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Adam C. Maerov,
Tushara Weerasooriya
and
Ahsan Mirza
McMillan LLP

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The Use of Releases in CCAA Restructuring Proceedings: How Wide is the Net?

Adam Maerov, Tushara Weerasooriya and Ahsan Mirza[*]

Plans of compromise or arrangement under the *Companies' Creditors Arrangement Act* ("CCAA") often include broad releases. The high profile Ontario Court of Appeal decision in *ATB Financial*,[1] a case that involved the restructuring of approximately $32 billion of non-bank sponsored asset backed commercial paper, represented a concrete step in the evolution of releases under CCAA plans. In particular, the decision effectively settled any lingering debate about whether third party releases can, in appropriate circumstances, form part of a plan.[2]

While some recent evidence suggests a possible retrenchment from the approval of increasingly broad releases following the *ATB Financial* decision, the scope of releases and the outer limits at which such releases will be considered "fair and reasonable" by a sanctioning court remain open questions. The ambiguity includes the types of obligations that may be released and the basis upon which non-voting creditors can legitimately be bound by plan based releases.

Part I of this paper sets out, by way of background, a brief history of third party releases under the CCAA. In Part II, we consider the circumstances in which releases in favour of third parties may be characterized as "fair and reasonable". For comparative purposes, Part II also considers the treatment of third party releases under Chapter 11 of Title 11 of the *United*

[1] *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, 2008 ONCA 587 leave to appeal refused 2008 CarswellOnt 5432 (SCC) (affirming [2008] 43 CBR (5th) 269 (Ont SCJ)) [*ATB Financial*].
[2] *Companies' Creditors Arrangement Act*, RS, 1985, c-C-36 [*CCAA*].

States Code (the "*Bankruptcy Code*")[3] and under the commercial proposal provisions of the *Bankruptcy and Insolvency Act* ("BIA")[4]. In Part III, we consider whether the scope of releases included in CCAA plans of arrangement is sufficiently certain and compatible with the objectives and scheme of the statute.

I. HISTORY OF THIRD PARTY RELEASES UNDER THE CCAA

The CCAA was enacted in 1933 in response to the Great Depression and the consequent systemic failures faced by businesses and financial institutions. The initial objective of the CCAA was to facilitate restructuring to avoid bankruptcies of large businesses and the associated "social evil of devastating levels of unemployment."[5] Since then, it has been held that the objectives of the CCAA are to facilitate going-concern outcomes for the benefit of *all* stakeholders—creditors, investors, employees, and the broader public.[6]

A company with claims against it or its affiliates in excess of $5 million can apply to the court for an initial order that provides for a stay of proceedings. This stay can help the company to try to avoid bankruptcy or liquidation by restructuring its financial affairs and reaching a compromise with its creditors. The CCAA can also be used to facilitate the sale of all or part of a debtor's assets free and clear of claims and encumbrances for the benefit of stakeholders generally.

A successful restructuring culminates in the emergence of the debtor from court supervised protection or with a sale of its assets free and clear of many of the pre-filing claims and encumbrances that otherwise threaten its success as a going concern. Third party releases, on

[3] 11 USC §§ 1101—1174.
[4] RS, 1985, c-B-3 [*BIA*].
[5] *ATB Financial*, *supra* note 1 at para 50.

the other hand, involve a release of claims against parties other than the debtor, usually in exchange for a financial investment or other contribution to the restructuring. The granting of releases in favour of third parties can be, in many cases, an important and effective tool to facilitate the going-concern restructuring of the debtor company. Indeed, such releases may be necessary for the approval of a plan by creditors. However, concern can arise over the scope of such releases because of the potential for abuse and the apprehension that third parties may be able to avoid liability without contributing material value to the restructuring process.

1. Early Scepticism

Third party releases became a common feature of CCAA plans by the early 1990s. Because of the increased complexity of financial relationships and growing interdependencies, releases in favour of third parties became a popular tool for balancing stakeholder interests. Releases were initially contemplated in favour of principals, directors and advisors of the debtor company to ensure their participation and cooperation in the restructuring process.[7] Canadian courts sanctioned CCAA plans containing third party releases where the plans, as a whole, were fair and reasonable and treated all affected creditors equitably. The CCAA does not expressly deal with the appropriateness of the releases and questions about the jurisdiction or authority of the courts did not arise regularly in the early jurisprudence. Courts appeared to rely on their inherent jurisdiction to consider CCAA plans and determine whether they were "fair and reasonable."[8]

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[6] See *ibid* at paras 50-52. See also *Century Services v AG Canada*, 2010 SCC 60.
[7] Mark Meland, "Extending 'Protection' to Third Parties in a Restructuring Plan – An Overview" (1993) 20 CBR (3d) 61 at 61-62.
[8] See e.g. *Algoma Steel Corp v Royal Bank*, [1992] 55 OAC 303 (Ont CA) (sanctioning a Plan compromising any creditor claims against the debtor company and against any other company that may become responsible for the liabilities of the debtor).

Steinberg Inc. c. Michaud[9] is an early example of the demonstration by the Quebec Court of Appeal of some reluctance to approve third party releases. In that case, the Court of Appeal refused to sanction a plan because it contained broad releases in favour of directors, officers, employees, and advisors of the debtor company. The Court of Appeal found these releases to be overly broad and outside the scope of a CCAA plan:

> "The Act offers the respondent [debtor company] a way to arrive at a compromise with its creditors. It does not go so far as to offer an umbrella to all the persons within its orbit by permitting them to shelter themselves from any recourse.
> [...]
> The Act and the case law clearly do not permit extending the application of an arrangement to persons other than the respondent and its creditors and, consequently, the plan should not have been sanctioned as is."[10]

In part, the court was concerned about the extreme breadth of the releases noting that the language was broader than the protection provided by the Quebec *Companies Act* or by the debtor's own bylaws. The court also relied on jurisprudence relating to rights against guarantors and extended the application of such cases to third party releases.

2. Releases for everyone?

After the decision in *Steinberg*, Parliament enacted section 5.1 of the CCAA in 1997 in order to encourage directors of insolvent corporations to remain in office and work towards a successful reorganization.[11] This section expressly permits releases of claims against directors, subject to an express exception in section 5.1(2) for claims based in misrepresentation or wrongful or oppressive conduct.

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[9] *Steinberg Inc c Michaud*, [1993] 42 CBR (5th) 1 (QCA).
[10] *Ibid* at paras 13-14.
[11] *NBD Bank, Canada v Dofasco Inc*, 181 DLR (4th) 37 at para 54 (Ont CA), citing LW Houlden and CH Morawetz, *The Annotated Bankruptcy and Insolvency Act: 2000* (Toronto: Carswell, 1999) at 192.

A question that arose after the enactment of section 5.1 of the CCAA was whether the compromise of claims against directors of the company could be extended to analogous categories of third parties, such as officers, employees or the company's advisors. In *Canadian Airlines*, the Court of Queen's Bench of Alberta answered this question in the affirmative and sanctioned a plan releasing claims against all directors, officers, employees and advisors of the debtor company.[12]

The *Canadian Airlines* decision arguably represented the leading edge of a trend toward broader releases. The case was identified by the court in *ATB Financial* as "the well-spring of the evolution of third-party releases."[13] The Court in *Canadian Airlines* rejected an argument by objecting creditors that the enactment of section 5.1 limited the scope of third party releases only to the debtor company and its directors. Instead, the Court held that third party releases were proper as part of a plan because they were not expressly prohibited by the CCAA.

Relying on *Canadian Airlines*, the Ontario Superior Court of Justice further expanded the scope of third party releases in *Muscletech*.[14] In that case, releases were granted in favour of unrelated non-debtor third parties that were outside the debtors' corporate family. The Muscletech reorganization was aimed at achieving a global resolution of 33 product liability class actions against Muscletech Inc. and other related and unrelated co-defendants, including marketing affiliates, research entities and independent vendors. The court sanctioned a plan that included broad releases in favour of the debtor company and all co-defendants, including co-defendants that were not CCAA debtors. Two factors appear to have heavily influenced the court's decision: First, in exchange for negotiated releases of class action claims, the third parties

[12] *Canadian Airlines Corp, Re*, [2000] 10 WWR 269 (Alta QB).
[13] *ATB Financial*, *supra* note 1 at para 76.
[14] *Muscletech Research & Development Inc, Re*, [2006] 25 CBR (5th) 231 (Ont SCJ).

agreed to make financial contributions to help fund recoveries for creditors under the plan. Second, the contribution and indemnity claims of the third parties, as co-defendants, were to be compromised under the plan. If the third parties were not released from the class action claims, they could arguably have been subject to a disproportionate amount of liability in the class actions, having lost their recourse against the debtor. Based on those two factors, the court held that the third party releases were fair and reasonable in the circumstances and essential for the success of the plan:

> "In the case at bar, the whole plan of compromise which is being funded by Third Parties will not proceed unless the plan provides for a resolution of all claims against the Applicants and Third Parties ... as part of a global resolution of the litigation commenced in the United States.
> [...]
> It is also, in my view, significant that the claims of certain of the Third Parties who are funding the proposed settlement have against the Applicants under various indemnity provisions will be compromised by the ultimate Plan to be put forward to this court. That alone, in my view, would be a sufficient basis to include in the Plan, the settlement of claims against such Third Parties. The CCAA does not prohibit the inclusion in a Plan of the settlement of claims against Third Parties."[15]

The scope of third party releases was expanded further in *ATB Financial*, where the CCAA was utilized to reorganize the entire non-bank sponsored asset-backed commercial paper ("ABCP") market in Canada. The Ontario Court of Appeal upheld a Superior Court decision sanctioning a plan that contained releases in favour of a variety of non-debtor entities involved in the ABCP market.[16]

In 2007, the ABCP market in Canada was facing a potentially fatal liquidity problem. As a result of the sub-prime lending crisis in the United States, investors had stopped buying ABCP and existing noteholders could no longer roll over their maturing notes. Following

[15] *Ibid* at paras 7-9.

extensive negotiations, in 2008, a number of the financial stakeholders agreed to utilize a single CCAA proceeding to effect a restructuring of the third party ABCP market in an effort to minimize the costs of complete market collapse. A Pan-Canadian Investors Committee was formed that was composed of 17 financial and investment institutions, including banks, credit unions, a pension board, a Crown corporation, and a university board of governors.

The committee brought forward a plan that included releases in favour of various banks, dealers, noteholders, asset providers, issuer trustees, liquidity providers, and other market participants—"virtually all participants in the Canadian ABCP market."[17] The releases were intended to address claims brought by investors in tort, including claims for negligence, misrepresentation, failure to act prudently as a dealer and advisor, acting in conflict of interest, and fraud or potential fraud. The releases were designed to benefit the third parties so as to ensure their participation in and contribution to the restructuring, including the sharing of proprietary financial information, continued assumption of risk from credit default swaps, and the provision of below-cost financing for a margin funding facility.[18]

The plan was voted upon favourably by 96% of the noteholders holding 96.12% of the outstanding principal amount of the notes. The motion for court approval of the plan was challenged by noteholders who opposed the restructuring plan principally on the basis of the third party releases. The collective holdings of the appellants amounted to approximately $1 billion, representing a relatively small fraction of the $32 billion involved in the restructuring.

To address some of the concerns raised by the objecting noteholders, the proponents of the plan agreed to a "carve-out" from the release for claims arising from

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[16] *ATB Financial*, *supra* note 1.
[17] *Ibid* at para 29, quoting Purdy Crawford.
[18] *Ibid* at paras 20-32.

fraudulent misrepresentations made by authorized representatives of ABCP dealers. For a potential plaintiff's claim to fall within the carve-out, the plaintiff was required to have suffered damages as a direct result of the purchase of ABCP in reliance on an express fraudulent misrepresentation. The fraudulent misrepresentation must have been made by an authorized representative of the dealer who sold the ABCP at the time of purchase with the intention of inducing the plaintiff to purchase. In addition, the dealer must have made the misrepresentation knowingly. Under the terms of the plan, a successful litigant would be entitled to full indemnity costs if it could successfully establish that a claim fell within the carve-out. The plan limited damages to the value of the claimant's notes, minus any funds distributed to the claimant pursuant to the CCAA plan.[19]

In upholding the order that sanctioned the plan, the Court of Appeal departed from the reasoning in *Canadian Airlines* and justified the granting of third party releases based on first-principles reasoning:

> "Respectfully, I would not adopt the interpretive principle that the CCAA permits releases because it does not expressly prohibit them. Rather, as I explain in these reasons, I believe the open-ended CCAA permits third-party releases that are reasonably related to the restructuring at issue because they are encompassed in the comprehensive terms "compromise" and "arrangement" and because of the double-voting majority and court sanctioning statutory mechanism that makes them binding on unwilling creditors."[20]

The implications of *ATB Financial* as well as the legal framework set out and Justice Blair's conceptual analysis are discussed further in Part II of this article.

3. A more reserved approach?

[19] Steven Golick, "Canadian Ruling Favours Third-Party Releases" 2008 ABI Journal 40.
[20] *ATB Financial*, *supra* note 1 at para 78.

Since *ATB Financial*, courts have been careful to emphasize that releases in favour of third parties are exceptional and not to be sanctioned as a matter of course. In *Re Canwest Global Communications Corp*., Justice Pepall of the Ontario Superior Court of Justice described *ATB Financial* as an "extraordinary and exceptional" case responding to "dire circumstances." Pepall J. stressed that "third party releases should be the exception and should not be requested or granted as a matter of course." However, on the facts of the case, Pepall J. sanctioned a plan of arrangement which included broad third party releases in favour of certain financial creditors, subject only to a carve-out for claims arising from fraud, wilful misconduct, or gross negligence.[21]

Re Canwest involved the restructuring of Canwest Global Communications Corp., Canwest Media Inc., and certain related companies that were active in Canwest's broadcasting business (collectively, the "CMI Entities"). Releases were included in the debtors' plan of arrangement in favour of an ad hoc committee of 8% noteholders, which collectively held approximately 70% of all outstanding notes. The court sanctioned the plan including the third party releases:

> "In this case, the releases are broad and extend to include the Noteholders, the Ad Hoc Committee and others. ... [T]he CMI Entities would not have been able to restructure without materially addressing the notes and developing a plan satisfactory to the Ad Hoc Committee and the Noteholders. The release of claims is rationally connected to the overall purpose of the Plan and full disclosure of the releases was made in the Plan, the information circular, the motion material served in connection with the Meeting Order and on this motion. "[22]

Notably, the plan was unopposed and was considered fair and reasonable by the Monitor.

[21] *Canwest Global Communications Corp, Re*, 2010 ONSC 4209 at paras 28-29.
[22] *Ibid* at para 30.

In the *Nortel* restructuring,[23] releases granted in favour of third parties pursuant to a court approved settlement agreement were more limited in their scope. Nortel Networks Limited and its subsidiary companies (collectively, "Nortel") contributed to a number of pension and other benefit plans for their employees and pensioners. For a period of time after its filing under the CCAA, Nortel continued to make all pension related payments and contributions. However, as a result of its insolvency and reduction in operating size, it became clear that at some point the cessation of such payments was inevitable.

Nortel entered into a settlement agreement with various parties to provide for a smooth transition for the termination of pension and disability payments. As compensation for the loss of the right to sue directors or officers of Nortel, the employees would receive under the settlement agreement guaranteed coverage until the end of 2010. One essential term of the agreement was a release in favour of Nortel and its successors, advisors, directors and officers from future claims regarding pension and disability payments. The inclusion of this release was the basis upon which a group of 37 employees on long-term disability objected to the settlement agreement. The opposing employees stressed the extreme hardship that would be created due to the $100 million shortfall in benefits and the $37 million shortfall Nortel's Health and Welfare Trust. They argued that releases of claims related to these benefits shortfalls, including breach of trust claims, were not necessary and essential to the restructuring.

The Ontario Superior Court concluded that the settlement agreement, including the releases, was fair and reasonable and, accordingly, approved the agreement. The Court held that the releases were not overly broad or offensive to public policy because the claims being released related specifically to the subject matter of the settlement agreement. Also, employee

[23] *Nortel Networks Corp, Re*, 2010 ONSC 1708.

claims against Nortel or its directors relating to the failure to properly fund pension plans were unlikely to succeed and could take years to resolve. Furthermore, the releases benefitted creditors generally because they "reduce[d] the risk of litigation, protect[ed] [Nortel] against potential contribution claims and indemnity claims ... , and reduce[d] the risk of delay caused by potentially complex litigation and associated depletion of assets to fund potentially significant litigation costs."[24]

Nortel and *Canwest* arguably articulate a more cautious approach to releases than was previously adopted in *Canadian Airlines*, *Muscletech*, and *ATB Financial*. However, it is noteworthy that the *Canwest* plan contained broad releases similar to the cases that pre-dated it. Accordingly, the court's admonition against encompassing releases might be more correctly understood as a word of caution than a substantive shift in approach.

II. FAIR AND REASONABLE RELEASES

The question of whether a release is appropriate is situated within the broader analysis a court undertakes when sanctioning a CCAA plan. Judges overseeing CCAA proceedings have a wide degree of discretion when deciding whether to approve a plan, and their decisions have been afforded material deference by appellate courts.[25] However, a plan of arrangement may be approved by the court only if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all the circumstances.[26] In the early British Columbia Court of Appeal case of *Northland Properties*, Chief Justice McEachern summarized the test for determining whether to sanction a plan of arrangement:

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[24] *Ibid* at para 81.
[25] Paul G Macdonald *et al*, "Canada" in Christopher Mallon, ed, *The Restructuring Review* (London: Law Business Research Ltd., 2008) 29 at 38.

> "The authorities do not permit any doubt about the principles to be applied in a case such as this. They are set out over and over again in many decided cases and may be summarized as follows:
>
> (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 which is not authorized by the CCAA; [and]
> (3) The plan must be fair and reasonable." [27]

1. Jurisdiction and Statutory Authority

To date, the first two prongs of the *Northland Properties* test have not been subject to exhaustive judicial consideration. In fact, in the early jurisprudence most courts sanctioned CCAA plans containing third party releases without much discussion of whether or not such releases were authorized by statute. *Steinberg Inc. c. Michaud*, in which it was held that the requested third party releases were not authorized by the CCAA, was the exception.

As noted above, the Ontario Superior Court in *ATB Financial* held (and the Court of Appeal agreed) that the CCAA permits the inclusion of third party releases in a plan. The Court of Appeal relied on three aspects of the CCAA to come to this determination. First, the open-ended, flexible character of the CCAA and its skeletal nature requires courts to fill in the gaps and apply the legislation in a broad and liberal manner.[28] Second, the objectives of the CCAA involve compromises, as reflected in the title: "An Act to facilitate compromises and arrangements between companies and their creditors."[29] The remedial purpose of the legislation and its objective to facilitate compromises allow for fluidity and flexibility in judicial interpretation. Third, the formal approval requirements in the Act, including double-majority voting and necessity of court sanction create a high threshold which ensures that creditors'

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[26] *Nortel*, *supra* note 23 at para 73.
[27] *Northland Properties Ltd v Excelsior Life Insurance Co of Canada*, [1989] 3 WWR 363 (BC CA) at para 23.
[28] *ATB Financial*, *supra* note 1 at para 43.

interests are served. These mechanisms provide statutory protection to dissenting creditors while advancing the interests of the creditor class as a whole. "Therein [in these three principles] lies the expression of Parliament's intention to permit the parties to negotiate and vote on, and the court to sanction, third-party releases relating to a restructuring."[30]

Some elements of the above rationale could arguably be read in a new light following the substantial amendments to the CCAA proclaimed into force after the decisions in *ATB Financial*. The amendments transform a skeletal twenty-two provision statute into a more detailed piece of legislation consisting of sixty-three sections. However, while several of these amendments intended to provide increased predictability and consistency to the scheme of the Act, they nonetheless also aim to preserve the flexible and remedial character of the CCAA.[31] Moreover, none of the amendments expressly addresses the question of how broad releases can be under the CCAA, or when it is appropriate for a plan containing releases to be sanctioned.

(a) Jurisdiction under BIA Proposals

In contrast to the CCAA, courts have consistently held that, with the exception of claims against directors expressly permitted under section 50(13) of the BIA, third party releases are not permitted in the context of proposals under Division I of that statute.[32] In the recent case of *CFG Construction Inc, Re*, the Quebec Superior Court refused to approve a proposal containing releases in favour of two sureties of the debtor company.[33] The court held that the BIA does not authorize third party releases except for compromises in favour of directors under

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[29] *Ibid* at para 50.
[30] *Ibid* at para 58.
[31] Office of the Superintendent of Bankruptcy Canada, "Summary of Key Legislative Changes in Chapter 47 of the Statutes of Canada, 2005, and Chapter 36 of the Statutes of Canada, 2007" online: <http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01782.html>.
[32] See LW Houlden and Geoffrey B Morawetz, *Houlden and Morawetz Bankruptcy and Insolvency Analysis* (Toronto: Carswell, 2009) E§22—Release of Claims Against Third Parties (WeC). See also *Cosmic Adventures Halifax Inc, Re*, [1999] 13 CBR (4th) 22 (NSSC); *Kern Agencies Ltd., (No. 2), Re*, [1931] 2 WWR 633 (Sask CA).

section 50(13). It also cited section 62(3) as specifically prohibiting the release of other third parties. The section provides that the acceptance of a proposal by a creditor does not release any person who would not be released under the BIA by the discharge of the debtor. The court canvassed the CCAA jurisprudence on releases, including *ATB Financial*, but ultimately held that uniformity between the CCAA and BIA was not a compelling reason to permit third party releases under the BIA.[34]

One might question whether, from a policy standpoint, there is a principled basis for different results under the CCAA and the proposal provisions of the BIA. Both have similar objectives of facilitating going-concern restructurings for the benefit of stakeholders generally. Like the CCAA plan, a BIA Proposal has been characterized by some as a contract between the debtor and his creditors.[35] Under both regimes, the twin checks of double-majority voting and court approval are statutorily required.[36] Moreover, the recent amendments further align the two statutes. For example, the BIA now expressly provides debtors with tools that at one time were thought by some to be exclusive to the CCAA, such as debtor-in-possession (DIP) financing[37] and disclaimer and assignment of agreements.[38]

On the other hand, in light of the relatively small scale of most BIA proposal cases, there may be a concern about insufficient incentives for creditors to challenge in court the appropriateness of third party releases in a given case. That concern might be raised in support of an argument that Parliament intended that insolvent companies requiring the benefit of third

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[33] 2010 QCCS 4643 [*CFG Construction*].
[34] *CFG Construction*, *supra* note 33 at para 67: « En conséquence, l'uniformité dans l'application de la LFI et de la LACC ne constitue pas un argument permettant d'écarter la volonté exprimée par le législateur de refuser la libération de la caution en matière de proposition ».
[35] *Employers' Liability Assurance Corp v Ideal Petroleum (1953) Ltd*, [1978] 1 SCR 230 at para 39. (The debate about whether a Proposal or Plan is akin to a contract is discussed in Part II.2.(c) of this article, below).
[36] *Ibid.*
[37] *BIA*, *supra* note 4 at s 50.6. See also *CCAA*, *supra* note 2 at s 11.2.

party releases proceed with an application for an Initial Order under the CCAA. That perspective does not however address the needs of insolvent companies seeking to restructure that do not qualify for relief under the CCAA (i.e. those with claims against them of less than $5,000,000).

(b) Jurisdiction Issues in the United States

The *Bankruptcy Code* can sometimes be a source of guidance when trying to flesh out the skeletal framework of the CCAA. Unfortunately, when it comes to consideration of third party releases, the *Bankruptcy Code* is also not entirely clear. In fact, US circuit courts are divided on the question of whether third party releases are permitted under Chapter 11.

A majority of circuits—the First, Second, Third, Fourth, Sixth, Seventh, Eleventh, and DC circuit—have held that the *Bankruptcy Code* allows third party releases in appropriate circumstances.[39] Those circuits have asserted jurisdiction based on broad equitable powers granted by §105(a), which is similar to section 11 of the CCAA and provides, in part, that "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [Title 11]."[40] Courts have also relied on §1123(b)(6), which provides that "a plan may include any other appropriate provision not inconsistent with the applicable provisions of this title."[41] Although these circuits permit releases of third parties, courts have held that such releases are only permissible in "unusual circumstances."

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[38] *BIA*, *ibid* at ss 65.11, 66(1.1), 84.1 and s. 146. See also *CCAA*, *ibid* at 11.3 and 32.

[39] See e.g. *Monarch Life Ins Co v Ropes & Gray*, 65 F (3d) 973 (1st Cir 1995); *In re Drexel Burnham Lambert Group, Inc*, 960 F (2d) 285 (2d Cir 1992); *In re Continental Airlines*, 203 F (3d) 203 (3d Cir 2000); *In re A.H. Robins Co, Inc*, 880 F (2d) 694 (4th Cir 1989); *In re Dow Corning Corp*, 280 F (3d) (6th Cir 2002); *Matter of Special Equipment Companies, Inc*, 3 F (3d) 1043 (7th Cir 1993); *Matter of Munford, Inc*, 97 F (3d) 449 (11th Cir 1996); and *In re AOV Industries, Inc*, 792 F (2d) 1140 (DC Cir 1986).

[40] 11 USC § 105(a): The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

[41] 11 USC § 1123(b)(6).

In contrast, the Fifth, Ninth, and Tenth circuits have held that the *Bankruptcy Code* prohibits releases of non-debtor parties.[42] Those courts have adopted a *per se* rule that prohibits all non-debtor releases and injunctions based on a strict reading of §524(e),[43] which provides that a "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."[44] These circuits also rely on §524(g), which expressly permits third party releases for certain co-defendants in asbestos cases as a basis for concluding that releases of other third parties are not permitted.[45]

The strict reading of the *Bankruptcy Code* by the Fifth, Ninth, and Tenth circuits and the reasons given for refusing to approve third party releases are similar to the reasoning of Canadian courts in refusing releases under the BIA proposal framework. Conversely, the circuits that have confirmed plans containing releases in favour of third parties have relied on the broad equitable powers of bankruptcy courts as the Ontario Court of Appeal did in *ATB Financial*.

2. The "Fair and Reasonable" Standard

As noted above, a plan of compromise or arrangement may be sanctioned by a court only if it is consistent with the spirit and purpose of the CCAA and is fair and reasonable in all the circumstances. Courts are cognizant of the purpose of the CCAA, which is to facilitate the reorganization of a debtor company as a going-concern for the benefit of the company, its creditors, employees, and other affected stakeholders. Courts are mindful of that purpose when determining whether to exercise their discretion and award any remedy.[46] In *ATB Financial*, the

[42] See e.g. *Matter of Zale Corp*, 62 F (3d) 746 (5th Cir 1995); *Resorts International, Inc v Lowenschuss*, 67 F (3d) 1394 (9th Cir 1995); and *In re Western Real Estate Fund, Inc*, 922 F (2d) 592 (10th Cir 1990).
[43] Kyung S Lee, Maria M Patterson & Jason M Rudd, "Revisiting the Propriety of Third-Party Releases of Nondebtors" (2009) 18 Norton Journal of Bankruptcy Law and Practice 2 at 7.
[44] 11 USC § 524(e).
[45] *Lowenschuss*, *supra* note 42.
[46] *ATB Financial*, *supra* note 1 at para 52.

Court considered seven facts that influenced the Court's conclusion that the third party releases were fair and reasonable:

> "[The] factual findings the application judge ... provide an important foundation for his analysis concerning the fairness and reasonableness of the Plan. The application judge found that:
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> a) The parties to be released are necessary and essential to the restructuring of the debtor;
> b) The claims to be released are rationally related to the purpose of the Plan and necessary for it;
> c) The Plan cannot succeed without the releases;
> d) The parties who are to have claims against them released are contributing in a tangible and realistic way to the Plan;
> e) The Plan will benefit not only the debtor companies but creditor Noteholders generally;
> f) The voting creditors who have approved the Plan did so with knowledge of the nature and effect of the releases; and that,
> g) The releases are fair and reasonable and not overly broad or offensive to public policy."[47]

3. The Nortel Criteria

In the recent *Nortel* case, the court laid out a three part test for determining whether a settlement agreement containing releases in favour of third parties was fair and reasonable:[48]

(i) the third party releases are necessary and connected to a resolution of claims against the debtor,

(ii) the releases will benefit creditors generally, and

(iii) the releases are not overly broad or offensive to public policy.

Each of the seven relevant facts identified in *ATB Financial* corresponds to, or fits within the boundaries of, the three-part test laid out in *Nortel*. Each of these three parts is discussed in further detail next.

[47] *ATB Financial*, *supra* note 1 at para 113.

(a) Required Nexus

It may not be entirely clear in all cases whether a release or compromise is "necessary and connected" or "necessary and essential" to the restructuring of an insolvent debtor. The case law to date suggests that courts will undertake a balancing exercise to determine the necessity and connection of a release to the restructuring. The following excerpt from the Ontario Court of Appeal decision in *ATB Financial* provides one example of such an approach. Justice Blair first notes that, in a very broad sense, not any and all claims can be released:

> "I do not suggest that any and all releases between creditors of the debtor company seeking to restructure and third parties may be made the subject of a compromise or arrangement between the debtor and its creditors. Nor do I think the fact that the releases may be 'necessary' in the sense that the third parties or the debtor may refuse to proceed without them, of itself, advances the argument in favour of finding jurisdiction (although it may well be relevant in terms of the fairness and reasonableness analysis)."[49]

Justice Blair defines the claims that can be released as those that are "justified" and "reasonably connected" to the restructuring:

> "The release of the claim in question must be *justified* as part of the compromise or arrangement between the debtor and its creditors. In short, there must be a *reasonable connection* between the third party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third party release in the plan."[50]

One factor that has put some definition around the question of whether third parties should be released is the contribution by such third parties of new money to fund distributions to creditors under the plan. In both *ATB Financial* and *Muscletech*, the funding to be provided by the released parties (and therefore the plan itself) was contingent upon the third

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[48] *Nortel*, *supra* note 23.
[49] *Ibid* at para 69.
[50] *Ibid* at para 70 [emphasis added].

parties being released. Therefore, the very existence of the plan, as opposed to its probability of success, depended upon the compromise of claims in favour of these third parties.

This distinction was identified in the recent Quebec decision in *Hy Bloom Inc. c. Banque Nationale du Canada*. [51] National Bank sought to permanently stay proceedings against it in reliance on the releases included in the *ATB Financial* plan. The plaintiff challenged the motion for the stay and argued that *ATB Financial* did not bind courts in Quebec. The plaintiff argued that the Quebec Superior Court was instead bound to follow the Court of Appeal decision in *Michaud c. Steinberg Inc.*[52]. National Bank argued that *Steinberg* was an anomaly that had not been followed. The Quebec Superior Court granted the National Bank motion and held that the funding contributed by the third party beneficiaries of the release was the fundamental distinction between *Steinberg* and *ATB Financial.* In *Steinberg*, third parties had not contributed financially to the restructuring, whereas the *ATB Financial* plan was dependent upon funding from third parties. The court effectively found that the financial contribution by the third parties established a sufficient connection between the releases and the resolution of claims under the plan. Thus, the court held that the releases were valid but also noted that releases that are unconnected to a restructuring due to the absence of any financial contribution by the beneficiaries would "likely be inadmissible."[53]

(b) Benefit to Creditors Generally

The second factor enumerated in *Nortel* is whether the releases will benefit creditors generally. Courts have in a number of cases relied on the level of creditor support for a plan as an indication of its overall fairness. For example, the plan in *ATB Financial* was

[51] *Hy Bloom Inc c Banque Nationale du Canada*, 2010 QCCS 737.
[52] *Michaud c Steinberg Inc*, *supra* note 9.
[53] *Hy Bloom*, *supra* note 51 at para 73. See generally paras 70-73.

approved by 96% of the voting creditors holding 96.12% of the dollar value of outstanding claims.[54] At first instance, Justice Campbell stated that "tyranny by a minority to defeat an otherwise fair and reasonable plan is contrary to the spirit of the CCAA" and "simply does not make commercial, business or practical common sense."[55] The CCAA allows creditors, as a class, to vote in favour of a plan to restructure an insolvent entity. It would defeat the purpose of the statute if a small minority of creditors could undermine the success of a restructuring by insisting on survival of claims against third parties.[56] In *Nortel*, Justice Morawetz noted that all parties benefitted from the release: the parties granting the release received immediate compensation and the maintenance of their rights in respect of the distribution of claims, while the applicants benefitted from the reduced risk of litigation and the associated delay and depletion of assets.[57]

Relying on the level of creditor support as a measure of benefit to creditors can be problematic in some circumstances. Courts avoid fragmenting creditors into too many small classes because such a "multiplicity of discrete classes" could undermine the reorganization.[58] However, it has been recognized that an overly broad classification of creditors can also result in silencing a dissenting minority of creditors within a class that has legitimate grievances.[59]

(c) Public Policy

An argument might be made that this branch of the *Nortel* test is the least certain of the three enumerated factors. One might reasonably ask under what circumstances could a release be offensive to public policy if such a release is necessary and rationally connected to a

[54] *ATB Financial*, *supra* note 1 at para 33.
[55] 43 CBR (5th) 269 (Ont SC) at paras 138 and 102
[56] LW Houlden & Geoffrey B Morawetz, "Case Updates: *Re Muscletech Research & Development Inc*" (2007) Insolvency Law News 17.
[57] *Nortel*, *supra* note 23.
[58] *Re Stelco Inc* (2005), 15 CBR (5th) 307 (Ont CA) at para 35.

restructuring and benefits all creditors generally? Beyond releases of claims arising from fraud or other intentional tort, it is difficult to assess how the potential for abuse inherent in third party releases factors into the fair and reasonable analysis.

It is clear that in the right circumstances, releases can advance the public interest. For example, in *ATB Financial*, the court held that the CCAA was designed to serve a broad constituency of investors, creditors and employees. If that is correct, then the court must, in considering applications brought under the statute, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest. With this consideration in mind, the court in *ATB Financial* approved the plan because the failure of the plan would have serious consequences on the ABCP market in Canada and the financial markets generally.[60]

Another public policy concern for courts has been the private law principle of freedom to contract. Some courts have held that a CCAA plan is akin to a contract between the debtor and its creditors. Just as a creditor and debtor could bind each other and compromise claims in a contract, nothing should prevent them from doing so through a plan. [61] In *Employers' Liability Assurance Corp*, the Supreme Court of Canada stated with respect to BIA Proposals, that "[t]he proposal is a contract between the debtor and his creditors."[62] In *ATB Financial*, this statement was adopted with respect to CCAA plans:

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[59] *Canadian Airlines*, *supra* note 12 at para 98.
[60] Janis Sarra, "Restructuring of the Asset-Backed Commercial Paper Market in Canada" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2008* (Toronto: Carswell 2009) 315 at 331.
[61] *ATB Financial*, *supra* note 1 at para 62 citing *Air Canada, Re* (2004), 2 CBR (5th) 4 (Ont SC) at para 6; *Olympia & York Developments Ltd v Royal Trust Co* (1993), 12 OR (3d) 500 (Gen Div) at 518.
[62] *Employers' Liability Assurance Corp*, *supra* note 35. See also *Re Lipson*, [1923] 2 DLR 347 at para 22 (Ont SC): "Duncan, in his work on Bankruptcy, at p. 214, states that a composition or scheme of arrangement, though approved by the Court and by statute binding on all the creditors, is at bottom only a contract between the parties; and I agree that this is a correct statement of the law."

> "In my view, a compromise or arrangement under the CCAA is directly analogous to a proposal for these purposes, and therefore is to be treated as a contract between the debtor and its creditors. Consequently, parties are entitled to put anything into such a plan that could lawfully be incorporated into any contract."[63]

If one accepts this view of the legal nature of a plan, the court's function is arguably not to second guess the business decisions of contracting parties or to substitute its own view of what is a fair and reasonable.[64] That said, the analogy between CCAA plan and a private contract may be subject to reasonable debate. In *Steinberg*, where the Quebec Court of Appeal held that a CCAA plan is not perfectly analogous to a contract and went as far as holding that such an assertion is contrary to the spirit of the Act.[65] In *Cable Satisfaction International*, the Quebec Superior Court followed *Steinberg* and noted that the statutory and judicial underpinnings of the CCAA are what give the plan its legitimacy, rather than analogy to private law of contract. The statutory framework allows a CCAA plan to be greater in scope and authority and bind dissenting creditors and other parties to the plan.[66] This view would appear to provide materially greater scope for judicial involvement when resolving the question of whether a plan should be sanctioned after having been approved by the creditors.

However, releases can potentially have consequences that could be offensive to public policy. In *NBD Bank, Canada v. Dofasco Inc.*, the Ontario Court of Appeal stated that it may be contrary to public policy to immunize corporate officers from negligence which might have occurred as a result of the knowledge that they would be forgiven under a subsequent restructuring plan.[67] This "moral hazard" line of argument has not since been utilized by courts

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[63] *ATB Financial*, *supra* note 1 at para 62.
[64] Janis Sarra, *supra* note 60.
[65] *Steinberg*, *supra* note 9.
[66] *Cable Satisfaction International Inc v Richter & Associés Inc*, [2004] 48 CBR (4th) 205 at paras 34-37.
[67] *NBD Bank Canada v Dofasco Inc*, [1999] 181 DLR (4th) 37 (Ont CA) at para 54.

and rulings such as *Muscletech* and *ATB Financial* have sanctioned plans containing third party releases in respect of claims that go beyond negligence.

In *ATB Financial*, the appellants argued that the third party releases, including releases for claims arising from fraud would be offensive to public policy. Although fraudulent misrepresentation claims against dealers had been carved out, the appellants claimed that there were potential fraud claims against third parties other than dealers that would be released. The Court of Appeal rejected this argument, holding that although fraud is a serious civil claim "there is no legal impediment to granting the release of an antecedent claim in fraud."[68]

Aside from fraud, public policy issues can also arise where a third party is potentially taking unfair advantage of the restructuring regime. For instance, if a co-defendant third party is solvent, what is the basis for allowing it to avoid its debts merely by funding or participating in the restructuring of an insolvent co-defendant? This was exactly the case in *Muscletech*. Where a bondholder or shareholder has acted in a way that is prejudicial to or unfairly disregards the interests of other stakeholders, would a release in favour of that party be offensive to public policy?

Some might argue that third party releases may undermine the legal right of innocent persons to pursue solvent parties not party to the restructuring and could inadvertently facilitate undesirable behaviour and abuse of the insolvency regime. Others might suggest that courts are placed in a difficult position of balancing economic benefit to stakeholders against potential negative public policy consequences, without detailed legislative guidance. Nonetheless, the current state of the law indicates that the public policy balance will, in many

[68] *ATB Financial*, *supra* note 1 at para 111.

cases, favour approval of a plan containing a third party release where such a release is necessary for the success of a restructuring.

4. The US Test for Granting Third Party Releases

As previously noted, the US federal appeals circuits have split on the question of whether third party releases are authorized under the *Bankruptcy Code*. The courts holding the majority view have considered similar factors when determining whether it is appropriate to grant third party releases or injunctions.[69] There is general consensus among these courts that third party releases and injunctions are only appropriate in exceptional or unusual circumstances where they are necessary to resolve a complex case.[70] The test for granting third party releases under Chapter 11 has been set out in *Dow Corning Corp.*:

> "We hold that when the following seven factors are present, the bankruptcy court may enjoin a non-consenting creditor's claims against a non-debtor:
>
> 1) Identity of interests between the debtor and third parties (such as the availability of indemnity or contribution claims by the third party against the debtor)
> 2) Non-debtor has contributed substantial assets to the reorganization
> 3) Debtor being free from indemnity or contribution claims is necessary to the success of the reorganization
> 4) Voting creditors overwhelmingly support the Plan
> 5) Plan provides for a mechanism to pay substantially all of the classes
> 6) Plan provides an opportunity for those claimants who choose not to settle to recover in full
> 7) Specific factual findings by the court support the grant of a third party release."[71]

These factors, referred to as the "Dow Corning Factors" or collectively as the "unusual circumstances test" have been adopted in all of the circuits that allow third party releases. However, the list of factors has not been adopted as a strict test by all of these courts.

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[69] *In re MacArthur*, 837 F (2d) 89 (2d Cir 1988); *In re AOV Industries*, 792 F (2d) 1140 (DC Cir 1986); and *In re Continental Airlines*, 203 F (3d) 203 (3d Cir. 2000).
[70] "Revisiting the Propriety of Third-Party Releases of Nondebtors," *supra* note 43 at 6.

For example, the Second Circuit likely appears to apply a less stringent test, requiring only that the third party release "plays an important part in the debtor's reorganization plan."[72] The factors on this list represent an accumulation of the factors considered by other courts, as well as the circumstances that were present in a number of the leading cases which involved mass tort claims. Together, these factors are intended to ensure that a requested third party release is sufficiently fair and necessary.

Most of these factors are consistent with the framework laid out by Canadian courts. One notable exception is the US "identity of interest" factor. However, this may be subsumed in at least some circumstances by the Canadian "necessary and connected" requirement. For example, in *Dow Corning Corp*, the court found that a co-defendant's contribution and indemnity relationship gave rise to an identity of interest between the debtor and the third party. To compare Canadian jurisprudence, *Muscletech* would presumably also satisfy the identity of interest element because the third party beneficiaries of releases were co-defendants who had similar contribution and indemnity claims against the debtor.

III. SCOPE OF THIRD PARTY RELEASES

Beyond the debate over whether a court should approve a third party release, consideration can also be given to what exactly the third parties are being released from and who is bound by the releases.

The subject-matter of releases in CCAA plans can be extremely broad. In *ATB Financial*, the court approved the following:

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[71] *In re Dow Corning Corp, supra* note 39 at para 19. The list of factors in *Dow Corning Corp* extends the list of factors noted by the court in *In re Master Mortgage Invest Fund Inc*, 168 BR 930 (WD Mo 1994).
[72] *In re Drexel*, 960 F (2d) 285 (2d Cir 1992).

> "every Person ... hereby fully, finally, irrevocably and unconditionally releases and forever discharges each of the Released Parties of and from any and all past, present and future claims, rights, interests, actions, rights of indemnity, liabilities, demands, duties, injuries, damages, expenses, fees, ... costs, compensation, or causes of action of whatsoever kind or nature whether foreseen or unforeseen, known or unknown, asserted or unasserted, contingent or actual, liquidated or unliquidated, whether in tort or contract, whether statutory, at common law or in equity ... "[73]

Similarly broad language can be found in a number of the cases surveyed above. The trend in the case law has been to sanction releases from a broad category of possible claims and actions with some limited exceptions or carve outs for liabilities arising from fraud, wilful misconduct, gross negligence or liabilities set out in section 5.1(2) of the CCAA. That section sets out the only express statutory limitation on the scope of releases under the CCAA and provides that claims *against directors* based in misrepresentation, wrongful conduct, or oppression may not be compromised. The language of some CCAA plans appears to suggest that while misrepresentation claims against directors are not released, claims based on similar facts, circumstances or legal principles against third parties who are not directors may be released as a matter of course. As a result, courts have questioned whether s.5.1(2) should be narrowly construed to refer only to directors or more broadly read as prohibiting similar releases in favour of a company's officers and management.[74] None of the recent amendments to the CCAA has provided express guidance as to the appropriate scope of such releases.

On the question of scope, there is unfortunately little guidance to be had from the US experience. The permissible scope of releases is unclear in the US circuits in which third party releases have been approved. For example, in the recent cross-border restructuring of

[73] *ATB Financial v Metcalfe & Mansfield Alternative Investments II Corp*, Order of Campbell J. dated 18 June 2008 (Court File No. 08-CL-7440) at para 17.
[74] See e.g. *Minds Eye Entertainment v Royal Bank*, [2004] 4 CBR (5th) 211 (Sask QB).

Trident Resources, the Second Amended Joint Plan of Reorganization released—subject to a carve-out for wilful misconduct, gross negligence and obligations arising under confidentiality agreements, joint interest agreements, and protective orders, if any, entered during the Chapter 11 cases—"any claim or cause of action existing at the effective date" arising from, based on, or relating to the debtors; the existing claim;; the Chapter 11 cases; or plan of reorganization; or the business or contractual arrangements between the releasing party and the debtor or between the debtor and the released party.[75] Similarly, in *Nortel Networks*, the plan of reorganization released all claims with respect to any act or omission in connection with and subsequent to the commencement of the Chapter 11 proceedings save and except for those arising as a result of gross negligence or wilful misconduct.[76]

Section 19 of the CCAA limits the scope of claims that can be dealt with in a compromise or arrangement to those that arise before proceedings are commenced under the Act or before the bankruptcy event occurs, as determined by the BIA. It is an open question as to whether a court in Canada would interpret the section as limiting the scope of claims that may be released to pre-filing claims. It is also unclear whether certain special types of claims can be released. For instance, it is difficult to analyze how the current legal framework would resolve non-monetary claims or remedies, including unique property claims or actions for specific performance or other injunctive relief. In some circumstances, monetary compensation may be inadequate as a substitute for such claims and it may be unfair to extinguish the claimant's rights by way of a release. Similarly, in light of the holding that labour relations are under the exclusive

[75] *In re Trident Resources Corp*, 2010 WL 2881345 (BD Del 2010), "Second Amended Joint Plan of Reorganization of Trident Resources Corp. and Certain Affiliated Debtors and Debtors In Possession confirmed by the United States Bankruptcy Court for the District of Delaware", ss 11.5 and 11.6.
[76] *In re Nortel Networks Corp*, 426 BR 84 (BD Del 2010), "Joint Chapter 11 Plan of Nortel Networks Inc. and its Affiliated Debtors confirmed by the United States Bankruptcy Court for the District of Delaware", s.11.5.

jurisdiction of the provincial Labour Relations Boards,[77] it is uncertain whether plans could affect claims related to collective bargaining rights without the consent of the bargaining agent.

Besides subject matter, third party releases can also vary in terms of the range of parties that can be bound by a release. Creditors who have filed proofs of claim and are entitled to vote are bound by releases contained in a sanctioned plan. Issues arise as to the binding effect of releases on non-voting creditors and other stakeholders.

The extent to which other stakeholders—including other creditors—who are not part of the claims bar process can be bound by a release or compromise is somewhat unclear. In *Menegon v. Phillips Services Corp.*, the Ontario Superior Court found that it was unfair to bind potential creditors to the provisions of a plan without giving them the opportunity to vote on the plan.[78] In that case, the potential creditors were not entitled to vote on the CCAA plan because of parallel proceedings taking place in the United States. *Muscletech* suggests that contingent creditors or stakeholders who choose not to participate in the CCAA proceedings can be bound by the release provisions approved by other creditors. There, a group of class action claimants chose not to file claims under the CCAA and sought instead to continue their class actions against Muscletech and its co-defendants. The court disagreed with their stance and sanctioned the plan which included releases binding on all class action claimants, including class action claimants who had not filed proofs of claim.[79] In the more recent Canwest newspaper restructuring, the court approved a release that purported to bind persons not entitled to vote on the plan.[80]

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[77] *GMAC Commercial Credit Corp - Canada v TCT Logistics Inc*, (2004) 71 OR (3d) 54 (Ont CA) rev'd by 2006 SCC 35
[78] (1999), 11 CBR (4th) 262.
[79] *Muscletech*, *supra* note 14 at para 7.
[80] *Re Canwest Publishing Inc*, Plan Sanction Order of Justice Pepall dated June 18, 2010 (Court file no. CV-10-8533-00CL) at para 59 [emphasis added].

Recent US case law dealing with the treatment of future contingent claimants has further broadened the scope of persons that may effectively have their claims released, albeit in the context of a sale under section 363 and not pursuant to a plan of reorganization. In the restructurings of *Chrysler*[81] and *GM*,[82] courts approved section 363 asset sales free and clear of all claims, including potential future claims, arising from accidents involving vehicles sold by the pre-restructuring entity.[83] In both *Chrysler* and *GM*, the courts rejected objections made on behalf of potential future tort claimants regarding the approval of a structure that would effectively undermine their ability to pursue legal action. It should be noted that in both *Chrysler* and *GM*, certain future claims were ultimately voluntarily assumed by the NewCo for non-legal reasons.

While the *GM* and *Chrysler* restructurings proceeded by way of an asset sale, it is arguable that stranding claims at the OldCo level is substantively similar to releasing such claims against the reorganized debtor company. The development raises the question of whether similar releases could be included in a plan of arrangement and whether such releases can extend to third parties.

CONCLUSION

Following *ATB Financial*, it is clear that courts in Canada have the authority to approve third party releases in CCAA plans. The circumstances under which the courts will exercise their discretion to approve such releases and their scope is however less clear. The

[81] *In re Chrysler LLC*, 405 BR 84 (SD NY 2009) appeal dismissed as moot 592 F (3d) 370 (2d Cir 2010).
[82] *In re General Motors Corp*, 407 BR 463 (SD NY 2009) aff'd *In re Motors Liquidation Co*, 428 BR 43 (SDNY 2010).
[83] A section 363 asset sale is a process under Chapter 11 of the *Bankruptcy Code* (11 USC §363). Under section 363, where an immediate asset sale is in the best interests of the debtor company and its creditors, a court can order a sale of the company's assets (including all or substantially all assets) without a plan of reorganization. A similar practice developed

court's comments in *Canwest* would seem to suggest that courts view the granting of third party releases as extraordinary relief to be given only in exceptional circumstances. It is not entirely clear if there can be a situation where a third party release is "fair and reasonable" under the *Nortel* criteria, but where the circumstances are not particularly exceptional. Also unclear is the scope of the claims that should form the substance of a third party release and who can be bound by such a release. Can a court really release the claims of parties who have not voted on the plan or who have not even had notice of the proceeding? Is such a release enforceable? The lack of any significant judicial consideration of these issues makes it difficult to predict which direction a court might take. Stay tuned!

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in Canada and was recently codified in section 36 of the CCAA. See *Houlden and Morawetz Bankruptcy and Insolvency Analysis*, *supra* note 32 at N§196—Court Approval of Sale of Assets.