costs above and beyond the accounting costs outlined above, which again could put Reorganized NAPCUS in an insolvent position and prevent it from developing its lands as identified in the Plan.

40. In sum, the success of the Plan hinges upon Reorganized NAPCUS avoiding these onerous obligations. It can do so by applying for an exemption from reporting issuer status under applicable Canadian securities laws **[TAB 8]**. In order to qualify for such an exemption, the company must have fewer than 51 security holders in total in Canada, no more than 15 of which are in any one provincial or territorial jurisdiction. At present, it appears that Petroflow has more than 3000 security holders in Alberta alone.

page 2

41. Providing all of Petroflow's current shareholders with shares in Reorganized NAPCUS upon emergence would preclude the company's obtaining an order that it is deemed not to be a reporting issuer, and could result in the failure of the Plan.

42. In order to address this issue, the Plan provides for the staged distribution of shares in Reorganized NAPCUS to certain former Petroflow shareholders, or at the election of Reorganized NAPCUS, a deferred payment of cash. The Plan has been developed in close consultation with the Equity Committee, a group of the Debtors' security holders appointed by the United States Trustee for the District of Delaware, in accordance with the Bankruptcy Code. The Equity Committee includes representation from Petroflow shareholders and has a fiduciary duty to all of the equity holders of the Debtors. It is anticipated that by the time this application is heard, the Equity Committee will have filed a statement with the United States Bankruptcy Court, endorsing the Plan.

43. The Equity Committee has closely considered a number of approaches by which it might increase the number of Petroflow shareholders who receive value upon the Effective Date of the Plan, including reducing the threshold number of shares required for a former

Petroflow shareholder to be included in Class 5A in jurisdictions other than Alberta, where many of Petroflow shareholders reside. This was determined to be a less fair method of segregating the shareholders than applying a single higher threshold across the board.

44. Discussions with the Equity Committee have also led to the inclusion of a number of safeguards for the members of Class 5B. The date on which Class 5B interest holders will receive value for their cancelled Petroflow shares, is to occur no less than two years following the Effective Date of the Plan. Rather than set this point as the Determination Date, the Plan requires the Board of Directors for Reorganized NAPCUS to defer the Determination Date by resolution every six months, to a maximum of two years. This increases the likelihood of an earlier distribution. The Plan also calls for the distribution to be made to Class 5B members if any cash dividends or other cash distributions are made to Reorganized NAPCUS shareholders prior to the Determination Date.

45. Determining whether a Plan is fair and reasonable involves, to a certain extent, comparing the Plan to other available alternatives: *Re Canadian Airlines Corp, supra*. There are only two such alternatives in the present case: provide Reorganized NAPCUS shares to all current Petroflow shareholders on emergence, or give the Petroflow shareholders nothing in return for their Petroflow shares upon the winding-up of that company.

46. In the present case, providing an immediate equity stake in Reorganized NAPCUS to <u>all</u> of Petroflow shareholders is impracticable as Reorganized NAPCUS would not qualify for an exemption from reporting issuer status – if Reorganized NAPCUS continues as a reporting issuer upon emergence, its securities will almost immediately be cease traded.

47. It would, on the other hand, be possible to proceed with a Plan in which the Petroflow shareholders receive nothing in return for their Petroflow shares, but the Applicant submits that this would be considerably less fair than the staged distribution proposed under the Plan.

48. Under the Plan as proposed, all shareholders in Petroflow are entitled to the same value for their Petroflow shares, but the distribution is spread out over time. This solution is, if not equal, at least equitable and proportionate, and the Applicant submits that it is both fair and reasonable in the circumstances.

DATED at the City of Calgary, in the Province of Alberta, this 21st day of July, 2011.

PARLEE McLAWS LLP

Per: ______________________________

for G. Scott Watson
Solicitors for Petroflow Energy Ltd.

TO: THE CLERK OF THE COURT
Calgary, Alberta

2011 CarswellBC 1043, 2011 BCSC 552, [2011] B.C.W.L.D. 4722, [2011] B.C.W.L.D. 4721, [2011] B.C.W.L.D. 4720

Probe Resources Ltd., Re

In the Matter of the Companies' Creditors Arrangement Act Part IV Cross-Border Insolvencies R.S.C. 1985, C. C-36, as amended

In the Matter of Probe Resources Ltd., Petitioner

British Columbia Supreme Court

S. Fitzpatrick J.

Heard: March 31, 2011
Judgment: March 31, 2011
Docket: Vancouver S112111

Counsel: P.J. Reardon, for Petitioner

Subject: Insolvency

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

Company was subject to cease trade order — Company operated through four wholly owned subsidiaries, all incorporated in United States — Restructuring officer was appointed and company and subsidiaries began proceedings in American court — Company brought application to recognize cross-border proceedings — Application granted — Company was foreign representative of itself and subsidiaries as required by s. 45 of Companies' Creditors Arrangement Act — It was clear that restructuring proceedings in U.S. were foreign proceeding as required by s. 45 of Act — Although not all documents required by Act had been filed to recognize proceedings, court was entitled to exercise discretion to rely on copies of court documents and affidavit evidence — American proceedings were foreign main proceedings — Centre of main interest of company and subsidiaries was United States — Company and subsidiaries operated in Texas and Louisiana — All company's business operations were through U.S. subsidiaries — Financial statements indicated all of group's revenues were derived in U.S. and that all operating assets were located in U.S. — Only nominal assets were located in Canada; other than administration and organization matters, all activities were in the U.S. — Company had little connection to British Columbia outside its incorporation — Third parties would expect that U.S. law would govern — Approval given for recognition of certain orders in American courts, and for board of company to issue new common shares in accordance with restructuring plan — Recognition of U.S. proceedings was necessary to ensure fair and efficient administration of insolvency proceeding — No prejudice to any Canadian interests .

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Company was subject to cease trade order — Company operated through four wholly owned subsidiaries, all incorporated in United States — Restructuring officer was appointed and company and subsidiaries began proceedings in American court — Company brought application to recognize cross-border proceedings — Application granted — Company was foreign representative of itself and subsidiaries as required by s. 45 of Companies' Creditors Arrangement Act — It was clear that restructuring proceedings in U.S. were foreign proceeding as required by s. 45 of Act — Although not all documents required by Act had been filed to recognize proceedings, court was entitled to exercise discretion to rely on copies of court documents and affidavit evidence — American proceedings were foreign main proceedings — Centre of main interest of company and subsidiaries was United States — Company and subsidiaries operated in Texas and Louisiana — All company's business operations were through U.S. subsidiaries — Financial statements indicated all of group's revenues were derived in U.S. and that all operating assets were located in U.S. — Only nominal assets were located in Canada; other than administration and organization matters, all activities were in the U.S. — Company had little connection to British Columbia outside its incorporation — Third parties would expect that U.S. law would govern — Approval given for recognition of certain orders in American courts, and for board of company to issue new common shares in accordance with restructuring plan — Recognition of U.S. proceedings was necessary to ensure fair and efficient administration of insolvency proceeding — No prejudice to any Canadian interests.

Cases considered by *S. Fitzpatrick J.*:

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

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

Xerium Technologies Inc., Re (2010), 2010 CarswellOnt 7712, 2010 ONSC 3974, 71 C.B.R. (5th) 300 (Ont. S.C.J. [Commercial List]) — considered

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Generally — referred to

Chapter 11 — considered

Business Corporations Act, S.B.C. 2002, c. 57

Generally — referred to

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

Generally — referred to

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

Generally — referred to

Pt. IV — referred to

s. 6(2) — considered

s. 44 — considered

s. 45(1) "foreign non-main proceeding" — considered

s. 45(1) "foreign representative" — considered

s. 45(2) — considered

s. 46 — considered

s. 46(1) — considered

s. 46(2) — considered

s. 46(2)(a) — considered

s. 46(2)(b) — considered

s. 46(2)(c) — considered

s. 46(3) — referred to

s. 46(4) — considered

s. 47(2) — considered

s. 48(1) — considered

s. 48(2) — considered

s. 49 — considered

s. 49(1) — considered

s. 53(b) — considered

APPLICATION by company involved in restructring proceedings for recognition of cross-border proceedings, pursuant to *Companies' Creditors Arrangement Act*.

***S. Fitzpatrick J.*:**

1

THE COURT: This is an application pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), and, specifically Part IV entitled "Cross-Border Insolvencies", to recognize certain cross-border insolvency proceedings relating to the petitioner, Probe Resources Ltd. ("Probe Canada").

2 By way of background, Probe Canada is a British Columbia corporation incorporated pursuant to the *Business Corporations Act*, S.B.C. 2002, c.57 (the "*BCA*"). Its registered office is located in Vancouver, British Columbia. It is listed as a public company on the TSX Venture Exchange. As at December 10, 2010, Probe Canada had approximately 106 million issued and outstanding common shares. At present, Probe Canada is subject to a cease trade order issued by securities regulators.

3 Probe Canada operates through four wholly owned subsidiaries, all of which are incorporated in the U.S. Its business operations include oil and natural gas exploration and production. I am advised that those subsidiaries operate businesses near the Gulf of Mexico in Texas and Louisiana. None of the business operations take place in Canada.

4 The impetus behind the restructuring proceedings, discussed in more detail below, arises from the secured debt owing by Probe Canada and its U.S. subsidiaries in the amount of approximately $27 million.

5 In November 2010, Mr. T. Coy Gallatin was engaged by the board of Probe Canada to become the chief restructuring officer of Probe Canada and its subsidiaries. Mr. Gallatin is a resident of Texas. Shortly after Mr. Gallatin's appointment, on November 16, 2010, the Probe U.S. subsidiaries commenced proceedings in the United States Bankruptcy Court for the Southern District of Texas Houston Division (the "U.S. Bankruptcy Court") pursuant to Chapter 11 of the *United States Bankruptcy Code*. The Chapter 11 proceedings of Probe Canada followed shortly thereafter, on December 10, 2010. I understand that joint administration of the bankruptcy cases for all five companies has been ordered by the U.S. Bankruptcy Court.

6 It appears that the Chapter 11 proceedings have progressed at a fairly rapid rate. Various orders have been granted in those proceedings approving the disclosure requirements relating to the joint plan of arrangement that was proposed, and approving the voting procedures so that the stakeholders could consider the plan. On March 18, 2011, Probe Canada and its subsidiaries confirmed to the U.S. Bankruptcy Court that the plan had been approved by the requisite majorities of the classes of creditors. Ultimately, on March 21, 2011, the Honourable Judge Karen Brown of the U.S. Bankruptcy Court granted an order confirming the joint plan as presented by Probe Canada and its U.S. subsidiaries.

7 The provisions of the *CCAA* relating to cross-border insolvencies that Probe Canada seeks to rely on have been in place for many years now. They were recently amended in late 2009 to, in large part, adopt the *United Nations Commission on International Trade Law* ("*UNCITRAL*") Model Law on cross-border insolvencies. I am advised by Mr. Reardon, counsel for the applicant, that there has been little judicial consideration of these new provisions.

8 The application is brought specifically under s. 46(1), which provides:

> A foreign representative may apply to the court for recognition of the foreign proceeding in respect of which he or she is a foreign representative.

9 The first question is whether or not the requirement of there being a "foreign representative" has been met. Section 45(1) defines a "foreign representative" as:

> ... a person or body, including one appointed on an interim basis, who is authorized, in a foreign proceeding respect of a debtor company, to

(a) monitor the debtor company's business and financial affairs for the purpose of reorganization; or

(b) act as a representative in respect of the foreign proceeding.

10 I have been referred to Judge Brown's order in the U.S. Bankruptcy Court on March 21, 2011, which specifically authorizes Probe Canada to act as a foreign representative on behalf of itself and the U.S. subsidiaries in any judicial or other proceeding held in a foreign country. Accordingly, I am satisfied that Probe Canada stands before the Court today as a foreign representative as that term is defined in the *CCAA*.

11 The next question is whether there is a "foreign proceeding". Section 45(1) defines a foreign proceeding as meaning:

> ... a judicial or an administrative proceeding ... in a jurisdiction outside Canada dealing with creditors' collective interests generally under any law relating to bankruptcy or insolvency in which a debtor company's business and financial affairs are subject to control or supervision by a foreign court for the purpose of reorganization.

12 It is clear in this case that the foreign proceedings are those under Chapter 11 of the *United States Bankruptcy Code*. I am satisfied that those proceedings were commenced in the U.S. Bankruptcy Court by Probe Canada and its U.S. subsidiaries, as I have earlier described. Proceedings under the *United States Bankruptcy Code* are well known in this Court and in other superior courts across Canada, and I do not believe that there is any controversy that those proceedings would constitute a foreign proceeding in this Court.

13 The *CCAA* provides that the foreign representation must submit certain documents in its application materials to prove both the existence of the foreign proceeding and also the foreign representative's authority to act as such. Subsections 46(2)(a) and (b) of the *CCAA* provide that an application must be accompanied by a certified copy of the instrument that both commences the foreign proceeding and that authorizes the foreign representative to act. In the alternative, the foreign representation must provide a certificate from the foreign court affirming the existence of the foreign proceedings and affirming the foreign representative's authority to act. Lastly, s. 46(2)(c) provides that the foreign representative must provide a statement identifying all foreign proceedings in respect of the debtor company that are known to the foreign representative. These documents may be accepted by the Court as evidence without further proof: s. 46(3).

14 In this case, certified copies of those U.S. Bankruptcy Court documents have not been provided. Nor has the U.S. Bankruptcy Court provided a certificate as required. Appended to Mr. Gallatin's affidavit are simply copies of the various court documents.

15 Counsel for Probe Canada made submissions regarding the manner of proof provided. Counsel for Probe Canada has referred me to s. 46(4) of the *CCAA* which provides that the Court may, in the absence of those documents, accept any other evidence of the existence of the foreign proceeding and the foreign representative's authority that it considers appropriate. I am satisfied on the basis of the affidavit evidence and copies of documents provided that the necessary evidentiary basis has been brought before this Court to establish both the commencement of the foreign proceeding and the authority of the foreign representative.

16 I would say, however, as a matter of practice, that s. 46(2) is clear in the sense of dictating the ideal evidence that should be brought before courts on these types of proceedings: the certified copies, or the certificate from the foreign court. In respect of future applications, however, it is my view that there must be some basis upon which courts would resort to s. 46(4) in considering a potential alternate form of proof of those matters. For example, I would have expected and will expect in future cases that if certified copies or court certificates are not available, there will be some reasonable explanation provided by the moving party as to why those are not available and why

the alternate form of proof should be accepted.

17 Accepting that the evidentiary basis under s. 46 of the *CCAA* has been met, the next question to be considered is whether this is a "foreign main proceeding" or a "foreign non-main proceeding", as those terms as defined in s. 45. This determination is important in two respects. Firstly, the *CCAA* dictates under s. 47(2) that the Court shall specify in the order whether it is one or the other, i.e., either a main proceeding or a foreign non-main proceeding. Secondly, that finding is not necessarily determinative of what relief might be granted by the Court under Part IV of the *CCAA*, but it does dictate whether certain provisions are mandatory or, alternatively, within the discretion of the Court.

18 Section 45(1) of the *CCAA* defines a "foreign main proceeding" as "a foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests." This definition derives in large part from the *UNCITRAL* Model Law and is known colloquially before this Court and other courts around the world as establishing where the "COMI" is.

19 Section 45(2) of the *CCAA* provides that:

> For the purposes of this Part, in the absence of proof to the contrary, a debtor company's registered office is deemed to be the centre of its main interests.

The registered office of Probe Canada is in British Columbia. Nevertheless, counsel for Probe Canada takes the position that the COMI of Probe Canada is in fact in the U.S. and that the recognition order should be granted by the Court on that basis.

20 As I said earlier, the 2009 amendments have been sparsely considered by Canadian courts to date. In particular, the definition of "foreign main proceeding" has received little judicial attention in Canada.

21 I have been referred by Probe Canada's counsel to Dr. Janis P. Sarra's text, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at 295-296. There, Professor Sarra states that the *UNCITRAL Legislative Guide on Insolvency Law* defines centre of main interest as "the place where the debtor conducts the administration of its interests on a regular basis and that is therefore ascertainable by third parties." Professor Sarra also states that the presumption that the centre of main interest is the registered office of the debtor company can be rebutted if there are factors which, viewed objectively by third parties, would lead to the conclusion that the centre of main interest is other than at the location of the registered office.

22 I also note the statement in Kevin P. McElcheran's text, *Commercial Insolvency in Canada*, 2nd ed., (Markham, Ont: LexisNexis Inc., 2011), at 376:

> Case law decided under other statutes based on the Model Law, such as the European Union *Insolvency Proceedings Regulation* [footnote omitted] and Chapter 15 of the U.S. *Bankruptcy Code*, provide guidance to Canadian courts in interpreting the meaning of COMI. European Union and American precedents suggest that COMI will be determined by reference to criteria that are objective and ascertainable by third parties. Such relevant factors include:
>
> (1) the location of headquarters;
>
> (2) the location of those who manage the debtor's business;
>
> (3) the location of primary assets and operations, and

(4) the location of majority of creditors.

In deciding whether the debtor has proven that its COMI is in the jurisdiction of the foreign proceeding, Canadian courts, as the U.S. courts have done, may consider the connections between the debtor and the foreign jurisdiction comprehensively in order to give effect to the legitimate expectations of the debtor's constituents as to which substantive laws will apply to their relationship with the debtor.

23 In *Xerium Technologies Inc., Re*, 2010 ONSC 3974 (Ont. S.C.J. [Commercial List]), Justice Campbell referenced an earlier recognition order that he had granted under Part IV of the *CCAA*. In that case, the applicant was Xerium, a Delaware company which had various direct and indirect subsidiaries, including one in Canada. The Delaware Chapter 11 proceedings were recognized in Ontario as a foreign main proceeding. Among other things, Justice Campbell noted that Xerium and its subsidiaries operated a highly integrated business and were managed centrally from the United States.

24 In this case, Mr. Gallatin has provided certain evidence in support of his contention that the U.S. is the COMI of Probe Canada and its subsidiaries. Probe Canada and its subsidiaries operate within Texas and Louisiana near the Gulf of Mexico. All of Probe Canada's business operations are through the U.S. subsidiaries. I was referred to consolidated financial statements of Probe Canada and its subsidiaries which indicate that all of the group's revenues are derived in the U.S. and that all of the operating assets are located in the U.S. Only nominal assets are located in Canada. All of the operations of Probe Canada, other than administration and organization matters, are in the U.S.

25 During counsel's submission, it was not apparent what the connection to British Columbia was, apart from Probe Canada's incorporation under the *BCA*. Although there was no evidence on these matters, I am prepared to accept the submissions of Mr. Reardon on these points. There does not appear to be any physical presence of Probe Canada in British Columbia, or in Canada. I was advised that the registered office of Probe Canada is in fact Mr. Reardon's law offices. Only one of the directors resides in British Columbia. I was not, unfortunately, advised as to where other directors might be located. Finally, I was also advised that the Chief Executive Officer and Chairman of Probe Canada, who was terminated shortly after the appointment of Mr. Gallatin, resided in Texas.

26 Mr. Gallatin also gave evidence that the operations of this group in the Gulf of Mexico are heavily regulated, particularly by the United States Bureau of Ocean Energy Management, Regulation and Enforcement.

27 Mr. Gallatin in his affidavit states, quite presumptively in my opinion, that he believes that the centre of main interest of Probe Canada is in the U.S. Mr. Reardon quite properly pointed out that the decision on that matter is within the Court's bailiwick and not Mr. Gallatin's.

28 In any event, I do agree with Mr. Gallatin. I conclude that, in all of the circumstances, the centre of main interest, or COMI, of Probe Canada and its subsidiaries is in the U.S. and that the Chapter 11 proceedings should be recognized on that basis. Looking objectively at the factors present in this case, I conclude that the legitimate expectations of third parties dealing with the group would consider that U.S. law would govern. These are the stakeholders who stand to be materially affected by the restructuring proceedings in the U.S. Accordingly, I find that the presumption in s. 45(2) of the *CCAA* has been rebutted in respect of Probe Canada.

29 Having concluded that the U.S. proceedings are a foreign main proceeding, ss. 48(1) and (2) of the *CCAA* dictate that I must make certain orders staying or prohibiting certain proceedings or dealing with the debtor company's assets:

Order relating to recognition of a foreign main proceeding

now s.49

48 (1) Subject to subsections (2) to (4), on the making of an order recognizing a foreign proceeding that is specified to be a foreign main proceeding, the court shall make an order, subject to any terms and conditions it considers appropriate,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken against the debtor company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the debtor company;

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the debtor company; and

(d) prohibiting the debtor company from selling or otherwise disposing of, outside the ordinary course of its business, any of the debtor company's property in Canada that relates to the business and prohibiting the debtor company from selling or otherwise disposing of any of its other property in Canada.

Scope of order

(2) The order made under subsection (1) must be consistent with any order that may be made under this Act.

30 The terms of the order proposed by Probe Canada are consistent with these provisions. I note that the proposed order is also consistent with the same type of terms contained in British Columbia's model *CCAA* initial order and therefore it complies with s. 48(2).

31 Even if I had concluded that the U.S. bankruptcy proceedings were not a foreign main proceeding, but a "foreign non-main proceeding", this Court has the jurisdiction to consider a recognition order. A "foreign non-main proceeding" is defined as a foreign proceeding other than a foreign main proceeding. If, for example, the COMI of Probe Canada and its subsidiaries was other than the U.S., the Court may exercise its discretion to essentially order the same relief in appropriate circumstances. Section 49(1)(a) provides:

Other orders

49 (1) If an order recognizing a foreign proceeding is made, the court may, on application by the foreign representative who applied for the order, if the court is satisfied that it is necessary for the protection of the debtor company's property or the interests of a creditor or creditors, make any order that it considers appropriate, including an order

(a) if the foreign proceeding is a foreign non-main proceeding, referred to in subsection 48(1);

(b) respecting the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor company's property, business and financial affairs, debts, liabilities and obligations; and

(c) authorizing the foreign representative to monitor the debtor company's business and financial affairs in Canada for the purpose of reorganization.

32 If necessary, and if the U.S. proceedings were a "foreign non-main proceeding", I would have considered the

same relief relating to a "foreign main proceeding" to be appropriate in these circumstances. Probe Canada seeks the relief relating to the stays of proceedings in order to allow the U.S. proceedings to be finalized in an orderly fashion. There are substantial factors connecting Probe Canada and its subsidiaries to the U.S. as noted above. To that extent, these provisions would be necessary for the protection of Probe Canada and its subsidiaries' property, and the interests of their creditor or creditors, whether in the U.S., Canada or elsewhere.

33 Probe Canada also seeks various ancillary orders pursuant to s. 49 of the *CCAA* which it says are appropriate in this case.

34 Probe Canada is seeking specific recognition of various court orders of Judge Brown granted in the U.S. bankruptcy proceedings, and orders allowing implementation of those orders, as follows:

(a) Order Approving Joint Disclosure Statement regarding Joint Chapter 11 Plan of Reorganization of Probe Canada and the U.S. Subsidiaries made March 1, 2011; and

(b) Amended Order approving:

(i) the Confirmation Hearing Notice, the contents of the Solicitation Package, and the manner of mailing and service of the Solicitation Package and Confirmation Hearing Notice;

(ii) the procedures for voting and tabulation of ballots;

(iii) the form of ballot; and

(iv) the procedures for allowing claims for voting purposes only made March 1, 2011; and

(c) Order confirming Joint Chapter 11 Plan and Reorganization of Probe Canada and the U.S. Subsidiaries made March 21, 2011. (By this order, Judge Brown confirmed that all requirements under the *United States Bankruptcy Code* had been met, that the joint plan was fair and reasonable, that the requisite number and value of claims had approved the joint plan and that the joint plan was to be implemented. This order has been filed with the U.S. Bankruptcy Court but has not yet been signed by Judge Brown.)

35 Mr. Reardon has referred me to the plan that has been approved by the U.S. Bankruptcy Court. I will briefly summarize the provisions in that plan. Basically, they provide for new common shares of Probe Canada to be issued to various classes of creditors whose claims are to be impaired by the plan. There are three classes of creditors whose claims will be impaired:

1. the senior secured creditor, who, as I said earlier, is owed in excess of $27 million;

2. certain creditors whose claims arise from a debt restructuring agreement (I am advised that these are essentially akin to administrative charges); and

3. the general creditors.

36 Under the joint plan, the senior secured creditor is to receive 90% of the new common stock and the class of debt restructuring creditors are to receive 10%. In essence, the majority of the new shares will be held by those two parties, and the existing shareholders of Probe Canada are to hold no more than 3% of the shares in the reorganized company.

37 The general creditors, which are the third class of creditors, are to receive a *pro rata* share of distributions from recoveries under certain avoidance actions available to restructured companies in the U.S.

38 Consistent with the requirement under s. 46(2)(c) of the *CCAA*, Mr. Gallatin states that a Canadian creditor, Cypress Acquisitions Ltd., just recently, on March 21, 2011, filed a notice of civil claim in this Court against Probe Canada, seeking recovery of approximately $70,600. I am advised that the general creditors under the joint plan in the U.S. include Cypress Acquisitions Ltd. In fact, I am advised by Mr. Reardon that the Chapter 11 proceedings in the U.S. have included all of the Canadian creditors of either Probe Canada or any of its subsidiaries and that those proceedings were equally available to the Canadian creditors, including Cypress Acquisitions Ltd.

39 The further ancillary relief sought by Probe Canada relates to the manner in which the new common shares are to be issued towards effecting the restructuring of the shareholdings in Probe Canada. Probe Canada seeks an order allowing its board of directors to take certain steps to effect the transactions. Those steps would include:

• Firstly, continuing Probe Canada under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44;

• Secondly, changing the name of Probe Canada to a name identified by the board; and,

• Thirdly, consolidating the common shares of Probe Canada in a ratio determined by the board, all pursuant to duly passed resolutions of the board.

All of these matters are consistent with the joint plan of arrangement as approved by the U.S. Bankruptcy Court on March 21, 2011.

40 The jurisdiction to grant such ancillary relief is found in s. 6(2) of the *CCAA*:

> If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

The applicability of that provision in the context of cross-border proceedings follows from s. 48(2) of the *CCAA*, which provides that an order under Part IV must be consistent with any order that may be made under the *CCAA*. Accordingly, to the extent that this Court may have granted this relief in other types proceedings under the *CCAA*, that relief is equally available in the context of recognition proceedings such as this one. I also note that to the extent that this provision allows the Court to override what might be requirements under provincial legislation in that respect (for example, under the *BCA*), the paramountcy doctrine might be invoked under the *CCAA*: see *Loewen Group Inc., Re* (2001), 32 C.B.R. (4th) 54 (Ont. S.C.J. [Commercial List]).

41 In conclusion, I am satisfied that I have the jurisdiction under Part IV of the *CCAA* to grant the order sought. In my view, a recognition order such as is sought here is consistent with the purpose of Part IV the *CCAA*, as articulated in s. 44:

> **Purpose**
>
> 44 The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote
>
> > (a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

42 In *Xerium*, at para. 27, Justice Campbell quotes certain factors from *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]), which may be considered in a recognition application. In *Xerium*, the Court was considering recognition of the final order of a U.S. Bankruptcy court approving a plan, having earlier granted an order recognizing the foreign proceeding and the authority of the foreign representative. Similar factors are at play here. The Probe companies are a highly integrated business that is managed centrally from the U.S. The confirmation of the U.S. proceedings and the joint plan is sought in accordance with standard and well-established procedures and practices from the U.S. Bankruptcy Court. Probe Canada is a full participant in those proceedings. Recognition of the U.S. proceedings is necessary to ensure that there is a fair and efficient administration of this insolvency proceeding. This is a situation where there is no prejudice to Canadian interests. Canadian creditors have had, and will enjoy, full rights of participation, along with the U.S. creditors, in those proceedings.

43 Mr. Reardon, I have one point on your draft form of order that I wish to address with you, unless you wish to take me through the order in some detail.

44

MR. REARDON: I'm happy to, My Lady. I was going to say the only thing that I would suggest is — I can't say it's out of the ordinary but what caused me a little concern — is the service of the material, which is at para. 12, page 5. All Part IV says about the obligation of the foreign representative is that it will advertise twice. We've asked for one advertisement. These advertisements are fairly expensive. It doesn't say anything else about serving anybody. Now, all of the creditors, of course, pursuant to the orders made in the U.S. have received notice of the U.S. bankruptcy proceeding, and so I have asked in the order that we comply with s. 53, which is placing at least one ad in either of the national papers but that there be no other necessity of notification, but then ask for an order about how to effect service if we have to, and I had in mind, particularly with para. 13, serving the one company that has started the action.

45

THE COURT: Well, I think that would certainly be the minimum, to serve Cypress Acquisitions Ltd. without delay. Section 53(b) of the *CCAA* requires that the foreign representation must publish once a week for two consecutive weeks, unless otherwise directed by the courts. In light of the lateness of the recognition proceeding, I am going to make you comply with publication for two consecutive weeks, and you can choose between the *Globe* or the *Post* in addition to, as I have said, serving Cypress Acquisitions Ltd.

46 I also wish to address the filing of this order in the U.S. Bankruptcy Court. What happens typically in these U.S. proceedings, of course, is that there is an internet portal through which interested parties can look at documents. I do not know if it is the same here as what has happened in cases where I was involved, but in my experience what typically happens is that the debtors retain an entity to post all of the court documents and allow people access to those documents over the internet. You have to sign up and then you get access to all of these documents, because there is typically a myriad of these documents that are filed and it is an ongoing process. So I am going to order that

if there is such a posting of the documents in the U.S. proceedings, that this order be similarly posted. I do not know whether that can arise directly or whether you have to file this order with the U.S. Bankruptcy Court in the first place. I am assuming that you are going to file this in the Chapter 11 proceedings in any event.

47

MR. REARDON: That will be up to counsel in the U.S. I will deliver the order to them and they will do, I guess, what they're supposed to do with it. I don't know, but certainly if you order that we post it, if this service exists, then that's easy. I mean, I will deliver it to them. I'm not sure we can order that it be filed in the Chapter 11 proceeding.

48

THE COURT: I do not know the answer to that either. What I am saying is that if there is this type of a process where you can post documents so that the public is aware of it, I am also ordering that it happen.

49

THE COURT: Regarding para. 6 of the draft order, I find it a bit odd that this Court would be asked to declare that "[t]he U.S. Court has the jurisdiction to determine, compromise or otherwise affect the interests of claimants, including creditors and shareholders of Probe Canada, against Probe Canada". The U.S. Bankruptcy Court's order approving the joint plan on March 21, 2010 specifically finds that that court has jurisdiction under the *United States Bankruptcy Code* in that respect. The order sought from this Court is simply to recognize the taking of that jurisdiction by the U.S. Bankruptcy Court and to grant ancillary relief to allow an orderly implementation of that approval order in Canada on the basis of comity. I do not see that it is necessary or desirable for this Court to make declarations on matters not within the purview of these recognition proceedings. It seems to me that it is implicit from this Court recognizing the U.S. orders that have been granted that the taking of that jurisdiction is to be recognized and enforced in Canada. I do not frankly think you need this provision.

50 Accordingly, the order sought is approved with the changes as discussed above.

Application granted.

END OF DOCUMENT

HMANALY N§221

Houlden and Morawetz Bankruptcy and Insolvency Analysis

L.W. Houlden and Geoffrey B. Morawetz

Companies Creditors Arrangement Act
Sections 44-61
N§221 — Discretionary Orders Made After Recognition Order

N§221 — Discretionary Orders Made After Recognition Order

See s. 61

Section 49(1) authorizes the court to grant post-recognition relief. The court is not restricted in its ability to grant any type of relief that is available under Canadian law and that may be appropriate in the circumstances of the case. Section 49(2) provides that any order must be consistent with any orders that may be made in any proceedings under the *CCAA* (2007, c. 36 proclaimed in force as of September 18, 2009). Section 49(3) clarifies that court orders made under subsection 49(1) do not prevent the commencement or continuation of proceedings under the *CCAA*, the *BIA* or the *Winding-up and Restructuring Act* in respect of the debtor company (2007, c. 36 proclaimed in force as of September 18, 2009).

Canadian debtors in a *CCAA* proceeding applied for an order authorizing an interim distribution of funds to a banking syndicate, their major secured creditor under a guarantee of the indebtedness of the entire corporate group, including debtors engaged in Chapter 11 proceedings in the United States. Romaine J. held that it is not necessarily the case that a distribution of funds from the Canadian estate must await the resolution of the Chapter 11 proceedings, as *CCAA* proceedings may advance at a different pace, if the court is satisfied by the evidence before it that it is appropriate to do so. However, here, the potential for prejudice to unsecured creditors outweighed the benefits of an early payment on the guarantee to the lenders and the court declined to make the order: *Re Sem-Canada Crude Co.* (2009), 2009 CarswellAlta 167, 52 C.B.R. (5th) 131, 2009 ABQB 90 (Alta. Q.B.). For a discussion of this decision, see N§126 "Claims of Creditors".

END OF DOCUMENT

2010 CarswellOnt 7712, 2010 ONSC 3974, 71 C.B.R. (5th) 300

Xerium Technologies Inc., Re

IN THE MATTER OF the Companies' Creditors Arrangement ACT, R.S.C. 1985, c. C-36, AS AMENDED

XERIUM TECHNOLOGIES, INC., IN ITS CAPACITY AS THE FOREIGN REPRESENTATIVE OF XERIUM TECHNOLOGIES, INC., HUYCK LICENSCO INC., STOWE WOODWARD LICENSCO LLC, STOWE WOODWARD LLC, WANGNER ITELPA I LLC, WANGNER ITELPA II LLC, WEAVEXX, LLC, XERIUM ASIA, LLC, XERIUM III (US) LIMITED, XERIUM IV (US) LIMITED, XERIUM V (US) LIMITED, XTI LLC, XERIUM CANADA INC., HUYCK.WANGNER AUSTRIA GMBH, XERIUM GERMANY HOLDING GMBH, AND XERIUM ITALIA S.P.A. (collectively, the "Chapter 11 Debtors") (Applicants)

Ontario Superior Court of Justice [Commercial List]

C. Campbell J.

Heard: May 14, 2010
Judgment: September 28, 2010
Docket: 10-8652-00CL

Counsel: Derrick Tay, Randy Sutton for Applicants

Subject: Insolvency

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Foreign Proceedings — Debtors commenced proceedings in U.S. under Chapter 11 of U.S. Bankruptcy Code ("U.S. Code") — Recognition order was granted in Canada recognizing Chapter 11 Proceedings as foreign main proceeding in respect of Debtors, pursuant to Pt. IV of Companies' Creditors Arrangements Act ("CCAA") — U.S. Bankruptcy Court made various orders in respect of Debtors' ongoing business operations ("Orders") and confirmed Debtors' Joint Plan of Reorganization ("Plan") under U.S. Code ("Confirmation Order") — Applicant company, Foreign Representative of Debtors, brought motion to have Orders, Confirmation Order and Plan recognized and given effect in Canada — Motion granted — Provisions of Plan were consistent with purposes set out in s. 61(1) of CCAA — Plan was critical to restructuring of Debtors as global corporate unit — Recognition of Confirmation Order was necessary to ensure fair and efficient administration of cross-border insolvency — U.S. Bankruptcy Court concluded Plan complied with U.S. Bankruptcy principles, and that Plan was made in good faith; did not breach any applicable law; was in interests of Debtors' creditors and equity holders; and would not likely be followed by need for liquidation or further financial reorganization of Debtors — Such principles also underlay CCAA, and thus dictated in favour of Plan's recognition and implementation in Canada.

Cases considered by *C. Campbell J.*:

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

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Generally — referred to

Chapter 11 — referred to

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

Generally — referred to

Pt. IV — referred to

s. 44 — considered

s. 53(b) — referred to

s. 61(1) — considered

MOTION by applicant for orders recognizing and giving effect to certain orders of U.S. Bankruptcy Court in Canada.

***C. Campbell J.*:**

1 The Recognition Orders sought in this matter exhibit the innovative and efficient employment of the provisions of Part IV of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C.36, as amended (the "CCAA") to cross border insolvencies.

2 Each of the "Chapter 11 Debtors" commenced proceedings on March 30, 2010 in the United States under Chapter 11 of Title 11 of the United States Bankruptcy Code (the "U.S. Bankruptcy Code") in the U.S. Bankruptcy Court for the District of Delaware (the "Chapter 11 Proceedings.")

3 On April 1, 2010, this Court granted the Recognition Order sought by, *inter alia*, the Applicant, Xerium Technologies Inc. ("Xerium") as the "Foreign Representative" of the Chapter 11 Debtors and recognizing the Chapter 11 Proceedings as a "foreign main proceeding" in respect of the Chapter 11 Debtors, pursuant to Part IV of the CCAA.

4 On various dates in April 2010, Judge Kevin J. Carey of the U.S. Bankruptcy Court made certain orders in respect of the Chapter 11 Debtors' ongoing business operations.

5 On May 12, 2010, Judge Carey confirmed the Chapter 11 Debtors' amended Joint Prepackaged Plan of Reorganization dated March 30, 2010 as supplemented (the "Plan")[FN1] pursuant to the U.S. Bankruptcy Code (the "U.S. Confirmation Order.")

6 Xerium sought in this motion to have certain orders made by the U.S. Bankruptcy Court in April 2010, the U.S Confirmation Order and the Plan recognized and given effect to in Canada.

7 The Applicant together with its direct and indirect subsidiaries (collectively, the "Company") are a leading global manufacturer and supplier of products used in the production of paper products.

8 Both Xerium, a Delaware limited liability company, Xerium Canada Inc. ("Xerium Canada"), a Canadian company, together with other entities forming part of the Chapter 11 Debtors are parties to an Amended and Restated Credit and Guarantee Agreement dated as of May 30, 2008 as borrowers, with various financial institutions and other persons as lenders. The Credit Facility is governed by the laws of the State of New York.

9 Due to a drop in global demand for paper products and in light of financial difficulties encountered by the Company due to the drop in demand in its products and is difficulty raising funds, the Company anticipated that it would not be in compliance with certain financial covenants under the Credit Facility for the period ended September 30, 2009. The Chapter 11 Debtors, their lenders under the Credit Facility, the Administrative Agent and the Secured Lender Ad Hoc Working Group entered into discussions exploring possible restructuring scenarios. The negotiations progressed smoothly and the parties worked toward various consensual restructuring scenarios.

10 The Plan was developed between the Applicant, its direct and indirect subsidiaries together with the Administrative Agent and the Secured Lender Ad Hoc Working Group.

11 Pursuant to the Plan, on March 2, 2010, the Chapter 11 Debtors commenced the solicitation of votes on the Plan and delivered copies of the Plan, the Disclosure Statement and the appropriate ballots to all holders of claims as of February 23, 2010 in the classes entitled to vote on the Plan.

12 The Disclosure Statement established 4:00 p.m. (prevailing Eastern time) on March 22, 2010 as the deadline for the receipt of ballots to accept or reject the Plan, subject to the Chapter 11 Debtors' right to extend the solicitation period. The Chapter 11 Debtors exercised their right to extend the solicitation period to 6:00 p.m. (prevailing Eastern time) on March 26, 2010. The Plan was overwhelmingly accepted by the two classes of creditors entitled to vote on the Plan.

13 On March 31, 2010, the U.S. Bankruptcy Court entered the Order (I) Scheduling a Combined Hearing to Consider (a) Approval of the Disclosure Statement, (b) Approval of Solicitation Procedures and Forms of Ballots, and (c) Confirmation of the Plan; (II) Establishing a Deadline to Object to the Disclosure Statement and the Plan; and (III) Approving the Form and Manner of Notice Thereof (the "Scheduling Order.")

14 Various orders were made by the U.S. Bankruptcy Court in April 2010, which orders were recognized by this Court.

15 On May 12, 2010, at the Combined Hearing, the U.S. Bankruptcy Court confirmed the Plan, and made a number of findings, *inter alia*, regarding the content of the Plan and the procedures underlying its consideration and approval by interested parties. These included the appropriateness of notice, the content of the Disclosure Statement, the voting process, all of which were found to meet the requirements of the U.S. Bankruptcy Code and fairly considered the interests of those affected.

16 The Plan provides for a comprehensive financial restructuring of the Chapter 11 Debtors' institutional indebtedness and capital structure. According to its terms, only Secured Swap Termination Claims, claims on account of the Credit Facility, Unsecured Swap Termination Claims, and Equity Interests in Xerium are "impaired" under the Plan. Holders of all other claims are unimpaired.

17 Under the Plan, the notional value of the Chapter 11 Debtors' outstanding indebtedness will be reduced from approximately U.S.$640 million to a notional value of approximately U.S.$480 million, and the Chapter 11 Debtors will have improved liquidity as a result of the extension of maturity dates under the Credit Facility and access to an U.S. $80 million Exit Facility.

18 The Plan provides substantial recoveries in the form of cash, new debt and equity to its secured lenders and swap counterparties and provides existing equity holders with more than $41.5 million in value.

19 Xerium has been unable to restructure its secured debt in any other manner than by its secured lenders voluntarily accepting equity and the package of additional consideration proposed to be provided to the secured lenders under the Plan.

20 The Plan benefits all of the Chapter 11 Debtors' stakeholders. It reflects a global settlement of the competing claims and interests of these parties, the implementation of which will serve to maximize the value of the Debtors' estates for the benefit of all parties in interest.

21 I conclude that the Plan is not likely to be followed by the liquidation or the need for further financial reorganization of the Chapter 11 Debtors.

22 On April 1, 2010, the Recognition Order granted by this Court provided, among other things:

(a) Recognition of the Chapter 11 Proceedings as a "foreign main proceeding" pursuant to Subsection 47(2) of the CCAA;

(b) Recognition of the Applicant as the "foreign representative" in respect of the Chapter 11 Proceedings;

(c) Recognition of and giving effect in Canada to the automatic stay imposed under Section 362 of the U.S. Bankruptcy Code in respect of the Chapter 11 Debtors;

(d) Recognition of and giving effect in Canada to the U.S. First Day Orders in respect of the Chapter 11 Debtors;

(e) A stay of all proceedings taken or that might be taken against the Chapter 11 Debtors under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(f) Restraint on further proceedings in any action, suit or proceeding against the Chapter 11 Debtors;

(g) Prohibition of the commencement of any action, suit or proceeding against the Chapter 11 Debtors; and

(h) Prohibition of the Chapter 11 Debtors from selling or otherwise disposing of, outside the ordinary course of its business, any of the Chapter 11 Debtors' property in Canada that relates to their business and prohibiting the Chapter 11 Debtors from selling or otherwise disposing of any of their other property in Canada, unless authorized to do so by the U.S. Bankruptcy Court.

23 I am satisfied that this Court does have the authority and indeed obligation to grant the recognition sought under Part IV of the CCAA. The recognition sought is precisely the kind of comity in international insolvency contemplated by Part IV of the CCAA.

24 Section 44 identifies the purpose of Part IV of the CCAA. It states

The purpose of this Part is to provide mechanisms for dealing with cases of cross-border insolvencies and to promote

(a) cooperation between the courts and other competent authorities in Canada with those of foreign jurisdictions in cases of cross-border insolvencies;

(b) greater legal certainty for trade and investment;

(c) the fair and efficient administration of cross-border insolvencies that protects the interests of creditors and other interested persons, and those of debtor companies;

(d) the protection and the maximization of the value of debtor company's property; and

(e) the rescue of financially troubled businesses to protect investment and preserve employment.

25 I am satisfied that the provisions of the Plan are consistent with the purposes set out in s. 61(1) of the CCAA, which states:

Nothing in this Part prevents the court, on the application of a foreign representative or any other interested person, from applying any legal or equitable rules governing the recognition of foreign insolvency orders and assistance to foreign representatives that are not inconsistent with the provisions of this Act.

26 In *Babcock & Wilcox Canada Ltd., Re* (2000), 18 C.B.R. (4th) 157 (Ont. S.C.J. [Commercial List]) at para. 21, this Court held that U.S. Chapter 11 proceedings are "foreign proceedings" for the purposes of the CCAA's cross-border insolvency provisions. The Court also set out a non exclusive or exhaustive list of factors that the Court should consider in applying those provisions.

27 The applicable factors from *Babcock & Wilcox Canada Ltd., Re* that dictate in favour of recognition of the U.S. Confirmation Order are set out in paragraph 45 of the Applicant's factum:

(a) The Plan is critical to the restructuring of the Chapter 11 Debtors as a global corporate unit;

(b) The Company is a highly integrated business and is managed centrally from the United States. The Credit Facility which is being restructured is governed by the laws of the State of New York. Each of the Chapter 11 Debtors is a borrower or guarantor, or both, under the Credit Facility;

(c) Confirmation of the Plan in the U.S. Court occurred in accordance with standard and well established procedures and practices, including Court approval of the Disclosure Statement and the process for the solicitation and tabulation of votes on the Plan;

(d) By granting the Initial Order in which the Chapter 11 Proceedings were recognized as Foreign Main Proceedings, this Honourable Court already acknowledged Canada as an ancillary jurisdiction in the reorganization of the Chapter 11 Debtors;

(e) The Applicant carries on business in Canada through a Canadian subsidiary, Xerium Canada, which is one of Chapter 11 Debtors and has had the same access and participation in the Chapter 11 Proceedings as the other Chapter 11 Debtors;

(f) Recognition of the U.S. Confirmation Order is necessary for ensuring the fair and efficient administration of this cross-border insolvency, whereby all stakeholders who hold an interest in the Chapter 11 Debtors are treated equitably.

28 Additionally, the Plan is consistent with the purpose of the CCAA. By confirming the Plan, the U.S. Bankruptcy Court has concluded that the Plan complies with applicable U.S. Bankruptcy principles and that, *inter alia*:

(a) it is made in good faith;

(b) it does not breach any applicable law;

(c) it is in the interests of the Chapter 11 Debtors' creditors and equity holders; and

(d) it will not likely be followed by the need for liquidation or further financial reorganization of the Chapter 11 Debtors.

These are principles which also underlie the CCAA, and thus dictate in favour of the Plan's recognition and implementation in Canada.

29 In granting the recognition order sought, I am satisfied that the implementation of the Plan in Canada not only helps to ensure the orderly completion to the Chapter 11 Debtors' restructuring process, but avoids what otherwise might have been a time-consuming and costly process were the Canadian part of the Applicant itself to make a separate restructuring application under the CCAA in Canada.

30 The Order proposed relieved the Applicant from the publication provisions of s. 53(b) of the CCAA. Based on the positive impact for creditors in Canada of the Plan as set out in paragraph 27 above, I was satisfied that given the cost involved in publication, the cost was neither necessary nor warranted.

31 The requested Order is to issue in the form signed.

Motion granted.

FN1 Capitalized terms used herein not otherwise defined shall have the meanings ascribed to them in the Plan. Unless otherwise stated, all monetary amounts contained herein are expressed in U.S. Dollars.

END OF DOCUMENT

2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [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, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

Canadian Airlines Corp., Re

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.

Alberta Court of Queen's Bench

Paperny J.

Heard: June 5-19, 2000
Judgment: June 27, 2000[FN*]
Docket: Calgary 0001-05071

Counsel: *A.L. Friend, Q.C.*, *H.M. Kay, Q.C.*, *R.B. Low, Q.C.*, and *L. Goldbach*, for Petitioners.

S.F. Dunphy, *P. O'Kelly*, and *E. Kolers*, for Air Canada and 853350 Alberta Ltd.

D.R. Haigh, Q.C., *D.N. Nishimura*, *A.Z.A. Campbell* and *D. Tay*, for Resurgence Asset Management LLC.

L.R. Duncan, Q.C., and *G. McCue*, for Neil Baker, Michael Salter, Hal Metheral, and Roger Midiaty.

F.R. Foran, Q.C., and *P.T. McCarthy, Q.C.*, for Monitor, PwC.

G.B. Morawetz, *R.J. Chadwick* and *A. McConnell*, for Senior Secured Noteholders and the Bank of Nova Scotia Trust Co.

C.J. Shaw, Q.C., for Unionized Employees.

T. Mallett and *C. Feasby*, for Amex Bank of Canada.

E.W. Halt, for J. Stephens Allan, Claims Officer.

M. Hollins, for Pacific Costal Airlines.

P. Pastewka, for JHHD Aircraft Leasing No. 1 and No. 2.

2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [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, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

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

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.

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

2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [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, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

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 en-

city 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 ·om $70 million to $120 million in January, 2000 and then to $145 million in March, 2000. Canadian agreed to supplement he 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").

he 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)

3 The Minority Shareholders suggested that the proposed reorganization effectively cancels their shares in CAC. As the .bove 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.

2000 CarswellAlta 662, 2000 ABQB 442, [2000] A.W.L.D. 654, [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, [2000] A.J. No. 771, 98 A.C.W.S. (3d) 334

,7 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),) 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 sec- .on 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 proceed-

ings 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 hift the "deal risk" associated with the Plan to Air Canada. The agreement reached with the Senior Secured Noteholders was lso 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

.ights 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.

10 The thrust of the Resurgence submissions suggests a mistaken belief that they will get more than 14 cents on liquida- .on. 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

.he 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")

33 There is no benefit to Air Canada in the pools of UCC unless it were established that the UCC pools are in excess of .he 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.).

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.

55 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 referred 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 ɔ 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 ac-

cepted 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.

FN* Leave to appeal refused 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, [2000] 10 W.W.R. 314, 2000 ABCA 238, 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]).

END OF DOCUMENT

1998 CarswellOnt 3867, 82 A.C.W.S. (3d) 895, [1998] O.J. No. 3934, 76 O.T.C. 115

St. Lawrence & Hudson Railway Co., Re

In the Matter of the Canadian Business Corporations Act, R.S.C. 1985, c. C44

St. Lawrence & Hudson Railway Company Limited, Ontario and Ontario and Quebec Railway Company Toronto, Grey and Bruce Railway Company, Canadian Pacific Railway Company, and Canadian Pacific Limited, Applicants

Ontario Court of Justice (General Division) [Commercial List]

Blair J.

Judgment: October 1, 1998
Heard: September 30, 1998
Docket: 98-CL-2831

Counsel: *Michael E. Barrack* and *Norma M. Priday*, for the Applicants.

Sean F. Dunphy, for Pope & Company and J. Allan Brown.

Christopher E. Chop, for the Turner Group.

Robert Sillcox, John Medcof, Mr. and Mrs. Friesen, C.W. Lewis Q.C., Chris Antwhistle, Joseph and Francis Pope, John Turner, Peter Love, Alan Sproule and Raymond Kennedy, Appearing in Person.

Subject: Corporate and Commercial; Public

Corporations --- Arrangements and compromises — Under general corporate legislation

CPR Co. was wholly owned subsidiary of CP Ltd. — CP Ltd. applied for approval of plan of arrangement concerning two railway companies controlled by CPR Co. — Plan involved amalgamation of two railways with existing company to create new company — Minority securities holders would receive cash or shares in CP Ltd. — Plan was supported by both majority and minority security holders of railway companies — Proposed plan met definition of arrangement in s. 192(1) of Canada Business Corporations Act — Solvency test of s. 192(2) of Act had also been met — Arrangement was put forward in good faith and had significant advantages to minority security holders — In all classes of securities, minority security holders had overwhelmingly approved plan — Value offered for securities was acceptable and fair — Proposed arrangement was fair and reasonable — Application was granted — Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 192(1), 192(2).

Cases considered by *R. A. Blair J.*:

Bell Canada Inc. v. Canada (Director, Business Corporations Act) (1982), 69 C.P.R. (2d) 188 (Que. S.C.) — considered

Canada (Attorney General) v. Bell Canada (1983), 72 C.P.R. (2d) 220, 147 D.L.R. (3d) 143 (Que. C.A.) — referred to

Canadian Pacific Ltd., Re (1990), 73 O.R. (2d) 212, 48 B.L.R. 252, 70 D.L.R. (4th) 349 (Ont. H.C.) — considered

Canadian Pacific Ltd., Re (1996), 30 O.R. (3d) 110, 30 B.L.R. (2d) 297, 8 O.T.C. 141 (Ont. Gen. Div. [Commercial List]) — considered

Canadian Pacific Ltd. v. Eliasen (September 17, 1998), Doc. CA C25309, C25310 (Ont. C.A.) — referred to

Dairy Corp. of Canada, Re, [1934] O.R. 436, [1934] 3 D.L.R. 347 (Ont. C.A.) — considered

General Accident Assurance Co. of Canada v. Lornex Mining Corp. (1988), 40 B.L.R. 299, 66 O.R. (2d) 783 (Ont. H.C.) — considered

Grouse Mountain Resorts Ltd. v. Angeli (1989), 42 B.L.R. 219 (B.C. C.A.) — considered

Second Standard Royalties Ltd., Re (1930), 66 O.L.R. 288 (Ont. H.C.) — considered

Trizec Corp., Re, 21 Alta. L.R. (3d) 435, [1994] 10 W.W.R. 127, 158 A.R. 33, 20 B.L.R. (2d) 202 (Alta. Q.B.) — applied

Wotherspoon v. Canadian Pacific Ltd., 76 N.R. 241, (sub nom. *Eaton Retirement Annuity Plan v. Cdn. Pacific Ltd.)* 21 O.A.C. 79, (sub nom. *Wotherspoon v. Cdn. Pacific Ltd.)* [1987] 1 S.C.R. 952, (sub nom. *Wotherspoon v. Cdn. Pacific Ltd.)* 39 D.L.R. (4th) 169, (sub nom. *Eaton Retirement Annuity Plan v. Cdn. Pacific Ltd.)* 45 R.P.R. 138 (S.C.C.) — considered

Statutes considered:

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

s. 24(3) — considered

s. 173(1)(i) — considered

s. 176(1) — considered

s. 176(1)(b) — considered

s. 176(4) — considered

s. 192 — considered

s. 192(1) — considered

s. 192(2) — considered

s. 192(3) — considered

s. 192(4) — considered

APPLICATION for approval of plan of arrangement.

***R. A. Blair J.*:**

Background

1 This Application represents a further step in a series of restructuring initiatives undertaken by Canadian Pacific Limited and Canadian Pacific Railway Company over the past few years. The Applicants seek approval of a proposed Plan of Arrangement under s. 192 of the CBCA. This Plan has been voted upon by, and has received overwhelming support from both the majority and the minority of security holders concerned. It is vigorously opposed — or at least sought to be amended — by certain of the security holders comprising the balance of the minority.

2 The Plan involves the securities of two old railways in Ontario — the Ontario and Quebec Railway Company (the "O & Q Railway"), and the Toronto, Grey and Bruce Railway Company (the "TG&B") — which are controlled by Canadian Pacific Railway. Canadian Pacific Railway Company ("CPR") is itself a wholly owned subsidiary of Canadian Pacific Limited ("CPL"). The securities of the O & Q Railway which are affected are its common stock ("the O&Q Shares") and its permanent debenture stock (the O&Q PDS"). The securities of the TG&B which are affected are its common stock (the "TG&B Shares) and its first mortgage bonds (the "TG&B Bonds"). There are no other outstanding securities of these companies.

3 CPR beneficially owns, or exercises control or direction over, 80.4% of the O&Q Shares and 70.9% of the O&Q PDS. It beneficially owns, or exercises control or direction over, 68.1% of the TG&B Shares and 53.7% of the TG&B Bonds (and is the only holder with beneficial ownership of more than 10% of those Bonds).

4 What lie at the heart of this reorganization are two long term leases emanating from the O&Q Railway and the TG&B. In 1883 the TG&B leased its entire railway undertaking to the O&Q Railway for 999 years, and somewhere between 1884 and 1888 the O&Q Railway leased *its* entire railway undertaking (including its rights under the TB&B lease) to CPR in perpetuity. I shall refer to these two leases together as "the Leases". All liabilities of O&Q and TG&B were assumed by CPR. As a result of these transactions O&Q and TG&B have not carried on any business since the execution of the leases, and will not do so in the future. They are dormant corporations, existing only for purposes of maintaining the existence of the Leases.

5 The Leases have been controversial, and have been the subject of at least one court battle which found its way to the Supreme Court of Canada: see *Wotherspoon v. Canadian Pacific Ltd.*, [1987] 1 S.C.R. 952 (S.C.C.). Central to that litigation was the question whether or not the underlying assets behind the leases were for the benefit of the two old railways (and hence of their security holders) or for the CPR as lessee — or, to put it another way, whether CPR was at liberty to deal with the underlying assets behind the leases at its will. The Supreme Court of Canada ruled in favour of the CPR, and the value of the securities in O&Y and TG&B, which had risen sharply for speculative reasons during the litigation, fell sharply. A number of security holders suffered serious financial losses as a result, and some of the fallout from these financial difficulties has continued to dog CPR's ability to deal with the two old railways and their leases. It is difficult for some who sustained such losses to accept that the value of their securities is not reflective of the assets underlying the Leases, but rather is reflective of the fixed income stream

generated from the securities.

The Plan of Arrangement

6 The gist of the Plan presently being put forward is that the O&Q Railway and the TG&B are to be continued as corporations under the *Canada Business Corporations Act* (the "CBCA") and then amalgamated with the St. Lawrence and Hudson Railway Company to create a new CBCA corporation which will assume the name St. Lawrence and Hudson Railway Company. As a result, CPR will hold 100% of the equity in the new St. Lawrence & Hudson Railway (the "New St.L & H"), and it will have been able to eliminate certain administrative inefficiencies and reduce costs and, as well, consolidate its eastern Canada railway assets, and rid itself of issues respecting the Leases and the minority. The minority holders of O&Q and TG&B securities will receive cash or shares in CPL, a publicly traded company, and those who wish to dissent will be entitled to do so under the CBCA:

7 The securities held by CPR in the O & Q Railway and the TG&B are to be exchanged for common shares in the New St.L & H. As a result, if the Plan is implemented, CPR will hold 100% of the equity in the New St.L & H and the leases will, in effect, no longer continue to exist.

8 The TG&B aspect of the proposed reorganization has not generated much opposition from the security holders of that Company. No minority common shareholders have surfaced. Of the minority holders of the TG&B Bonds only one, Mr. Sillcox — who is also the holder of one O&Q Share — has voiced opposition. The minority holders of the O&Q Shares and of the O&Q PDS, have voiced initial — and in a few cases, continuing — opposition to the Plan, however; and it is in relation to these securities that concentrated negotiations have taken place since the commencement of these proceedings in April of this year and, as I have said, that resistance persists in some quarters.

9 As a result of the negotiations which took place, the Plan being put forward was amended by the Applicants to provide that holders of the O&Q PDS would be entitled to acquire shares in CPL, as opposed to cash as was originally proposed. This change was sufficient to garner the support of most of the holders of those securities. With respect to the O&Q Shares, negotiations — principally with the Pope Group — resulted in the price being offered for the O&Q Shares increasing by more than 300%, from an initial offer of $650 to $2300. This change, too, was sufficient to win the support of the large majority of the minority holders of such shares for the proposed Plan.

10 On September 17, 1998, meetings of the security holders were held in accordance with the terms of a First Interim Order granted in these proceedings on May 20, 1998. The following are the results of the votes in total:

TG&B Shares ...... 100% in favour

TG&B First Mortgage Bonds ...... 100% in favour

O&Q Permanent Debenture Stocks ...... 99.995% in favour

O&Q Common Shares ...... 99.989% in favour

11 CPR controls the majority of the security holders in each class, however. Consequently, it is not surprising that the Plan was successful in generating majority support. What is revealing is the support that it received *from the minority*. Seventy-five percent of the O&Q minority shareholders and 42% of the O&Q minority PDS holders participated in the voting. The results were as follows:

TG&B Shares ...... No minority voted

TG&B First Mortgage Bonds ...... 100% in favour

O&Q Permanent Debenture Stock ...... 96.782% in favour

O&Q Common Shares ...... 93.421% in favour

The Test

12 The tests which the Court must apply when requested to approve a plan of arrangement under the CBCA are well-established. The Court must be satisfied,

a) that all statutory requirements have been fulfilled;

b) that the arrangement is put forward in good faith; and,

c) that the arrangement is fair and reasonable.

13 As to the statutory requirements, what must be shown is,

(i) that the proposed plan meets the definition of an arrangement under subsection 192(1) of the CBCA;

(ii) that the corporate applicant — or, at least one of the corporate applicants — is not insolvent as that term is defined in subsection 192(2) of the CBCA; and,

(iii) that it is not practicable for the applicant, or applicants, to effect a fundamental change in the nature of the arrangement under any other provision of the CBCA.

14 See, generally, with respect to the above: *Dairy Corp. of Canada, Re*, [1934] 3 D.L.R. 347 (Ont. C.A.); *Trizec Corp., Re* (1994), 21 Alta. L.R. (3d) 435 (Alta. Q.B.); *Canadian Pacific Ltd., Re* (1996), 30 O.R. (3d) 110 (Ont. Gen. Div. [Commercial List]), affirmed, unreported decision of the Ontario Court of Appeal, (September 17, 1998), Doc. CA C25309, C25310 (Ont. C.A.); *Canadian Pacific Ltd., Re* (1990), 73 O.R. (2d) 212 (Ont. H.C.); *Bell Canada Inc. v. Canada (Director, Business Corporations Act)* (1982), 69 C.P.R. (2d) 188 (Que. S.C.), affirmed (1983), 147 D.L.R. (3d) 143 (Que. C.A.).

The Fulfillment of Statutory Requirements

15 I am satisfied that all requisite statutory requirements have been fulfilled. The proposed Plan meets the definition of an arrangement set out in subsection 192(1) of the CBCA, and it has earlier been determined in these proceedings that the solvency test of subsection 192(2) has been met because at least one of the Applicants is a solvent corporation. On the same occasion, a number of other "threshold" or preliminary legal issues pertaining to the arrangement were also considered and determined. They included:

a) whether there was a jurisdictional impediment to the continuance of the O&Q Railway and the TG&B under the CBCA (Answer: There was not);

b) whether the O&Q PDS and the TG&B Bonds are securities which can be affected by a Plan of Arrangement (Answer: They are); and,

c) whether there was a conflict of interest between the various Applicant Corporations which affected the proceedings (Answer: There was not).

16 See as to the above, the Order dated July 30, 1998, and the reasons given in relation to it. It is worth noting in passing, as well, that at the July 30th Hearing relating to these various preliminary matters, the Court also ordered the Applicants to record full information at the meetings to be held and to provide evidence of what transpired in this regard at the Fairness Hearing scheduled for yesterday. This has been done; and I have reviewed the submissions made at the meetings by various concerned security holders, and the letters filed there and latterly with the Court. It was also made clear at the July 30th Hearing that the opposing or dissenting shareholders were not to be estopped from raising any argument regarding the fairness of the Plan at the Fairness Hearing.

17 The Applicants filed a Compendium of Affidavits of Service and Mailing. These affidavits demonstrate that all notification requirements called for in the First Interim order and other Orders of this Court respecting notice and the dissemination of information regarding the proposed arrangement, have been met. Issues regarding the provision of notice to affected parties and respecting the provision of opportunities to security holders to present their concerns and the nature of their opposition to the Court have been a feature of each of the 6 different occasions on which Hearings have been held throughout the process — including yesterday's fairness hearing.

18 Finally — under the rubric of matters relating to the fulfillment of statutory requirements — it seems to me that the Applicants are correct when they submit that what is sought to be accomplished by the Plan cannot practicably be accomplished under the CBCA other than under its arrangement provisions. The securities of the O&Q Railway and the TG&B are unique, and the leasehold arrangements governing the assets of the corporations are unusual, at least, in present day corporate and financing settings. More than a continuance is necessary. More than an amalgamation is necessary. More than an exchange of securities, or of cash for securities, is necessary. It is through a plan of arrangement that the necessary flexibility can be achieved to accomplish the purposes in question. The test is one of "practicability", not "impossibility". The Applicants need not prove that the transactions contemplated in the Plan are impossible to accomplish in some other way: CBCA, s. 192(3): *Trizec Corp., Re*, *supra*, at pp. 440-441.

Is the Arrangement Put Forward in Good Faith?

19 With regard to the second criteria, there is no doubt in my mind that the arrangement is put forward in good faith. Indeed, Mr. Medcof, who made submissions personally on his own behalf seeking an amendment to the Plan, was otherwise complimentary toward Canadian Pacific for finally bringing forward a proposal that will clarify the anachronistic structure pertaining to the security holding positions in the two old railways — as were other security holders whose sentiments expressed at the meetings on September 17th in that regard were presented to the Court. The proposed Plan is another in a series of re-structurings by CPL designed to rationalize and improve its overall operations, and — in this case — its eastern canadian rail operations in particular. It has the advantage to CPR of introducing administrative efficiencies and reduced costs, and of consolidating its eastern railway assets. Not insignificantly — although not stated expressly in the materials — it has the considerable advantage of eliminating an awkward minority situation and of removing the difficult aspects of those pesky 999 year and perpetual leases.

20 At the same time, there *are* significant advantages in the restructuring to the minority security holders as well. Not the least of these is that they are able to participate in a one-time enhancement in the value of their securities which will be in excess of the capitalized value of the revenue stream currently flowing to them from those securities. I shall return to the advantages and disadvantages of the proposal from the perspective of the minority security holders momentarily.

Is the Plan Fair and Reasonable?

21 The central issue on this Hearing — as is usually the case — is whether or not the proposed Plan of Ar-

rangement is fair and reasonable, having regard to the interests of the Applicants and of the security holders taken as a whole. That is why the hearing at which the Court is asked to approve the arrangement is frequently referred to, in general terms, as "the fairness hearing".

22 In these proceedings, "fairness" has been addressed by the opposing minority in several ways. It has been asserted,

a) that insufficient value has been offered, for the O&Q Shares in particular;

b) that the Plan ought not to be approved because it does not treat security holders within the same classes in the same manner, in that CPR is to obtain shares in the New St.L & H in exchange for its majority security interests in the O&Q Railway and the TG&B whereas the other security holders are required to accept shares in CPL; and,

c) that the process has been flawed because the "fairness hearing" has been scheduled to follow the security holders' meetings, rather than the reverse, thus depriving the security holders of the comfort of the Court having indicated its views as to the fairness in advance of their consideration.

Which Should Come First: the Meeting of Security Holders or the "Fairness Hearing"?

23 Let me deal with this latter concern first, because it encompasses as well other considerations relevant to the fairness hearing. I understand that this concern emanates from a group of security holders who genuinely feel that they are at an insurmountable disadvantage because they do not have the size of holdings or the resources to conduct their own enquiries or valuation studies, and, in short, that they are a real minority. These sentiments are expressed eloquently, and poignantly, by Mr. Alan J. Sproule, who with members of his family holds 37 shares in the O&Q Railway, purchased in the early 1980's for approximately $9500, in the belief "that the asset base of this railway would protect it [i.e. the investment]". His affidavit bears citing at length, because it puts forward so well the feelings underlying the opposition which continues respecting the arrangement. He continued:

4. However, in the Supreme Court of Canada decision known as "Wotherspoon" the court determined that the leases in perpetuity granted to C.P.R. prevailed, and the value of the shares dropped dramatically overnight, to the face value of the shares.

5. I am filing this affidavit with the court because I believe that this court needs to know the hardship being done to the small individual shareholder through the actions of C.P.R.

6. *I have attended the court proceedings and observed what has gone on and simply can't understand why the Fairness Hearing is after the shareholders meeting.*

7. *What is the point?* As soon as C.P.R. has control over the O. and Q. shares, they have indicated at the shareholders meeting that they will terminate the leases.

8. As soon as they terminate the leases, the property or asset value of the company will dramatically increase, giving C.P.R. a profit which is unconscionable and strictly at the expense of the shareholders, some of whom have continued to hold their shares since before the Supreme Court Decision.

9. I realize I probably have no recourse in this matter but feel I must express my disappointment and disapproval at what is happening to my shares and the money I have invested.

> 10. The court has been given an appraisal by Nesbitt Burns and a negotiated settlement with The Pope Group. I was not a party to those negotiations and had no input into the negotiated settlement figure of $2300 which I feel is wholly inadequate.
>
> 11. I note that the first affidavit of the Pope Group agreed with my view of the situation, and the inadequacy of the agreed upon figure.[FN1]
>
> 12. *The valuation does not include any of the land or other asset values.*
>
> 13. As a result of the above, my family will lose an amount which is in the six figure category, in particular $163,726.09. (italics added)

24 There is no indication as to how Mr. Sproule arrives at the quantum of the latter claim, but it is clearly premised upon the value of the shares reflecting the value of the land and other assets underlying the O&Q and TG&B leases. All opposing security holders echoed this sentiment, and a number of them also expressed frustration with what they consider to be the reverse juxtaposition of the meetings of security holders and the fairness hearing.

25 The arrangement provisions of corporate legislation are clearly designed not only to give the majority the flexibility to accomplish complicated restructuring objectives, but also to protect the minority from being unfairly prejudiced during such an exercise. However, the notion that the fairness hearing should precede the securityholders' consideration and approval of the proposed Plan is, in my respectful view, a misdirected one.

26 While corporate legislation can provide the necessary legal framework for a corporate restructuring such as an arrangement, whether or not the Plan which is proposed is acceptable to the security holders from a business and commercial perspective is a key consideration in assessing whether or not it is fair and reasonable. The test is one of "business judgment". As Forsyth J. noted, in *Trizec Corp., Re, supra*, at p. 444:

> The appropriate test a court must apply in determining the fairness of a plan of arrangement is the "business judgment" test. This test, which has been accepted and restated in numerous decisions, boils down to whether the court may conclude that an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan: *Re Alabama, New Orleans, Texas & Pacific Junction Railway Co.*, [1891] 1 Ch. 213 (C.A.); *Re Dorman, Long & Co; Re Durham Steel & Iron Co.*, [1934] Ch. 635; *Re Dairy Corp. of Canada Ltd., supra*; *Premji v. Amoco Acquisition Co.* (1988), 61 Alta. L.R. (2d) 279 (C.A.).
>
> It is important to remember that in determining the fairness of a proposal the court need not determine that it is the "most fair"? proposal possible. Rather, the court need determine only that it is fair and reasonable in all the circumstances.

27 What better litmus test, then — barring such things as fraud, or a clearly overbearing majority which prevents the true expression of the minority's will, or similar considerations of that nature — for assessing whether in the circumstances of a given arrangement "an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve of the plan", than the votes of those whose interests are actually at stake? The votes of security holders at meetings to consider a proposed Plan are not conclusive, but a substantial vote in favour of the proposed plan of arrangement by the security holders affected is an important factor in the court's considerations. The "business judgment" of the security holders in determining their own interests is to be given great weight: see *Canadian Pacific Ltd., Re* (1996), 30 O.R. (3d) 110 (Ont. Gen. Div.) at p. 132; affirmed, unreported decision of the Ontario Court of Appeal, September 17, 1998.

28 It is for the foregoing reasons that meetings of security holders are held to consider and approve a proposed

plan before court approval it then sought. That is the scheme which is featured in the English legislation upon which the CBCA arrangement provisions are patterned, and it is consistent with the powers of the court set out in subsection 192(4) of the Act and the chronology of prospective orders contemplated therein.

Value for the Securities

29 In this case it cannot be ignored that in all classes of the securities in question, the minority security holders have approved the Applicants' Plan in a resounding and ringing fashion. One hundred percent of the TG&B minority security holders voted in favour.[FN2] Over 93.4% of the O&Q minority Shares, and over 96.7% of the O&Q Permanent Debenture Stock, that were voted were voted in favour. To say the approval of the minority has been "overwhelmingly" is to understate the matter.

30 This approval rate says something about the valuation issue as well. It is the valuation of the O&Q Shares which has been the source of most of the concern expressed. There was great skepticism over the value expressed in the Nesbitt Burn's opinion which was distributed in connection with the Management Proxy Circular, and which supported the initial offered price of $650 per share. Whether that skepticism is justified or not, subsequent events have overtaken that opinion as the benchmark of fairness in terms of value, in any event. Primarily as a result of the efforts of the Pope Group of opposing security holders, the price offered was increased to $2300 per share. There is no suggestion that any other valuation would generate an estimated value of any more than that amount, unless it was based upon the value of the assets underlying the Leases rather than the income stream generated by the securities — a result which seems to be precluded following the decision of the Supreme Court of Canada in the *Wotherspoon* case, *supra*. There are in addition, a number of other ingredients which, taken together, provide persuasive indicia that the value presently being offered for the securities is adequate in the circumstances. Not the least of these is that the Popes — well known to be tireless and tenacious pursuers of value for the O&Q Shares — have been satisfied that a fair value has been obtained, and as well that other opposing security holders have fallen in behind them in agreement. In the end, what has been achieved by negotiation, as Mr. Dunphy submitted, is that the price has moved into an area where the dynamic of the process has achieved a strong consensus.

31 Notwithstanding the opposition which remains from some quarters, I think the assessment of value for the O&Q Shares generally, and from the perspective of the minority in particular, is articulated as well as it can be in the following passages from the affidavit of Francis Pope sworn in support of approval of the Plan, on September 25, 1998:

> 4. As I have previously advised the court, I am of the view that the proposed Arrangement is fair from a financial point of view to the shareholders of O&Q. I would not have negotiated the revision to the price or signed the support agreement with CP if I did not hold this view.
>
> 5. In concluding that the Arrangement is fair from a financial point of view, I have considered (among others) the following factors:
>
>> (a) the financial value of the dividend stream associated with this illiquid investment is a fraction of the price being offered;
>>
>> (b) the ability to receive shares of CP[FN3], a very liquid, public company will enable shareholders to avoid the potential negative tax consequences of an outright sale of their shares if they so wish;
>>
>> (c) the value of CP shares into which the O&Q shares would be converted has dropped considerably since this revised price was negotiated which means that O&Q shareholders electing to receive CP shares will receive a much higher number of CP shares than was expected to be the case when I originally negotiated the increase in price to $2300;

(d) there is no avenue to force CP to do a transaction at a price which is higher than what it is willing to pay;

(e) the Supreme Court of Canada decision left little room open to attempt to re-litigate the *Wotherspoon* case and taking such a step would, in any event, require a huge and highly speculative commitment both of time and legal fees in order to have any hope of success,

(f) the $2300 price which CP has agreed to pay represents a substantial premium payment which CP is making at this time in order to remove the few remaining strictures contained in the O&Q Leases and thereby be free to deploy its assets as it sees fit;

(g) it has taken eleven years from the time of the *Wotherspoon* decision for CP to attempt to resolve this situation and there is no guarantee that another opportunity will present itself soon — even if a premium as large (or larger) as the premium negotiated here could be negotiated at some future date, the shareholders would have lost the opportunity of investing that premium for all of the intervening years;

(h) the $2300 represents a very substantial premium over the price range at which the shares of O&Q have been trading since the *Wotherspoon* case in 1987 — if the transaction were to be defeated notwithstanding the affirmative vote of more than 98% of the O&Q shareholders, there is every likelihood that the price of O&Q shares would once again sink to similar levels and stay at such levels for an indeterminate period of time.

9. Fundamentally, I negotiated a price which CP was willing to pay and which the vast and overwhelming majority of shareholders of O&Q are willing to accept. The alternative to this transaction is not a higher or "fairer" price as there is virtually no assurance that CP would he willing to offer any "fairer" price. Any shareholder who is of the view that there is an objectively-determinable, higher "fair" value had the option of exercising their dissent fights and taking that risk.[FN4] However, the only alternative to this transaction which is known to exist is the status quo which existed before this transaction was announced. In that case I, along with the great and overwhelming majority of O&Q shareholders, would be enormously prejudiced as I would risk losing the entire amount of the premium negotiated and be left with thinly-traded shares of stock with a very small intrinsic value. Two or three hundred dollars per share of a thinly traded stock is a lot less fair than $2300 in cash or in shares of a very easily traded stock.

32 I accept this evidence, and I agree with Mr. Pope's analysis. In all the circumstances I am satisfied that the value being offered for the securities in question is acceptable and fair.

Equality of Treatment Among Security Holders of the Same Class

33 This brings me to the final concern expressed, namely that of inequality of treatment as between security holders of the same class. This concern was advanced at the Hearing by Mr. Sillcox and Mr. Medcof. This argument is premised upon the requirements of s. 24(3) of the CBCA providing that "where a corporation has only one class of shares, the rights of the holders are equal in all respects ...", and upon the consequent submission that the directors have a fiduciary duty to treat the holders of all issued common shares in an equal manner; affidavit of Robert Lewis Sillcox, sworn September 25, 1998, paragraph 5.

34 Under the Plan, CPR is to receive 32 shares of the New St.L & H in exchange for each O&Q Share, whereas the minority holders of those shares are required to accept an exchange of shares with the parent company, Canadian Pacific Limited. This, it is argued, is unequal treatment as amongst shareholders of the same class. Mr. Sillcox and

Mr. Medcof say they are ready to accept CPR's valuation of the O&Q Shares as being worth 32 common shares of the New St.L & H, and they ask that the Plan be approved, but only in an amended form which would offer to the holders of O&Q Shares the option of exchanging each of those shares for 32 common shares of the New St.L & H.

35 In support of the foregoing contention, reference was made to the comments of this Court in a case involving an earlier Canadian Pacific arrangement. In *Canadian Pacific Ltd., Re*, *supra*, the Court observed (pp. 125-126):

> It is not a question of different classes being dealt with in a disproportionate manner, in my opinion, but of different classes giving rise to different factors for consideration in determining the ultimate proposal for each class. While shareholders *within the same class* of shareholders must be dealt with proportionately and equally, it is not accurate to say that all shareholders *as between classes* must be treated the same, proportionately or equally: see *Re Second Standard Royalties Ltd.* (1930), 66 O.L.R. 288 (H.C.) at p. 300. (underlining added; italics in original)

36 While this Statement is accurate, I believe, I do not think it implies that all shareholders within a class must in all circumstances be dealt with *in the same fashion* as long as they are treated proportionately and equally. Equality does not necessarily connote sameness. It was different treatment between members of different classes which was the subject of consideration in *Canadian Pacific Ltd., Re*, *supra*, and not different treatment between members of the same class. In any event, it is apparent from the passage relied upon from *Second Standard Royalties Ltd., Re* [(1930), 66 O.L.R. 288 (Ont. H.C.)], referred to above, that the emphasis was on disproportionate and unequal treatment — as opposed to different treatment. Orde J.A. was quoted as saying, in the latter case (at p. 300):

> I think it must be a fundamental factor for consideration in all such schemes or arrangements that the proposed sacrifice or other modification of charter-rights *must be borne proportionately by all those members of the class affected*, so that a minority, while opposed, may at least feel that the majority are all giving up as much proportionately as they are. (italics in *Canadian Pacific Ltd., Re* quotation; underlining added)

37 The arrangement provisions of s. 192 of the CBCA are flexible enough, in my opinion, to accommodate the treatment of majority and minority shareholders of a same class in a different fashion provided that the two groups are treated in a proportionate and equal fashion, and provided that the proposed structure is approved by a sufficient majority of the minority in the class. What the level of approval of that minority should be is a question for determination in the circumstances of each case — it was pointed out that even the most stringent requirements of OSC Policy Statement No. 9.1 and of the Policy of the Director Concerning Arrangements Under Section 192 of the CBCA only require a 2/3 majority of the minority. The precise level of approval is an academic question in this case because, by any standards, an approval rate of over 93.4% is more than adequate to meet the standard, in my view.

38 This result is consistent with the purpose of s. 192, which is to permit flexibility in the development of complex corporate restructurings, subject to fairness and other principles designed to protect the minority. It is also consistent with other provisions in the CBCA which permit differential treatment of shares within a class, provided that a requisite majority of the group affected approve. For example, under subsection 173(1)(i) of the Act, the articles of incorporation may be amended to divide a class of shares and fix the rights, privileges, restrictions and conditions of the divided shares. Under subsection 176(1) the holders of shares of a class — unless the articles otherwise provide — are entitled to vote on matters such as (by virtue of clause (b)) amendments which effect an exchange, reclassification or cancellation of all *or part* of the shares of such class. Pursuant to subsection 176(4) the holders of a series of a class are entitled to vote separately where "such series is affected by *an amendment in a manner different from other shares of the same class*". Thus, it is apparent that some different treatment of shareholders within the same class is contemplated in the legislation. See also *General Accident Assurance Co. of Canada v. Lornex Mining Corp.* (1988), 66 O.R. (2d) 783 (Ont. H.C.) at pp. 789; *Grouse Mountain Resorts Ltd. v. Angeli* (1989), 42 B.L.R. 219 (B.C. C.A.).

39 In this case the different treatment between CPR and the minority O&Q shareholders is justifiable, in my opinion, and does not detract from the fairness and reasonableness of the arrangement. CPR is not entitled, from a statutory perspective, to take *its* consideration in the form of shares in CPL. One of the acknowledged — and, other things being equal, legitimate — goals of CPR through the restructuring process is to do away with having to deal with a minority in connection with its eastern railway assets. The objective is to accomplish this by maintaining the New St.L & H as a wholly Owned subsidiary. Furthermore, the arrangement itself contains a provision that the Applicants need not proceed with it even if approved by the Court, and counsel for the Applicants stated in Court that the Applicants may well decide not to do so if an amendment such as that sought by Messrs. Sillcox and Medcof is granted. While this response may have an appearance of the exercise of majority muscle it is a fact of life, and it would jeopardize the interests of the vast majority of the minority if such were to transpire. I am satisfied that it is a legitimate goal of the Applicants in the circumstances, in any event.

40 Moreover, there are clear disadvantages to suggested amendment, as the majority of the minority have recognized, as compared to the advantages of having the option to take shares in CPL. New St. L & H will be an indirectly owned subsidiary of CPL and there will be no public market for its securities. Permitting the minority holders of O&Q Shares allows them to take their consideration for those shares in the form of CPL shares which provides them with certain tax advantages and, in addition, with highly liquid securities of a publicly traded company. It provides them with a one-time opportunity to obtain an enhanced value for their O & Q Shares.

41 It is well established that the Court's power to amend a Plan at the time of approval should only be sparingly exercised, and in exceptional circumstances. As Forsyth J. noted in *Trizec Corp., Re*, *supra*, at p. 442:

> ... the spirit and intent of s. 192 requires that all stakeholders be given a chance to review their positions and express their judgment in a vote before a substantive change can be made to a plan...

42 His comments regarding the process aspect of fairness, in that case, are also apt, in my opinion. At pp. 445-446 he said:

> Moreover ... the court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. *The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.* (italics added)

Conclusion

43 Here, the overall fairness of the arrangement — buttressed and underpinned as it is by the resounding and overwhelming approval of the minority security holders affected — dictates that it be approved, and approved without amendment. I conclude that the Applicants have met the tests required to be met, and that — taken as a whole, and viewed from the perspective of the company and all of the shareholders (with no one sectional interest prevailing over the others) — the proposed arrangement is fair and reasonable.

44 Accordingly, the approval of the court is granted, and an order will issue in the form of the draft order filed. I note in closing that the Director has filed a letter indicating that the Director has reviewed the draft order and that it does not need to appear to be heard.

Application granted.

FN1 At the time of the first affidavit sworn in these proceedings by Francis Pope on June 3, 1998 — then in opposition to the arrangement — the price being offered per share was $650.00.

FN2 Even if the £300 TG&B Bonds held by Mr. Sillcox, and not cast in time to be properly recorded, are taken into account, the approval rate amongst the minority is 98.89%.

FN3 That is, of Canadian Pacific Limited, the parent company.

FN4 It may be noted that 7 security holders have, in fact, exercised their rights to dissent and to have their security holdings valued.

END OF DOCUMENT

1992 CarswellNB 37, 15 C.B.R. (3d) 316

Wandlyn Inns Ltd., Re

Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re WANDLYN INNS LTD.

New Brunswick Court of Queen's Bench (Trial Division)

Dickson J.

Judgment: December 8, 1992
Docket: Doc. Fredericton

Counsel: *Charles A. Sargeant, Q.C.*, and *Lorraine D. King, Q.C.*, for Wandlyn Inns Ltd.

Thomas L. McGloan, Q.C and *G. Dwight Hubley*, for Bank of Montreal.

R. Leslie Jackson, Q.C., for Howie Bird Water and Sewerage Supplies Ltd.

Walter Vail, for RoyNat Inc.

R. Gary Faloon, for Maritime Life Assurance Company.

John McNair, for Royal Trust.

David W. Clark, for Multi-Ventures Ltd.

Peter J. Adams, for ADI Limited and Mutual Life Insurance Company.

Nancy J. Wilson, for Wilson Concrete Pipe (1982) Ltd.

David Young, for Central Guaranty Trust Company.

Charles LeBlanc, for Gerling Global.

Britt Dysart, for G.E. Capital Co.

George Kalinowski, for Irving Oil Limited.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court — "Fair and reasonable".

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangements Act — Arrangements — Approval by Court.

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Sanction hearing — Court considering whether proposed plan of arrangement fair and reasonable — Order sanctioning plan being granted.

A company under the protection of the *Companies' Creditors Arrangement Act* ("CCAA") applied for an order approving its proposed plan. Five objections were filed seeking either rejection or modification of the plan.

Held:

The plan was approved.

Section 11(*c*) of the CCAA does not allow the court at a sanction hearing to go beyond making technical amendments to the plan. When it appears to the court that further amendments are proper because the plan does not appear to be fair and reasonable to all concerned, it can adjourn the hearing in order to give a particular class or classes of creditors the opportunity to renegotiate or reconsider how the plan might be amended. In this case, such an adjournment was not necessary.

In deciding whether to approve a plan, the court must consider whether (1) the plan complies with the statutory requirements, (2) all material filed and procedures carried out are in compliance with and authorized by the CCAA, and (3) the plan is fair and reasonable.

The application fulfilled the first two requirements. With regard to the third, "fair and reasonable" does not mean equal; it means equitable. No plan is going to be perfect. It cannot look after every eventuality, but it must be inherently fair, reasonable and equitable. The plan as proposed was fair and reasonable.

Cases considered:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303 (C.A.) [leave to appeal to S.C.C. refused (1992), 94 D.L.R. (4th) vii (note) (S.C.C.)] — *not followed*

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

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) [affirmed 73 C.B.R. (N.S.) 195, (sub nom. *Northland Properties Ltd. v. Excelsior Life Insurance Co. of Canada)* 34 B.C.L.R. (2d) 122, [1989] 3 W.W.R. 363 (C.A.)] — *applied*

Statutes considered:

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

s. 11(c)

Application for order sanctioning plan of arrangement.

Dickson J. **(orally):**

1 I think I should review some of the steps taken in connection with this application before getting right down to the crunch of the judgment, although I don't propose to take any longer than is necessary for it, but this is what hopefully is the last in a fairly extensive series of hearings dealing with the application of Wandlyn Inns Ltd. for approval of a plan of reorganization under the *Companies' Creditors Arrangement Act* [R.S.C. 1985, c. C-36].

2 In May the application was launched and on May 20 an order was made declaring the company to be a company within the meaning of the *Companies' Creditors Arrangement Act*. Essentially, that order put a prohibition on any actions being brought against the company until it had an opportunity to put a plan of reorganization, or a plan of arrangement, before its creditors and to call the necessary creditors' meetings and so on.

3 In July, I believe it was, a classification hearing was held and the various creditors were then grouped into different classes, I believe they were seven in number, or something to that order. Those classifications were largely agreed upon; I don't think there was very much objection. There may have been some objection, as Mr. Young noted this morning, but essentially they were accepted.

4 It's not an easy thing to group all creditors. Usually unsecured creditors can be put into one classification without too much difficulty, but it is essential, of course, in some cases to put creditors who haven't got absolutely like interests in some particular class. That, of course, was true here, and undoubtedly usually is, of any class comprising secured creditors, because here we put in mortgage-holders and debenture-holders with lien claimants, who have security or have the potential for having security, and also we put in a creditor holding a floating lien, in this case the company's bank, over a great number of the company's assets. These people aren't equal. They are similar in some respects but they do have a like interest and it's practical, of course, in an application of this sort to stick them in the same class. You can't take every creditor whose position is totally different or somewhat different from any other creditor and say that creditor is going in a class of its own. That, of course, as has been pointed out in the literature, would lead to that creditor having an absolute veto over any application for reorganization under the Act and it would defeat the whole purpose of the Act.

5 In September, I believe it was September 19 or thereabouts, a plan of arrangement was filed by the company and was distributed among creditors.

6 I'm not referring to all of the hearings that have been held here. They have been quite numerous and it seems to me that it's not essential to refer to them all.

7 On October 31 the meetings of the creditors in their various classifications were held. A first amendment to the plan of organization was distributed to shareholders before that and was included in the plan and voted upon by the groups of creditors, the classes of creditors who did vote on that day. The secured creditors did not vote on that date. Obviously, it was felt by someone or other that they couldn't agree in sufficient numbers to obtain approval of the plan and therefore their meeting was adjourned over, like the meetings of the other classes, to November 13.

8 Certainly the Act envisages adjournments of meetings of creditors and negotiations continuing between those adjourned hearings and even at the adjourned hearings and right up until the time the final votes are taken. I don't doubt in the case of all applications under the C.C.A.A. there are negotiations of that nature, and a company must file amendments right up to the last moment because there's no point in an applicant under the C.C.A.A. going to meetings of creditors unless there is a reasonable hope that the plan is going to be approved in the proportions required by the Act.

9 On November 13 the adjourned meetings of the creditors were held. Two more amendments to the plan had

been filed by that time, one I believe a few days before and another one the day before, and those were voted upon and the plan as amended by the three successive amendments was overwhelmingly approved by all groups of creditors both as to numbers and as to values at the meetings of creditors, and secured creditors on November 13 when they voted and the other classes of creditors when they voted on October 31. Of course, the percentage of the vote and percentage in numbers and percentage as to value are something that a court has to have very strong regard for in determining whether sanction should be given or not.

10 Now the applicant comes before the court seeking approval of its plan. Five objections have been filed seeking either rejection or modification of the plan, and counsel representing the objectors have been heard. Other counsel have been heard representing creditors who support the plan and they have spoken in favour of its being sanctioned here today. Two of the objections have largely dissolved, I might say, those of Irving Oil and of Gerling Global, but I will deal with those presently.

11 The objection of ADI is not an objection to approval of the plan but instead seeks what the proponent describes as a technical amendment of the plan by the court. I don't question the authority of the court to make technical amendments to the plan; in fact, a couple of them have been ordered here today at this hearing just before lunchtime. But the amendment sought here amounts, in my view, to a substantive change in the plan.

12 It has been suggested that the *Algoma Steel* case, the Court of Appeal decision in the *Algoma Steel* case in Ontario [*Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303], supports the notion that a court at a sanction hearing can even go beyond making technical amendments to the plan but I am unable to find, as I indicated earlier today, that the section of the Act cited by the Court of Appeal, namely subs. 11(*c*), supports that contention.

13 That doesn't mean that I wouldn't be prepared, as I indicated earlier, to even adjourn a sanction hearing in a proper circumstance and give a particular class or classes of creditors the opportunity to renegotiate or reconsider how a plan might be amended if it appeared on the face of it that it were not fair and reasonable to all concerned, or to anybody concerned. I think in doing that one would have to weigh very carefully what might be attained by such a course and the dangers inherent in it, the dangers namely of upsetting the whole apple-cart and having some class or classes of creditors throw up their hands and say look, that's the end of it. If this thing is being opened up again it gives me the chance I want to pull out of it.

14 I don't feel that this is a situation here, having regard to the amounts involved and so on, and without acknowledging that there is anything unfair or unreasonable about the plan inherently, I don't think it's a case where there should be an adjournment for further negotiation.

15 What this hearing really boils down to is that there are two alternatives for the court, as I see it, today. One is to reject the plan and the other is to sanction the plan.

16 The other three objectors, I might say, are two lien claimants and a present mortgage-holder. All three seek rejection of the plan, although it would appear that the lien claimants would be satisfied if other lands were to be substituted for certain lands constituting security under the plan of arrangement. Similarly, Maritime Life, the mortgage-holder, presumably would be satisfied if changes in the plan were made to provide them with a second mortgage for the full amount of any deficiency on the sale of the property on which they presently hold the first mortgage. All of those changes would amount to substantive changes and they would require the consent of other creditors, most essentially the consent of the bank, and for that reason I don't feel that it would warrant sending the matter back to further meetings of the secured creditors to try to have any changes effected there.

17 So what we really come down to is whether the plan as it stands should be rejected or approved. The general principles governing the question of sanction or otherwise have been referred to several times already today and they

have been described by Trainor J. in *Re Northland Properties Ltd.* [(1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.)], the 1989 British Columbia case, at pp. 182-183:

> In the exercise of its discretion the Court should consider three criteria, which are:
>
> 1. There must be strict 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 Companies' Creditors Arrangement Act.
>
> 3. The plan must be fair and reasonable.

18 Those same principles, of course, were stated in, as I recall, essentially the same terms in an earlier judgment in a case in 1934, I believe it was, by Middleton J.A. in Ontario, and I can't remember the name of the case and I may be wrong about the name of the judge, but in any event it was the year 1934 and it was only two years after the *Companies' Creditors Arrangement Act* had been initially passed or enacted, and he did so there in terms which were essentially what Trainor J. says today [*Re Dairy Corp. of Canada Ltd.*, [1934] O.R. 436, [1934] 3 D.L.R. 347 (C.A.)].

19 In the instant case, I have followed closely this application from the beginning and through the various stages of hearings, all of which I have presided over. I have tried to be meticulous in ensuring that the Act was followed and that the various steps prescribed in the literature and by other court precedents have been followed, and I am satisfied that there has been strict compliance with the statutory requirements throughout. Similarly, I am satisfied that the material filed and the procedures carried out suggest that nothing has been done which is not authorized by the Act. I am unaware that there has been any deviation from the Act at all. There may have been very minor departures, but they have not amounted to anything of substance. I don't take all the credit for that surveillance over the case myself, because I have had the cooperation of not only the solicitors for the applicant but also the solicitors for all parties represented throughout, and if I forget to say so later I acknowledge that now and I do thank counsel for their assistance.

20 Now, the third point is, of course, the question of whether the plan is fair and reasonable. I don't intend to go into all of the ramifications of what is fair and reasonable. It's been pointed out that fair and reasonable doesn't mean equal; it means equitable in essence, and I adopt that interpretation. For instance, in the case of Maritime Life, the position of that company has been compared to that of Central Guaranty. While their positions are in some respects similar, they're certainly not identical. Maritime Life was a company which was much more undersecured in its original position than was Central Guaranty, at least as far as dollar values were concerned, and the two companies can't be treated as being totally equal. I don't feel here that any injustice would result to Maritime Life through the sanctioning of this plan.

21 No plan is going to be perfect. It is not going to look after every eventuality, but one has to decide is it inherently fair, is it inherently reasonable, is it inherently equitable, and I feel that the plan here is, and I feel that it's equally fair and equitable, even to those two remaining lienholders who have objected to it.

22 A great deal of thought has gone into the plan. If the proposition put forward by Mr. Bogart in the affidavit filed this morning is correct, or is given effect to, then Maritime Life will perhaps come out of it far better than Central Guaranty may. It's not possible to say that that will happen; they may come out of it a great deal worse, but I don't think in any sense it can be said that anyone has been treated unduly harshly here under this plan. Certainly all of the creditors, it seems to me, with the possible exception of one of the secured creditors, whom I mentioned this morning, seem to be coming out of it better than they would have done had the other course of the company going into bankruptcy occurred, and even for that one creditor there are probably advantages which far outweigh any dis-

advantages here.

23 In the case of Maritime Life, that company I would say is probably going to be substantially better off than it would have been had there been no reorganization effected, and I would say the same about the other companies which have objected. I respect their right to object and to have these matters raised, but I can only say that I have looked carefully at the matter, I have read practically all of the material put before me at the various stages of the application and particularly the very voluminous amount of material that has been filed with me re this hearing, and I think I have a reasonably good grasp of what it's all about and I'm not concerned when I come to the finding that it is fair, equitable and reasonable.

24 I don't think really it's necessary for me to say anything more than that. It follows quite naturally from what I have said that I do intend to make an order sanctioning the plan of arrangement. I will at the same time extend the prohibition against bringing actions against the company until the settlement date has arrived. That will give a short breathing period here and give an opportunity for giving effect to the plan of arrangement and getting its implementation underway.

25 As to the Irving Oil application for leave to file its mechanics' lien, I will only say that it may do that, if it so desires, at any time commencing now. In doing that I am not saying that it's a valid lien claim; I simply say you have the right to a certain lien claim by filing and commencing your action.

26 Re Gerling Global, I don't think there's any problem there. I am going to remove the restriction as of now and imposed earlier by my order against you as far as taking any action to collect on your judgment against Wandlyn Consolidated Ltd. I do urge on Gerling Global the use of some discretion in moving in that regard, not to do so unduly so as to prejudice the chance to get this plan of arrangement on its feet and get it going, but I'm not placing any restriction on that at the present time. I indicated earlier that on reflection I had some misgivings as to my authority perhaps to impose that restriction, although I did it in good faith at the time and I would follow the same course of action again.

27 I don't think it's necessary for me to deal with any other points except, Mr. Sargeant, you presumably will want to get a formal order drawn. If you would draw one incorporating my rulings on the matter, these brief rulings just at the end. You don't have to cover all the points. Are there any salient points that I should be dealing with that I haven't?

28 MR. SARGEANT: My Lord, the various prayers in the notice of motion, if you are saying that they are to be addressed in the draft order, then I have nothing else.

29 THE COURT: Well, have I addressed them all?

30 MR. SARGEANT: Not directly, My Lord, no.

31 THE COURT: What haven't I addressed?

32 MR. SARGEANT: Item number two with respect to funds on deposit at the Bank of Montreal, funds that are required for both the settlement and for working capital purposes. Those are funds that were set up in that special account authorized by your order back in July.

33 THE COURT: That's right, and you are asking what be done with that?

34 MR. SARGEANT: That the company be allowed access to those funds.

35 THE COURT: As of now.

36 MR. SARGEANT: As of now.

37 THE COURT: I could see no objection to that being ordered.

38 MR. SARGEANT: The third item really ties in with the first, that is, both sanction and implementation if we proceed with implementing the plan.

39 THE COURT: I think that speaks for itself.

40 MR. SARGEANT: The fourth item deals with the further directions vis-à-vis mechanic lien settlements.

41 THE COURT: You can put that in the order, but I'm not giving encouragement to your coming back to the court for further instructions. Hopefully, implementation of the plan will proceed without that being necessary. If there are any further matters that have to be referred to the court, I'm available, or somebody else is, to deal with it.

42 MR. SARGEANT: It is our intention to try and facilitate a resolution of it without involving the court. And then I think as a safety net there should be some opportunity to revisit the court as problems might arise, which is the fifth item. Maybe it isn't necessary per se.

43 THE COURT: Again, you can put that, too, in your order if you wish.

44 The only other thing I wish to do before we conclude is to thank the monitor for his assistance through the matter. His part in this whole thing perhaps hasn't ended right here because he still — When I say he, I don't mean just Mr. O'Neil, but his colleagues in Price Waterhouse as well. Mr. O'Neil particularly, perhaps, has been a great help to the court and you still have some functions, I believe, under the plan of arrangement, so good luck to you in that regard.

45 I want to thank again all counsel involved, even though I did earlier. They have all been of great assistance here and I must say that I think the whole application and its consideration, quite apart from the outcome, has gone very, very smoothly. Applications of this type are complicated. I find that counsel have been a great help. Mrs. King's brief was an excellent specimen of what a legal brief should be on this subject and I hope other counsel will keep it as a model to go by in future similar cases. But all the briefs were excellent and I thank counsel for their assistance.

Order accordingly.

END OF DOCUMENT

1998 CarswellOnt 1145, 3 C.B.R. (4th) 171

Sammi Atlas Inc., Re

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

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

In The Matter of a Plan of Compromise or Arrangement of Sammi Atlas Inc.

Ontario Court of Justice, General Division [Commercial List]

Farley J.

Heard: February 27, 1998
Judgment: February 27, 1998
Docket: 97-BK-000219, B230/97

Counsel: *Norman J. Emblem*, for the applicant, Sammi Atlas Inc.

James Grout, for Agro Partners, Inc.

Thomas Matz, for the Bank of Nova Scotia.

Jay Carfagnini and *Ben Zarnett*, for Investors' Committee.

Geoffrey Morawetz, for the Trade Creditors' committee.

Clifton Prophet, for Duk Lee.

Subject: Insolvency; Corporate and Commercial

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous issues

Corporation brought motion for approval and sanctioning of plan of compromise and arrangement under Companies' Creditors Arrangement Act — There must be strict compliance with all statutory requirements and adherence to previous orders of court — All materials filed and procedures carried out must be examined to determine whether anything has been done or purported to be done which is not authorized by Act — Plan must be fair and reasonable — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Corporation and majority of creditors approved plan of compromise and arrangement under Companies' Creditors Arrangements Act providing for distribution to creditors on sliding scale based on aggregate of all claims held by each claimant — Corporation brought motion for approval and sanctioning of plan — Creditor by way of assignment brought motion for direction that plan be amended — Motion for approval and sanctioning was granted, and motion for amendment was dismissed — Court should be reluctant to interfere with business decisions of creditors reached as a body — No exceptional circumstances supported motion to amend plan after it was voted on — No jurisdiction existed under Act to grant substantive change sought by creditor — Creditor and all unsecured creditors were treated fairly and reasonably — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by *Farley J.*:

Algoma Steel Corp. v. Royal Bank (1992), 11 C.B.R. (3d) 11, 8 O.R. (3d) 449, 93 D.L.R. (4th) 98, 55 O.A.C. 303 (Ont. C.A.) — applied

Campeau Corp., Re (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) — applied

Central Guaranty Trustco Ltd., Re (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) — applied

Northland Properties Ltd., Re (1988), 73 C.B.R. (N.S.) 175 (B.C. S.C.) — applied

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.) — referred to

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

Statutes considered:

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

Generally — referred to

MOTION for approval and sanctioning of plan of compromise and arrangement under *Companies' Creditors Arrangement Act*; MOTION by creditor for amendment of plan.

***Farley J.*:**

1 This endorsement deals with two of the motions before me today:

1) Applicant's motion for an order approving and sanctioning the Applicant's Plan of Compromise and Arrangement, as amended and approved by the Applicant's unsecured creditors on February 25, 1998; and

2) A motion by Argo Partners, Inc. ("Argo"), a creditor by way of assignment, for an order directing that the Plan be amended to provide that a person who, on the record date, held unsecured claims shall be entitled to elect treatment with respect to each unsecured claim held by it on a claim by claim basis (and not on an aggregate basis as provided for in the Plan).

2 As to the Applicant's sanction motion, the general principles to be applied in the exercise of the court's discretion are:

1) there must be strict compliance with all statutory requirements and adherence to the previous orders of the court;

2) 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 *Companies' Creditors Arrangement Act* ("CCAA"); and

3) 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 (1989), 73 C.B.R. (N.S.) 195 (B.C. C.A.) at p.201; *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.) at p.506.

3 I am satisfied on the material before me that the Applicant was held to be a corporation as to which the CCAA applies, that the Plan was filed with the court in accordance with the previous orders, that notices were appropriately given and published as to claims and meetings, that the meetings were held in accordance with the directions of the court and that the Plan was approved by the requisite majority (in fact it was approved 98.74% in number of the proven claims of creditors voting and by 96.79% dollar value, with Argo abstaining). Thus it would appear that items one and two are met.

4 What of item 3 - is the Plan fair and reasonable? A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights: see *Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at p.109. It is recognized that the CCAA contemplates that a minority of creditors is bound by the Plan which a majority have approved - subject only to the court determining that the Plan is fair and reasonable: see *Northland Properties Ltd.* at p.201; *Olympia & York Developments Ltd.* at p.509. In the present case no one appeared today to oppose the Plan being sanctioned: Argo merely wished that the Plan be amended to accommodate its particular concerns. Of course, to the extent that Argo would be benefited by such an amendment, the other creditors would in effect be disadvantaged since the pot in this case is based on a zero sum game.

5 Those voting on the Plan (and I note there was a very significant "quorum" present at the meeting) do so on a business basis. As Blair J. said at p.510 of *Olympia & York Developments Ltd.*:

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

The court should be appropriately reluctant to interfere with the business decisions of creditors reached as a body. There was no suggestion that these creditors were unsophisticated or unable to look out for their own best interests. The vote in the present case is even higher than in *Central Guaranty Trustco Ltd., Re* (1993), 21 C.B.R. (3d) 139 (Ont. Gen. Div. [Commercial List]) where I observed at p.141:

> ... This on either basis is well beyond the specific majority requirement of CCAA. Clearly there is a very heavy

> burden on parties seeking to upset a plan that the required majority have found that they could vote for; given the overwhelming majority this burden is no lighter. This vote by sophisticated lenders speaks volumes as to fairness and reasonableness.
>
> The Courts should not second guess business people who have gone along with the Plan....

6 Argo's motion is to amend the Plan - after it has been voted on. However I do not see any exceptional circumstances which would support such a motion being brought now. In *Algoma Steel Corp. v. Royal Bank* (1992), 11 C.B.R. (3d) 11 (Ont. C.A.) the Court of Appeal observed at p.15 that the court's jurisdiction to amend a plan should "be exercised sparingly and in exceptional circumstances only" even if the amendment were merely technical and did not prejudice the interests of the corporation or its creditors and then only where there is jurisdiction under the CCAA to make the amendment requested, I was advised that Argo had considered bringing the motion on earlier but had not done so in the face of "veto" opposition from the major creditors. I am puzzled by this since the creditor or any other appropriate party can always move in court before the Plan is voted on to amend the Plan; voting does not have anything to do with the court granting or dismissing the motion. The court can always determine a matter which may impinge directly and materially upon the fairness and reasonableness of a plan. I note in passing that it would be inappropriate to attempt to obtain a preview of the court's views as to sanctioning by brining on such a motion. See my views in *Central Guaranty Trustco Ltd., Re* at p.143:

> ... In *Algoma Steel Corp. v. Royal Bank* (1992), 8 O.R. (3d) 449, the Court of Appeal determined that there were exceptional circumstances (unrelated to the Plan) which allowed it to adjust *where no interest was adversely affected*. The same cannot be said here. FSTQ aside from s.11(c) of the CCAA also raised s.7. I am of the view that s.7 allows an amendment after an adjournment - *but not after a vote has been taken.* (emphasis in original)

What Argo wants is a substantive change; I do not see the jurisdiction to grant same under the CCAA.

7 In the subject Plan creditors are to be dealt with on a sliding scale for distribution purposes only: with this scale being on an aggregate basis of all claims held by one claimant:

> i) $7,500 or less to receive cash of 95% of the proven claim;
>
> ii) $7,501 - $100,000 to receive cash of 90% of the first $7,500 and 55% of balance; and;
>
> iii) in excess of $100,000 to receive shares on a formula basis (subject to creditor agreeing to limit claims to $100,000 so as to obtain cash as per the previous formula).

Such a sliding scale arrangement has been present in many proposals over the years. Argo has not been singled out for special treatment; others who acquired claims by assignment have also been affected. Argo has acquired 40 claims; all under $100,000 but in the aggregate well over $100,000. Argo submitted that it could have achieved the result that it wished if it had kept the individual claims it acquired separate by having them held by a different "person"; this is true under the Plan as worded. Conceivably if this type of separation in the face of an aggregation provision were perceived to be inappropriate by a CCAA applicant, then I suppose the language of such a plan could be "tightened" to eliminate what the applicant perceived as a loophole. I appreciate Argo's position that by buying up the small claims it was providing the original creditors with liquidity but this should not be a determinative factor. I would note that the sliding scale provided here does recognize (albeit imperfectly) that small claims may be equated with small creditors who would more likely wish cash as opposed to non-board lots of shares which would not be as liquidate as cash; the high percentage cash for those proven claims of $7,500 or under illustrates the desire not to have the "little person" hurt - at least any more than is necessary. The question will come down to balance - the plan must be efficient and attractive enough for it to be brought forward by an applicant with the realistic chance of its succeeding (and perhaps in that regard be "sponsored" by significant creditors) and while not being too generous so that the future of the applicant on an ongoing basis would be in jeopardy: at the same time it must gain enough support amongst the creditor body for it to gain the requisite majority. New creditors by assignment may provide not only liquidity but also a benefit in providing a block of support for a plan which may not have been forthcoming as a small creditor may not think it important to do so. Argo of course has not claimed it is a "little person" in the context of this CCAA proceeding.

8 In my view Argo is being treated fairly and reasonably as a creditor as are all the unsecured creditors. An aggregation clause is not inherently unfair and the sliding scale provisions would appear to me to be aimed at "protecting (or helping out) the little guy" which would appear to be a reasonable policy.

9 The Plan is sanctioned and approved; Argo's aggregation motion is dismissed.

Addendum:

10 I reviewed with the insolvency practitioners (legal counsel and accountants) the aspect that industrial and commercial concerns in a CCAA setting should be distinguished from "bricks and mortgage" corporations. In their reorganization it is important to maintain the goodwill attributable to employee experience and customer (and supplier) loyalty; this may very quickly erode with uncertainty. Therefore it would, to my mind be desirable to get down to brass tacks as quickly as possible and perhaps a reasonable target (subject to adjustment up or down according to the circumstances including complexity) would be for a six month period from application to Plan sanction.

Motion for approval granted; motion for amendment dismissed.

END OF DOCUMENT

Canadian Securities Administrators | Autorités canadiennes en valeurs mobilières

CSA Staff Notice 12-307

Applications for a Decision that an Issuer is not a Reporting Issuer

(First published September 12, 2003 and revised February 4, 2005, November 1, 2006 and March 7, 2008)

March 7, 2008

Purpose

This Notice provides information and guidance on coordinated review applications that may be made under National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* (NP 11-203) for a decision that an issuer is not a reporting issuer (a decision) on or after March 17, 2008 (these applications were previously made under National Policy 12-201 *Mutual Reliance Review System for Exemptive Relief Applications*). Among other things, this Notice covers:

- how an issuer can apply for a decision under a simplified procedure if it meets certain conditions.
- how an issuer can apply for a decision if it is not eligible to use the simplified procedure.
- how an issuer can describe the decision it wants in way that addresses legislative differences between jurisdictions.
- how a foreign issuer with a small securityholder presence in Canada can apply for a decision.
- the procedure for dissolved issuers.

The Simplified Procedure

The local securities regulatory authority or regulator in each of Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland and Labrador (the Jurisdictions) has adopted a simplified procedure for certain coordinated review applications (NP 11-203 describes the process for a coordinated review application) in which an issuer is seeking a decision that it is not a reporting issuer under the securities legislation of the Jurisdictions (the Legislation).

The simplified procedure is available to a reporting issuer:

- that is not a reporting issuer in British Columbia (including an issuer that has voluntarily surrendered its reporting issuer status under British Columbia Instrument 11-502 *Voluntary Surrender of Reporting Issuer Status*);

- that is seeking a decision that it is not a reporting issuer, from the local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions in which it is a reporting issuer;
- whose outstanding securities, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 security holders in each of the jurisdictions in Canada and fewer than 51 security holders in total in Canada;
- whose securities are not traded on a marketplace as defined in National Instrument 21-101 *Marketplace Operation*; and
- that is not in default of any of its obligations under the Legislation as a reporting issuer.

The reporting issuer may request a decision by submitting, to each of the Jurisdictions in which it is seeking the decision, the fees applicable under the Legislation, a draft decision document and a letter in duplicate prepared by or on behalf of the issuer that:

- states that the issuer is seeking a decision of the Decision Makers that it is not a reporting issuer;
- references the simplified procedure in this Notice; and
- includes representations that the applicant meets each of the criteria set out in the simplified procedure in this Notice.

Schedule 1 includes a sample application letter and form of decision document. In some cases, staff may request additional information from the reporting issuer. The reporting issuer should make its application in paper and electronic format as described in section 5.5 of NP 11-203.

The procedure will simplify the process in certain routine circumstances for a reporting issuer submitting a coordinated review application under NP 11-203 for decision that it is not a reporting issuer.

Applying for relief in British Columbia
The simplified procedure is not available in British Columbia. If a reporting issuer has no more than 50 securityholders (both debt and equity) and its securities are not traded through any exchange or market, it may surrender its status as a reporting issuer in that province by filing with the British Columbia Securities Commission the notice described in British Columbia Instrument 11-502 *Voluntary Surrender of Reporting Issuer Status*. The issuer would then apply for relief in other jurisdictions using the simplified procedure under this Notice.

What to do when the simplified procedure in this Notice and BC Instrument 11-502 is not available
If an issuer cannot meet all of the simplified procedure criteria in this Notice or in BC Instrument 11-502 (if the issuer is a reporting issuer in British Columbia), the issuer should submit an

application under the standard procedure for a coordinated review application under NP 11-203 using the form of decision document attached as Annex C to NP 11-203. The reporting issuer should submit its application to each jurisdiction where the issuer is a reporting issuer.

An issuer wanting to avoid the minimum 10-day waiting period under BC Instrument 11-502 (which is a condition precedent to the other jurisdictions making a decision under the simplified procedure) should follow the standard procedure for a coordinated review application.

How to describe the decision the issuer wants
The legislation varies among the jurisdictions in how it authorizes regulators to terminate reporting issuer status. An issuer should include the language in the legislation of its principal regulator in its draft decision document. Where Québec is not the principal regulator and the issuer requires a decision in Québec, the issuer should also include the wording "revoke the issuer's status as a reporting issuer" in its draft decision document if the language in the legislation of the principal regulator uses the phrase "ceased to be a reporting issuer". The form of decision document in Schedule 1 to this Notice sets out the applicable language for each principal regulator.

The Territories
The concept of reporting issuer does not currently exist in the securities legislation of the Northwest Territories, Nunavut and Yukon, so no relief is currently necessary in those jurisdictions. However, those jurisdictions plan to amend their legislation in 2008 to include the concept of reporting issuer and then adopt the simplified procedure for relief in their jurisdictions.

Going-private transactions
Where the issuer is in the process of completing a going-private transaction following which it will want to stop being a reporting issuer, the issuer may apply for relief using the simplified process in this Notice prior to completing the transaction. A jurisdiction cannot make a decision until the transaction is complete and the issuer can represent that it has satisfied all the criteria in for the simplified procedure.

Successor reporting issuers
In circumstances where an issuer has exchanged its securities with another party (or that party's securityholders) in connection with a statutory arrangement or procedure, the issuer should consider whether any other party in the transaction will or has become a reporting issuer following the exchange. If so, the issuer should disclose the name of that party in its application to stop being a reporting issuer and provide a brief summary of the statutory arrangement or procedure and the parties involved.

Foreign issuers
Foreign-incorporated issuers often seek decisions that they are not reporting issuers under applicable securities legislation when they have a declining numbers of securityholders in Canada. In general, these issuers do not meet the criteria for the simplified procedure in this Notice because they typically have many beneficial securityholders in jurisdictions in Canada, and their securities are listed on one or more exchanges outside of Canada. However, they wish

to cease being reporting issuers in Canada because their securities are not listed on an exchange in Canada and they do not intend to make any further distributions of securities in Canada.

Past approach
In the past, CSA staff have recommended a decision that a foreign issuer is not a reporting issuer where the issuer could demonstrate that Canadian ownership of its securities is *de minimis* compared to the total ownership by non-Canadian securityholders. In past decisions, this has been demonstrated when an issuer had:

- fewer than 300 beneficial securityholders in Canada, and
- a small percentage of total securityholdings beneficially owned by Canadian residents.

Modified approach
We have adopted a modified approach for applications by issuers that report in the U.S. and are listed on a U.S. exchange. If such an issuer meets the following criteria, CSA staff will generally recommend a decision that the issuer is not a reporting issuer:

1. The issuer makes a representation that residents of Canada do not:

   (a) directly or indirectly beneficially own more than 2% of each class or series of outstanding securities of the issuer worldwide, and

   (b) directly or indirectly comprise more than 2% of the total number of securityholders of the issuer worldwide.

   CSA staff have noticed that some filers have difficulty making representations on the beneficial ownership of securities by residents of Canada. CSA staff will not generally recommend granting the relief without the issuer satisfying the "2% test". In addition, staff will not generally recommend granting the relief where a representation is qualified or limited to the knowledge of the issuer, unless the issuer can fully demonstrate that it has made diligent enquiry to support the representation and why it cannot give an unqualified representation.

2. The issuer files continuous disclosure reports under U.S. securities laws and is listed on a U.S. exchange.

3. In the 12 months before applying for the decision, the issuer has not taken any steps that indicate there is a market for its securities in Canada. Steps that would indicate there is a market in Canada include conducting a prospectus offering in Canada, or establishing or maintaining a listing on a Canadian marketplace or exchange.

4. The issuer provides advance notice to Canadian resident securityholders in a press release that it has applied to securities regulatory authorities for a decision that it is not a reporting issuer in Canada and, if that decision is made, the issuer will no longer be a reporting issuer in any jurisdiction in Canada.

5. The issuer undertakes to concurrently deliver to its Canadian securityholders, all disclosure the issuer would be required under U.S. securities law or exchange requirements to deliver to U.S. resident securityholders.

Non-U.S. issuers that are listed on a major foreign exchange and meet the 2% test may also apply using the modified approach, provided that the issuer demonstrates that Canadian securityholders will receive adequate disclosure under the foreign securities law or exchange requirements.

Reporting issuer that has been dissolved or terminated
A reporting issuer does not need to apply for a decision that it is not a reporting issuer if it is:

- a corporation that was dissolved under applicable corporate legislation,
- a limited partnership that was dissolved under applicable limited partnership legislation,
- a trust that was terminated under its declaration of trust, or
- another form of business organization that was dissolved or terminated under its applicable governing legislation or constating or establishing document.

In each case, it will be sufficient if an agent files evidence of the dissolution or termination with the securities regulatory authority in each jurisdiction where the issuer was a reporting issuer.

For a corporation, sufficient evidence includes a copy of the certificate and articles of dissolution.

For a limited partnership, sufficient evidence typically includes:

- a copy of the declaration of dissolution or similar document filed under applicable limited partnership legislation, and
- a written representation from the general partner about the effective date of dissolution under applicable limited partnership legislation.

For a trust, sufficient evidence typically includes:

- a copy of the resolution authorizing the termination of the trust,
- a report on voting results indicating that the resolution was passed,
- a written representation that the trust no longer exists (it is sufficient if this representation is provided by filing counsel or former trustees or officers),
- a copy of the change in corporate structure notice filed under section 4.9 of National Instrument 51-102 *Continuous Disclosure Obligations*, and

- evidence such as a copy of a press release or written submission from filing counsel that the trust has no securities outstanding and none listed on an exchange.

If an issuer has commenced dissolution proceedings but still exists, it will remain a reporting issuer in the absence of a decision that it is not a reporting issuer.

For more information
If you have questions about this Notice, please contact:

Noreen Bent
British Columbia Securities Commission
(604) 899-6741 or (800) 373-6393 (in B.C.)
nbent@bcsc.bc.ca

Ian Kerr
Alberta Securities Commission
(403) 297-4225
ian.kerr@seccom.ab.ca

Dean Murrison
Saskatchewan Financial Services Commission
(306) 787-5879
dmurrison@sfsc.gov.sk.ca

Chris Besko
The Manitoba Securities Commission
(204) 945-2561
cbesko@gov.mb.ca

Michael Bennett
Ontario Securities Commission
(416) 593-8079
mbennett@osc.gov.on.ca

Sarah Oseni
Ontario Securities Commission
(416) 593-8138
soseni@osc.gov.on.ca

Sylvie Lalonde
Autorité des marchés financiers
Telephone: (514) 395-0337 ext. 4398
sylvie.lalonde@lautorite.qc.ca

Marie-Christine Barrette
Autorité des marchés financiers
(514) 395-0337 ext. 4401
marie-christine.barrette@lautorite.qc.ca

Susan Powell
New Brunswick Securities Commission
(506) 643-7697
susan.powell@nbsc-cvmnb.ca

Shirley Lee
Nova Scotia Securities Commission
(902) 424-5441
leesp@gov.ns.ca

Schedule 1

Example of an Application Letter under the Simplified Procedure

[Enter date]

[List name of the principal regulator
and each non-principal regulator]

Dear Sirs/Mesdames:

Re: [Enter name of applicant] (the Applicant) - application for a decision under the securities legislation of [list the jurisdictions] (the Jurisdictions) that the Applicant is not a reporting issuer

We are applying to the **[identify principal regulator]** as principal regulator **[on behalf of the Applicant]** for a decision under the securities legislation (the Legislation) of the Jurisdictions that the Applicant is not a reporting issuer.

Under the simplified procedure in CSA Staff Notice 12-307, the Applicant represents that:

- the outstanding securities of the Applicant, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 security holders in each of the jurisdictions in Canada and fewer than 51 security holders in total in Canada;
- no securities of the Applicant are traded on a marketplace as defined in National Instrument 21-101 *Marketplace Operation*;
- the Applicant is applying for a decision that it is not a reporting issuer in all of the jurisdictions in Canada in which it is currently a reporting issuer; and
- the Applicant is not in default of any of its obligations under the Legislation as a reporting issuer.

[Enter name of Applicant]
[Signature of the person who has signing authority]

Example of a Decision Document under the Simplified Procedure

[Enter date]

[Enter name and address of Applicant]

Dear Sirs/Mesdames:

Re: [Enter name of applicant] (the Applicant) - application for a decision under the securities legislation of [list the jurisdictions] (the Jurisdictions) that the Applicant is not a reporting issuer

The Applicant has applied to the local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions for a decision under the securities legislation (the Legislation) of the Jurisdictions that the Applicant is not a reporting issuer.

As the Applicant has represented to the Decision Makers that:

(a) the outstanding securities of the Applicant, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 security holders in each of the jurisdictions in Canada and fewer than 51 security holders in total in Canada;

(b) no securities of the Applicant are traded on a marketplace as defined in National Instrument 21-101 *Marketplace Operation*;

(c) the Applicant is applying for a decision that it is not a reporting issuer in all of the jurisdictions in Canada in which it is currently a reporting issuer; and

(d) the Applicant is not in default of any of its obligations under the Legislation as a reporting issuer,

[If the principal regulator is Ontario, insert:]

each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met and orders that the Applicant is not a reporting issuer.

OR

[If the principal regulator is Saskatchewan or New Brunswick, insert:]

each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met and orders that the Applicant is not to be a reporting issuer.

OR

[If the principal regulator is Alberta or Nova Scotia, insert:]

each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met and orders that the Applicant is deemed to have ceased to be a reporting issuer **[if a decision is also sought in Quebec, add:]** and that the Applicant's status as a reporting issuer is revoked.

OR

[If the principal regulator is Manitoba, insert:]

each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met and makes an order declaring that the Applicant has ceased to be a reporting issuer **[if a decision is also sought in Quebec, add:]** and revoking the Applicant's status as a reporting issuer.

OR

[If principal regulator is Quebec, insert:]

each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met and orders that the Applicant's status as a reporting issuer is revoked.

______________________________ **(Name of signatory for the principal regulator)**

______________________________ **(Title)**

______________________________ **(Name of principal regulator)**