



Canada's top court nixes challenge to ABCP restructuring

BY KENNETH A. DEKKER, AFFLECK GREENE MCMURTRY LLP

On September 19, 2008, the Supreme Court of Canada dismissed an application¹ for leave to appeal the approval of an all-encompassing restructuring plan for the Canadian market in Asset-Backed Commercial Paper (ABCP). In doing so, Canada's top court put an end to all legal challenges relating to what is now appearing to be merely the first Canadian chapter in a financial crisis that has since swept the globe.

This chapter began in the summer of 2007, when widespread defaults on U.S. sub-prime mortgages led to a loss of confidence in ABCP. ABCP is a complex investment in which investors' cash is used to purchase a note that is, in turn, secured by a portfolio of financial assets, including mortgages. ABCP had been peddled to investors as a safe and secure type of investment akin to a GIC. However, some ABCP investments contained sub-prime mortgages and a general lack of transparency in the ABCP market meant that investors, including large pension funds and other institutional investors, could not tell what assets backed their notes. When large-scale U.S. sub-prime mortgage defaults began, ABCP investors assumed the worst. They stopped rolling over their notes and there was no money to repay them. The market for third-party (i.e. non-bank-sponsored) notes collapsed.

In order to salvage some value for investors, the \$32 billion third-party ABCP market was frozen and an investors' committee headed by a senior lawyer, Purdy Crawford, worked out a plan to restructure that market under the ambit of the *Companies Creditors' Arrangement Act* ("CCAA") – a statute normally used to allow single insolvent corporations to restructure. The ultimate solution was a plan in which the notes were converted to long-term bonds. As part of the plan, the banks and other

institutions involved in providing the assets that backed the ABCP made concessions in exchange for, among other things, broad releases in favour of virtually all ABCP market participants. The releases even covered most types of fraud.

This restructuring plan was approved by 96% of the ABCP noteholders and by the Superior Court judge supervising the restructuring over the objection of certain of the creditors. The objecting creditors appealed that decision, arguing that the Plan and, in particular, its wholesale release of all claims against ABCP market participants, was inappropriate, unconstitutional and outside the scope of the court's authority under the CCAA. The Ontario Court of Appeal disagreed. While the notion of releases covering fraud by financial institutions is distasteful, it is a step that is both necessary to the restructuring and within the scope of the court's authority under the CCAA, the appeal court held.

Given the Ontario Court of Appeal's own observation that this case "raises issues of considerable importance to restructuring proceedings under the CCAA Canada-wide," it is somewhat surprising that the Supreme Court of Canada found that it did not warrant further consideration.

Now that the legal challenges are complete, it now remains to be seen whether the restructuring plan will, in fact, be carried through to its conclusion. As of the date of this article, the committee overseeing the restructuring has missed two deadlines and many blame the current market turmoil for making the process much more difficult and complex than anticipated.

**For more information contact:**

Kenneth A. Dekker, Affleck Greene McMurtry LLP

Tel: 416.360.6902

Email: kdekker@agmlawyers.com

¹ *Jean Coutu Group (PJC) Inc. v. Metcalfe & Mansfield et al.* (September 19, 2008, SCC File No. 32765)