

# focus

## on

# Insolvency Law

June, 2008

The logo for Fraser Milner Casgrain LLP, consisting of the letters 'FMC' in white on a dark blue square background.

FRASER MILNER CASGRAIN LLP

### CASE UPDATE - ASSET BACKED COMMERCIAL PAPER PLAN OF ARRANGEMENT APPROVED

In its analysis the Court observed that what was being sought was not just a restructuring of the insolvent corporations which were the Issuer Trustees in the proceeding, but rather a restructuring of the asset backed commercial paper market itself in Canada. The opposing parties did not take issue with the legal or practical basis of the goal of the Plan itself. Rather, their objections focused upon some of the release provisions of the Plan of Arrangement. The Court described the players and situation as follows:

Given the nature of the ABCP market and all its participants, it is more appropriate to consider all Noteholders as claimants and the object of the Plan to restore liquidity to the assets being the Notes themselves. The restoration of the liquidity of the market necessitates the participation (including more tangible contribution by many) of all Noteholders.

In these circumstances, it is unduly technical to classify the Issuer Trustees as debtors and the claims of Noteholders as between themselves and others as being those of third party creditors, although I recognize that the restructuring structure of the CCAA requires the corporations as the vehicles for restructuring.

The insolvency is of the ABCP market itself, the restructuring is that of the market for such paper - restructuring that involves the commitment and participation of all parties...

Turning to the point which prevented the Court from approving the Plan of Arrangement earlier in May, being the potential for the releases under the Plan of Arrangement to exonerate fraud, the Court states:

I am satisfied that based on [the evidence] ..., a compelling case for the need for comprehensive releases, with the exception of certain fraud claims, has been made out.

The Released Parties have made comprehensive releases a condition of their participation in the Plan or as parties to the Approved Agreements. Each Released Party is making a necessary contribution to the Plan without which the Plan cannot be implemented. The Asset Providers, in particular, have agreed to amend certain of the existing contracts and/or enter into new contracts that, among other things, will restructure the trigger covenants, thereby increasing their risk of loss and decreasing the risk of losses being borne by Noteholders. In addition, the Asset Providers are making further contributions that materially improve the position of Noteholders generally, including through forbearing from make collateral calls since August 15, 2007, participating in the MAB2 Margin Funding Facility at pricing favourable to the Noteholders, accepting additional collateral at part with respect to the Traditional Assets and disclosing confidential information, none of which they are contractually obligated to do. The ABCP Sponsors have also released confidential information, cooperated with the Investors Committee and its advisors in the development of the Plan, released their claims in respect of certain future fees that would accrue to them in respect of the assets and are assisting in the transition of administration services to the Asset Administrator, should the Plan be implemented. ...

In many instances, a party had a number of relationships in different capacities with numerous trades or programs of an ABCP Conduit, rendering it difficult or impractical to identify and/or quantify any individual Released Parties contribution. Certain of the Released Parties may have contributed more to the Plan than others. However, in order for the releases to be comprehensive, the Released Parties (including those Released Parties without which no restructuring could occur) require that all Released Parties be included so that one Person who is not released by the Noteholders is unable to make a claim over for contribution from a Released Party and thereby defeat the effectiveness of the releases...

The consequences of failing to approve a Plan with the subject releases was succinctly summarized by the Court as follows:

I am also satisfied that those parties and institution who were involved in the ABCP market directly at issue and those additional parties who have agreed solely to assist in the restructuring have valid and legitimate reasons for seeking such releases. To exempt some Noteholders from release provisions not only leads to the failure of the Plan, it does likely result in many Noteholders having to pursue fraud or negligence claims to obtain any redress, since the value of the assets underlying the Notes may, after first security interests be negligible.

The Court then undertook a lengthy analysis of many of Canada's leading CCAA cases (including Canadian Airlines, Canadian Red Cross Society, Muscletech, Stelco, and the numerous cases they refer to) with a view to determining whether any of them provided any precedent for the broad releases of the type contemplated by this Plan, and concluded the Court did have the jurisdiction to approve such releases.

Next the Court undertook a lengthy analysis of recent academic discussion concerning the proper statutory interpretation of the CCAA, including the concepts of "gap filling", judicial discretion and inherent jurisdiction within the skeleton of the CCAA. The Court found that the present case is one where it is appropriate for the use of the gap filling function:

I have been satisfied the Plan cannot succeed without the compromise. In my view, given the purpose of the statute and the fact that this Plan is accepted by all appearing parties in principle, it is a reasonable gap filling function to compromise certain claims necessary to complete restructuring by the parties. Those contributing to the Plan are directly related to the value of the Notes themselves within the Plan.

In coming to this conclusion, the Court adopted the following conclusion of the academic writers:

On the authors' reading of the commercial jurisprudence, the problem most often for the Court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the Court, or in some cases, grants the Court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right too, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the Court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

With respect to the releases of potential fraud claims, the Court summarized the position of those opposing the Plan, and then gave its determination:

The thrust of the Plan opponents' arguments is that as drafted, the permitted fraud claims would preclude recovery in circumstances where senior bank officers who had the requisite fraudulent intent directed sales persons to make statements that the sales persons reasonably believed but that the senior officers knew to be false.

That may well be the result of the effect of the Releases as drafted. Assuming that to be the case, I am not satisfied that the Plan should be rejected on the basis that the release covenant for fraud is not as broad as it could be.

The Applicants and supporters have responded to the Court's concern that as initially drafted, the initial release provisions would have compromised all fraud claims. I was aware when the further request for release consideration was made that any "carve out" would unlikely be sufficiently broad to include any possibility of all deceit or fraud claims being made in the future.

The particular concern was to allow those claims that might arise from knowingly arise from false representations being made directly to Noteholders, who relied on the fraudulent misrepresentation and suffer damage as a result.

The release as drafted accomplishes that purpose. It does not go as far as to prevent all possible fraud claims. ...

Therefore, the Court found that the release provisions, in the circumstances of the case, were fair and reasonable.

Finally, in conclusion, this Court stated:

I have as a result addressed a number of questions in order to be satisfied that in the specific context of this case, a Plan that includes third party releases is justified within CCAA jurisdiction. I have concluded that all of the following questions can be answered in the affirmative.

1. Are the parties to be released necessary and essential to the restructuring of the debtor?
2. Are the claims to be released rationally related to the purpose of the Plan and necessary for it?
3. Can the Court be satisfied that without the releases the Plan cannot succeed?
4. Are the parties who will have claims against them released contributing in a tangible and realistic way to the Plan?
5. Is the Plan one that will benefit not only the debtor but creditor Noteholders generally?
6. Have the voting creditors approved the Plan with knowledge of the nature and effect of the releases?
7. Is the Court satisfied that in the circumstances the releases are fair and reasonable in the sense that they are not overly broad and not offensive to public policy?

I have concluded on the facts of this Application that the releases sought as part of the Plan, including the language exempting fraud, to be permissible under the CCAA and are fair and reasonable.

The motion to approve the Plan of Arrangement sought by the Application is hereby granted on the terms of the draft Order filed and signed.

For further information please contact David Mann at 403 268-7097 or David LeGeyt at 403 268-3075, or visit our website [www.fmc-law.com/insolvency](http://www.fmc-law.com/insolvency).