Superior Court of Ontario

361 University Avenue, Room 170, Judges' Administration
Toronto, Ontario
Tel: 416-327-5284. Fax: 416-327-5417

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Mr Craig Hill
Borden Ladner
Fax: 416-367-6749

From: Justice Colin Campbell

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DATE: 20080424

SUPERIOR COURT OF JUSTICE
ONTARIO
(Commercial List)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT Involving Metcalfe & Mansfield Alternative Investments II Corp., Metcalfe & Mansfield Alternative Investments III Corp., Metcalfe & Mansfield Alternative Investments V Corp., Metcalfe & Mansfield Alternative Investments XI Corp., Metcalfe & Mansfield Alternative Investments XII Corp., 6932819 Canada Inc. and 4446372 Canada Inc., Trustees of the Conduits Listed In Schedule "A" Hereto

BETWEEN:	THE INVESTORS REPRESENTED ON THE PAN-CANADIAN INVESTORS COMMITTEE FOR THIRD-PARTY STRUCTURED ASSET-BACKED COMMERCIAL PAPER LISTED IN SCHEDULE "B" HERETO (Applicants)
AND:	METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS II CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS III CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS V CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XI CORP., METCALFE & MANSFIELD ALTERNATIVE INVESTMENTS XII CORP., 6932819 CANADA INC. AND 4446372 CANADA INC., TRUSTEES OF THE CONDUITS LISTED IN SCHEDULE "A" HERETO (Respondents)
BEFORE:	C. CAMPBELL J.
HEARD:	March 17, 2008

ENDORSEMENT

[1] Given the urgent need for a decision in this matter, this brief endorsement will have to suffice until a complete written decision is delivered.

[2] The motions of the moving parties seek: (a) a determination that the releases presently contemplated to be required of parties in this CCAA process are overly broad and in the circumstances confiscatory of parties' rights and therefore illegal; (b) that corporate and individual Noteholders who object to the releases be a separate class; and (c) that the meeting and vote of Noteholders be adjourned until further information sought from the Applicants is made available.

[3] This CCAA Plan that has been initiated is of unprecedented size, complexity and importance to the capital markets of Canada.

[4] I have concluded that the Noteholder vote scheduled for April 25, 2008 should go ahead. To postpone the vote, even if something else were to take place before the April 30 expiry of the Standstill Agreement, would signal the failure of the Plan. A failure of the Plan will have extremely serious consequences.

[5] I do not take lightly nor decide against the rights of certain Noteholders to argue that the issue of releases does have a legal validity component to it as well as specific fairness. In my view, those issues should be considered together as part of the fairness process, not be determined in isolation at this time.

[6] The issue of third party releases is sufficiently accepted in our Courts that they are at least worthy of consideration in context of whether the Plan as whole is accepted by all or a sufficient portion of Noteholders that it can go forward.

[7] If third party releases are a necessary and incidental part of a Plan's success, that is one matter. If the effect of releases is to deprive a party of claims unrelated to the Plan, that is another. There must be a reasonable balance.

[8] I am satisfied that the legitimate concerns of some Noteholders can be accommodated in the fairness/sanction process and the motion insofar as releases are concerned is adjourned for that purpose.

[9] It will be helpful to all concerned to know whether the Plan is accepted and if so by whom. Since the Monitor will be able to tabulate return information in a fashion that enables Noteholders who argue that there should be a separate class for them to know just who they are and in amounts and particulars, I see no need to provide for different classes of Noteholders before the vote.

[10] The arguments in favour of a classification that would give some Noteholders in effect a veto would mean the Plan that is before the Court would be defeated. I do not think this is a desirable result for any of the parties associated in any way with the Plan or for those who participate or observe the financial markets in Canada.

[11] A reclassification at this point would in my view require a postponement of the vote, an unacceptable approach. Since the issue for which the moving parties seek further voting classification is directly related to the issue of validity and fairness of the proposed releases, I do not think it unfair that the vote go ahead in a "one vote per Noteholder" fashion at this time.

[12] The distinction related to risk and benefit of the Plan to those who seek further consideration of releases in the sanction process can best be dealt with when those parties decide whether they wish to work within the Plan while preserving their ability to argue both validity and fairness of specific releases, or alternatively to vote against the Plan at this stage to signal that they will insist on no compromise of any actual or potential litigation right.

[13] In giving this preliminary decision, I am mindful from the very forceful argument of counsel for the moving parties that there is a very serious issue of law of the legally permissible extent of third party releases. An analysis of the authorities will have to wait.

[14] I am also mindful of the limits of the mandate of the Applicants in these circumstances. The Plan has been carefully and painstakingly negotiated over a number of months and I have no doubt that if the result of the fairness process were to open up the right of every Noteholder to sue whomsoever they wished for any reason related to their purchase of notes, the Plan will likely be withdrawn.

[15] How then to put some focus on the release issues? In some restructurings, the applicants will suggest a claims process that may well bring in those who seek to advance specific claims that affect the debtor and its business, as well as related parties. This is normally done on a consensual basis so that expedition and management can be assured.

[16] As has been said in many cases, the purpose of the CCAA is to allow business people an opportunity to "facilitate compromises and arrangements between companies and their creditors."

[17] Without in any way defining at the moment just how far that can go in respect of third party rights, I do think that a more defined and principled approach to that issue is appropriate for the sanction process.

[18] The Court is simply not in a position to make an informed decision on what may or may not be appropriate claims to be released without more information.

[19] The Applicants and those affected should also have full particulars. If there is a ruling favourable to the moving parties, the Applicants and Plan Sponsors will have a decision to make whether or not to continue the Plan.

[20] I see no reason that process cannot start as soon as possible after the vote results are known. If the vote favors the Plan, I suggest a directions hearing on April 28 or 29 to see if and under what circumstances the Standstill may be extended.

[21] Some moving parties requested that the vote be postponed until further specific information is provided by the Applicants on, among other things, projected recoveries anticipated under the Plan. I am satisfied, at least for the present time, that the Applicants have provided the information that is reasonably available.

[22] Some of the Moving Parties chose not to avail themselves of further information as they did not want to sign confidentiality agreements. I am satisfied that the Plan and other information, which was available if sought, are sufficient to enable the vote to proceed on as informed a basis as possible in the circumstances.

[23] Again, if the Noteholder vote favours the Plan and there is information required for the issue of validity and fairness of releases, the matter may be raised again. The motion requesting adjournment is dismissed.

[24] There are several specific issues that will have to be revisited once the vote results are known. Mr Lax on behalf of Hollinger Publishing urged that the Ironstone Noteholders be simply removed from the Plan. This Court is not in a position at this time to make that Order without rejecting the Plan as a whole, except at the request of the Applicants. The alternative submission, that there be separate classes for the different series of Ironstone Noteholders, can be readdressed when the vote is known and the Monitor reports. That motion is adjourned at this time.

[25] The Court was advised that there would likely be accommodation for the relief sought by JTI MacDonald. Counsel may renew that motion if required.

[26] If further direction is required by any party as a result of this decision, counsel may make an appointment through the Commercial List Office.

C. CAMPBELL J.

Released: April 24, 2008

SCHEDULE "A'

CONDUITS

Apollo Trust

Apsley Trust

Aria Trust

Aurora Trust

Comet Trust

Encore Trust

Gemini Trust

Ironstone Trust

MMAI-I Trust

Newshore Canadian Trust

Opus Trust

Planet Trust

Rocket Trust

Selkirk Funding Trust

Silverstone Trust

Slate Trust

Structured Asset Trust

Structured Investment Trust III

Symphony Trust

Whitehall Trust

SCHEDULE "B"

APPLICANTS

ATB Financial

Caisse de Dépôt et Placement du Québec

Canaccord Capital Corporation

Canada Post Corporation

Credit Union Central of Alberta Limited

Credit Union Central of British Columbia

Credit Union Central of Canada

Credit Union Central of Ontario

Credit Union Central of Saskatchewan

Desjardins Group

Magna International Inc.

National Bank Financial Inc./National Bank of Canada

NAV Canada

Northwater Capital Management Inc.

Public Sector Pension Investment Board

The Governors of the University of Alberta