Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	**)**	**THURSDAY, THE 18th DAY**
	)	
JUSTICE MORAWETZ	**)**	**OF JUNE, 2009**

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO **FRASER PAPERS INC.**, FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H. LLC (collectively, the "Applicants")

INITIAL ORDER

THIS APPLICATION, made by the Applicants pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of J. Peter Gordon sworn June 17, 2009 and the Exhibits thereto (the "Gordon Affidavit"), the Pre-Filing Report of PricewaterhouseCoopers Inc. ("PwC"), in its capacity as proposed Monitor of the Applicants, and on hearing the submissions of counsel for the Applicants, CIT Business Credit Canada Inc. ("CIT"), Brookfield Asset Management Inc. ("Brookfield"), the Province of New Brunswick, Canadian Imperial Bank of Commerce, and counsel for the directors of Fraser Papers Inc., no one appearing for any other parties, and on reading the Consent of PwC to act as the Monitor, and upon being satisfied that this Court has jurisdiction to receive the Application in respect of the Applicants pursuant to

sections 3 and 9(1) of the CCAA and upon being satisfied that the Applicants' center of main interest is within the jurisdiction of this Court:

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that each of the Applicants is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that the Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan") between, *inter alia*, the Applicants and one or more classes of their respective secured and/or unsecured creditors as they deem appropriate.

POSSESSION OF PROPERTY AND OPERATIONS

4. THIS COURT ORDERS that the Applicants shall remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"). Subject to further Order of this Court, the Applicants shall continue to carry on business in a manner consistent with the preservation of their business (the "Business") and Property. The Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by each of them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

5. THIS COURT ORDERS that the Applicants shall be required to continue to utilize the centralized cash management system, including blocked account and lockbox arrangements,

currently in place as described in the Gordon Affidavit (the "Cash Management System") and that any Person (as defined below) providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person other than the Applicants, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

6. THIS COURT ORDERS that the Applicants shall be entitled and are hereby directed to continue, in the ordinary course of business as carried on immediately prior to the date hereof, all existing arrangements under a Paper Supply Agreement dated January 29, 2009 as described in the Gordon Affidavit, unless otherwise agreed to by the parties thereto.

PAYMENTS

7. THIS COURT ORDERS that the Applicants shall pay the following expenses:

(a) all outstanding and future wages, salaries, vacation pay, and expenses that may be owing at any time to employees who continue to provide services on or after the date of this Order (the “Active Employees”), in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements, whether incurred prior to, on or after the date of this Order;

(b) all existing and future employee health, dental, life insurance, short and long term disability and related benefits (collectively, the “Group Benefits”) that may be owing at any time to Active Employees, in each case incurred in the ordinary course of business and consistent with existing policies and arrangements or such amended policies and arrangements as are necessary or desirable to deliver the

existing Group Benefits, whether incurred prior to, on or after the date of this Order;

(c) all normal cost contribution obligations (the "Current Contributions") in respect of current service provided by Active Employees of any funded pension plans maintained by the Applicants (collectively, the "Pension Plans") whether such Current Contributions were incurred prior to, on or after the date of this Order, but for greater certainty not including any past service contributions or special payments;

(d) payment for goods or services actually supplied to the Applicants on or after the date of this Order; and

(e) the fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges, whether incurred prior to, on or after the date of this Order.

8. THIS COURT ORDERS that, except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

(b) all outstanding and future claims, premiums or other amounts payable in respect of workers' compensation programs applicable to the Applicants' employees, whether incurred prior to, on or after the date of this Order, all in the ordinary course of business and in accordance with the terms of any existing insurance or other policies;

(c) payments on account of existing employee performance incentive programs in respect of Active Employees, whether incurred prior to or after the date of this Order, all in the ordinary course of business as carried on immediately prior to the date hereof;

(d) with the prior written approval of the Monitor and subject to the terms of the DIP Financing, payments in respect of key employee incentive programs established on or after the date of this Order;

(e) any amounts payable in respect of Group Benefits in respect of retired employees or other current or former employees who are not Active Employees, whether incurred prior to, on or after the date of this Order, all subject to the terms of the DIP Financing and the Definitive Documents, as defined in this Order;

(f) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof, any local, state or federal taxation authority in the United States or any other taxation authority, in all cases in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors but: (i) are not attributable to or in respect of the ongoing Business carried on by the Applicants on or after the date of this Order; or (ii) are payable in respect of a period prior to the date of this Order;

(g) any outstanding amounts payable in respect of (i) customer programs including, *inter alia*, rebates, adjustments, performance and volume discounts and (ii) billing errors, including duplicative invoicing, improper invoicing, duplicative payment, mispricing and various other billing and payment errors, whether incurred prior to, on or after the date of this Order; and

(h) amounts owing for goods and services actually supplied to the Applicants, or to obtain the release of goods contracted for prior to the date of this Order, in each case with the consent of the Monitor and the DIP Lender, as defined in this Order,

up to the maximum amount of USD$12,300,000 if, in the opinion of the Applicants, such supplier is critical to the ongoing Business of the Applicants.

9. THIS COURT ORDERS that the Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any state or federal authority in the United States or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes;

(b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order, and

(c) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof, or any local, state or federal authority in the United States, in all cases in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are: (i) entitled at law to be paid in priority to claims of secured creditors; (ii) attributable to or in respect of the ongoing Business carried on by the Applicants; and (iii) payable in respect of the period commencing on or after the date of this Order, or on terms as may be agreed to between such Applicant and the applicable taxation authority.

10. THIS COURT ORDERS that until such time as the Applicants repudiate a real property lease in accordance with paragraph 17(d) of this Order, the Applicants shall pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable to

the landlord under the lease) or as otherwise may be negotiated by the Applicants from time to time ("Rent"), for the period commencing from and including the date of this Order, bi-weekly, in advance (but not in arrears).

11. THIS COURT ORDERS that, except as specifically permitted herein, the Applicants are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of this date, save and except in respect of payments referred to in paragraph 12 below and other existing secured creditors as may be specifically provided for in the DIP Term Sheet, as defined in this Order; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business.

12. THIS COURT ORDERS that, notwithstanding any other provision of this Order:

(a) the Applicants are authorized to enter into an amendment to the credit agreement dated as of May 2, 2008, between Fraser Papers Inc. and CIT Business Credit Canada Inc., as agent for itself and the lenders from time to time under such credit agreement, as amended (the “CIT Credit Agreement”), substantially on the terms of the term sheet between the Applicants and CIT (the “CIT Term Sheet”) attached to the Gordon Affidavit;

(b) the Applicants are hereby authorized to borrow, repay and reborrow under and in accordance with the terms of the CIT Term Sheet and the CIT Credit Agreement, and are authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to CIT under and pursuant to the CIT Term Sheet and the CIT Credit Agreement as and when the same become due and are to be performed; and

(c) CIT shall be entitled to issue such notices as may be needed to permit it to exercise cash dominion over the lockbox accounts subject to the Existing CIT Security (as defined below).

PENSION PLANS

13. THIS COURT ORDERS that, notwithstanding any other provision of this Order, the Applicants shall not make any past service contributions or special payments to fund any going concern unfunded liability or solvency deficiency of the Pension Plans during the Stay Period (as defined in this Order), pending further Order of this Court.

14. THIS COURT ORDERS that none of the Applicants or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any Person to make any contribution or payments other than Current Contributions during the Stay Period, that they might otherwise have been required to make to any Pension Plans maintained by any of the Applicants.

15. THIS COURT ORDERS that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions in accordance with Sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act* (the "BIA")) during the Stay Period that such Person might otherwise have become required to make to any Pension Plans but for the stay provided for herein, no such claim, lien, charge or trust shall be recognized in these proceedings or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants as having priority over the claims of the CCAA Charges as set out in this Order.

16. THIS COURT ORDERS AND DECLARES that nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants, if any, regarding payments under the Pension Plans.

RESTRUCTURING

17. THIS COURT ORDERS that the Applicants shall, subject to such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their Business or operations;

(b) dispose of redundant or non-material assets not exceeding CDN$500,000 in any one transaction or CDN$2,000,000 in the aggregate, subject to paragraph 17(d), if applicable;

(c) terminate the employment of such of their employees or temporarily lay off such of their employees as appropriate on such terms as may be agreed upon between the Applicant and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

(d) in accordance with paragraphs 18 and 19, vacate, abandon or quit any leased premises and/or repudiate any real property lease and any ancillary agreements relating to any leased premises, on not less than seven (7) days' notice in writing to the relevant landlord on such terms as may be agreed upon between the Applicant and such landlord, or failing such agreement, to deal with the consequences thereof in the Plan;

(e) repudiate such of their arrangements or agreements of any nature whatsoever, whether oral or written, as the Applicants, or any of them, deem appropriate on such terms as may be agreed upon between any one of the Applicants and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; and

(f) pursue all avenues of refinancing and offers for material parts of the Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing or any sale (except as permitted by subparagraph (a), above),

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "Restructuring").

18. THIS COURT ORDERS that the Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the

landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and such Applicant, or by further Order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If an Applicant repudiates the lease governing such leased premises in accordance with paragraph 17(d) of this Order, it shall not be required to pay Rent under such lease pending resolution of any such dispute, and the repudiation of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.

19. THIS COURT ORDERS that if a lease is repudiated by an Applicant in accordance with paragraph 17(d) of this Order, then (a) during the notice period prior to the effective time of the repudiation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the repudiation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicant of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

20. THIS COURT ORDERS that, subject to the other provisions of this Order (including the payment of Rent as herein provided) and any further Order of this Court, the Applicants shall be permitted to dispose of any or all of the Property located (or formerly located) at such leased premises without any interference of any kind from landlords (notwithstanding the terms of any leases) and, for greater certainty, the Applicants shall have the right to realize upon the Property and other assets in such manner and at such locations, including leased premises, as they deem suitable or desirable for the purpose of maximizing the proceeds and recovery therefrom.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

21. THIS COURT ORDERS that until and including July 17, 2009 or such later date as this Court may order (the "Stay Period"), no claim, grievance, application, action, suit, right or

remedy, proceeding or enforcement process in any court, tribunal or arbitration association (each, a "Proceeding") shall be commenced or continued against or in respect of any of the Applicants or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of any of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

22. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicants and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicants to carry on any business which the Applicants are not lawfully entitled to carry on, (ii) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

23. THIS COURT ORDERS that during the Stay Period, no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, including but not limited to renewal rights in respect of existing insurance policies on the same terms, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

24. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written agreements with the Applicants or statutory or regulatory mandates for the supply of goods and/or services, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business or any of the Applicants, are hereby restrained until

further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicants, and that the Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with normal payment practices of the Applicants or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

25. THIS COURT ORDERS that, without limiting paragraph 24 hereof, all Persons providing freight services to the Applicants shall deliver all shipments relating to the Applicants or their Business or Property in transit as at the date hereof (the "In Transit Shipments") in accordance with the existing arrangements and delivery instructions with respect to the In Transit Shipments. The Applicants are hereby directed to pay to the applicable freight provider the freight costs associated with the In Transit Shipments, within five (5) business days following delivery of the In Transit Shipments.

NON-DEROGATION OF RIGHTS

26. THIS COURT ORDERS that, notwithstanding anything else contained herein, no creditor of the Applicants shall be under any obligation after the making of this Order to advance or re-advance any monies or otherwise extend any credit to any Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

27. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.5(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

28. THIS COURT ORDERS that the Applicants shall indemnify their directors and officers from all claims, costs, charges and expenses relating to the failure of the Applicants, after the date hereof, to make payments of the nature referred to in subparagraphs 7(a), 9(a), 9(b) and 9(c) of this Order which they sustain or incur by reason of or in relation to their respective capacities as directors and/or officers of the Applicants except to the extent that, with respect to any officer or director, such officer or director has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct in respect thereto.

29. THIS COURT ORDERS that the directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "Directors' Charge") on the Property, which charge shall not exceed an aggregate amount of USD$30,000,000, as security for the indemnity provided in paragraph 28 of this Order. The Directors' Charge shall have the priority set out in paragraphs 49 and 51 herein.

30. THIS COURT ORDERS that, notwithstanding any language in any applicable insurance policy to the contrary, (a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge, and (b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 28 of this Order.

APPOINTMENT OF MONITOR

31. THIS COURT ORDERS that PricewaterhouseCoopers Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property and the Applicants' conduct of the Business with the powers and obligations set out in the CCAA or set forth herein and that the Applicants and their shareholders, officers, directors and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations.

32. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, the Restructuring and such other matters as may be relevant to the proceedings herein;

(c) assist the Applicants, to the extent required by the Applicants, in their dissemination to CIT and the DIP Lender and their counsel of financial and other information as agreed to between the Applicants and CIT or the DIP Lender, as applicable, which may be used in these proceedings, including reporting on a basis to be agreed with CIT and with the DIP Lender;

(d) assist the Applicants in their preparation of the Applicants' cash flow statements, budgets and any other reporting or information that they may require in relation to the Business or the Property, including any reporting required by CIT or the DIP Lender, which information shall be reviewed with the Monitor and delivered to CIT and its counsel, and to the DIP Lender and its counsel in accordance with any reporting requirements of the DIP Term Sheet or the CIT Term Sheet, or as otherwise agreed to by CIT or the DIP Lender, as applicable;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan and, to the extent required by the Applicants, in their negotiations with creditors, customers, vendors and other interested Persons;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) assist the Applicants, to the extent required by the Applicants, in dealing with their respective creditors, customers, vendors and other interested Persons;

(h) assist the Applicants with their financing and restructuring activities to the extent required by the Applicants;

(i) have full and complete access to the books, records and management, employees and advisors of the Applicants and to the Business and the Property to the extent required to perform its duties arising under this Order;

(j) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order, including any affiliate of, or person related to, PwC;

(k) consider, and if deemed advisable by the Monitor, prepare a report and assessment on the Plan; and

(l) perform such other duties as are required by this Order or by this Court from time to time.

33. THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.

34. THIS COURT ORDERS that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the Canadian *Environmental Protection Act*, the Ontario *Environmental Protection Act*, the Ontario *Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder, and such similar legislation in any jurisdiction in which the Property may be located (the "Environmental Legislation"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the

Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

35. THIS COURT ORDERS that the Monitor shall provide any creditor of the Applicants, CIT and the DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

36. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

37. THIS COURT ORDERS that the Monitor, counsel to the Monitor and all counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a bi-weekly basis.

38. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

39. THIS COURT ORDERS that the Monitor, counsel to the Monitor and the Applicants' Canadian and U.S. counsel shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which charge shall not exceed an aggregate amount of CDN$750,000, as security for their professional fees and disbursements incurred at the standard rates and charges of the Monitor and such counsel, both before and after the making of this Order

in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 49 and 51 hereof.

DIP FINANCING

40. THIS COURT ORDERS that the Applicants are hereby authorized and empowered to obtain and borrow under a credit facility (the “DIP Facility”) from Brookfield (the "DIP Lender") in order to finance the Applicants’ working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed USD$22,000,000 unless permitted by further Order of this Court.

41. THIS COURT ORDERS that the DIP Facility shall be substantially on the terms and subject to the conditions set forth in the commitment letter between the Applicants and the DIP Lender dated as of June 17, 2009 (the "DIP Term Sheet") annexed to the Gordon Affidavit, as same may be amended from time to time with the Monitor’s written consent.

42. THIS COURT ORDERS AND DECLARES that this Court has been advised of the minority approval requirements of Multilateral Instrument 61-101 “Protection of Minority Security Holders in Special Transactions” and the exemption from such requirements contained in Section 5.7(d) hereof, all as contained in the Gordon Affidavit, and that compliance with the provisions of such Multilateral Instrument is hereby dispensed with.

43. THIS COURT ORDERS that the Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, the "Definitive Documents"), as are contemplated by the DIP Term Sheet or as may be reasonably required by the DIP Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the DIP Lender under and pursuant to the DIP Term Sheet and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

44. THIS COURT ORDERS that the DIP Lender shall be entitled to the benefit of and is hereby granted a charge (the "DIP Lender’s Charge") on the Property as security for any and all

obligations of the Applicants under or pursuant to the DIP Facility, the DIP Term Sheet and the Definitive Documents, which charge shall not exceed the aggregate amount owed to the DIP Lender under or pursuant to the DIP Facility, the DIP Term Sheet and the Definitive Documents. The DIP Lender's Charge shall have the priority set out in paragraphs 49 and 51 hereof.

45. THIS COURT ORDERS that CIT shall be entitled to the benefit of and is hereby granted a charge (the "CIT DIP Charge") on the Property in the amount of USD$24,000,000 to secure amounts outstanding under the CIT Term Sheet and the CIT Credit Agreement as amended pursuant to paragraph 12(a), all as described in the CIT Term Sheet and the CIT Credit Agreement.

46. THIS COURT ORDERS that, notwithstanding any other provision of this Order:

(a) the DIP Lender and CIT may take such steps from time to time as they may deem necessary or appropriate to file, register, record or perfect the DIP Lender's Charge or the DIP Term Sheet or any of the Definitive Documents, or the CIT DIP Charge;

(b) upon the occurrence of an event of default under the DIP Term Sheet or Definitive Documents or the DIP Lender's Charge, the DIP Lender, may immediately cease making advances to the Applicants and set off and/or consolidate any amounts owing by the DIP Lender to the Applicants against the obligations of the Applicants to the DIP Lender under the DIP Term Sheet, the Definitive Documents or the DIP Lender's Charge and make demand, accelerate payment and give other notices and, upon five (5) days notice to the Applicants and the Monitor, may exercise any and all of its other rights and remedies against the Applicants or the Property under or pursuant to the DIP Term Sheet, Definitive Documents and the DIP Lender's Charge, including without limitation, to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants, and upon the occurrence of an event of default under the terms of the DIP Term Sheet or the Definitive Documents, the DIP Lender shall be entitled to seize and retain proceeds from the

sale of the Property and the cash flow of the Applicants to repay amounts owing to the DIP Lender in accordance with the Definitive Documents and the DIP Lender's Charge, but subject to the priorities as set out in paragraphs 49 and 51 of this Order;

(c) upon the occurrence of an event of default under the CIT Term Sheet, the CIT Credit Agreement or the CIT DIP Charge, CIT, may immediately cease making advances to the Applicants and set off and/or consolidate any amounts owing by CIT to the Applicants against the obligations of the Applicants to CIT under the CIT Term Sheet, the CIT Credit Agreement, the related documents or the CIT DIP Charge and make demand, accelerate payment and give other notices and, upon five (5) days notice to the Applicants and the Monitor, may exercise any and all of its other rights and remedies against the Applicants or the Property including under or pursuant to the CIT Term Sheet, the CIT Credit Agreement and the CIT DIP Charge, including without limitation, to apply to this Court for the appointment of a receiver, receiver and manager and manager or interim receiver, or for a bankruptcy order against the Applicant and for the appointment of a trustee in bankruptcy of the Applicants, and upon the occurrence of an event of default under the terms of the CIT Term Sheet, the CIT Credit Agreement or the CIT DIP Charge, CIT shall be entitled to seize and retain proceeds from the sale of the Property and the cash flow of the Applicants to repay amounts owing to CIT in accordance with the CIT Term Sheet, the CIT Credit Agreement and the CIT DIP Charge, but subject to the priorities as set out in paragraphs 49 and 51 of this Order; and

(d) the foregoing rights and remedies of the DIP Lender and CIT shall each be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

47. THIS COURT ORDERS AND DECLARES that CIT and the DIP Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the BIA, with respect to any advances

made under the CIT Term Sheet, the CIT Credit Agreement, the DIP Term Sheet or the Definitive Documents and with respect to any claims and rights the DIP Lender may have under or pursuant to the Paper Supply Agreement and the Amended and Restated Guarantee and Reimbursement Agreement dated as of September 22, 2008 made by the Applicants in favour of the DIP Lender and the liens relating thereto.

INTER-COMPANY TRANSACTION CHARGE

48. THIS COURT ORDERS AND DECLARES that each Applicant shall be entitled to and is hereby granted the benefit of a charge (the "Inter-Company Charge") on the Property of each of the other Applicants in an amount equal to but not exceeding:

(a) in respect of the period from June 1, 2009 to the date of this Order, the costs of all goods and services supplied by one Applicant to another; and

(b) in respect of the period from and after the date of this Order, (i) the costs of all goods and services supplied by one Applicant to another, and (ii) the net advances actually made by one Applicant to another,

all in accordance with existing cash management and inter-company transaction practises existing as at the date of this Order. The Inter-Company Charge in favour of the Applicants shall have the priority set out in paragraphs 49 and 51 hereof.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

49. THIS COURT ORDERS that the priorities of the Directors' Charge, the Administration Charge, the CIT DIP Charge, the DIP Lender's Charge and the Inter-Company Charge as among them, and as against the existing security held by CIT prior to the issuance of this Order (the "Existing CIT Security"), shall be as follows:

(a) with respect to all assets charged in favour of CIT under the Existing CIT Security (collectively, the "CIT Collateral"):

First – Existing CIT Security;

Second – Administration Charge (to the maximum amount of CDN $750,000);

Third – CIT DIP Charge;

Fourth – DIP Lender's Charge;

Fifth – Directors' Charge (to the maximum amount of USD$30,000,000);

Sixth – Inter-Company Charge; and

(b) with respect to the Property of the Applicants other than the CIT Collateral:

First – Administration Charge (to the maximum amount of CDN $750,000);

Second – CIT DIP Charge;

Third – DIP Lender's Charge;

Fourth – Directors' Charge (to the maximum amount of USD$30,000,000); and

Fifth – Inter-Company Charge**.**

50. THIS COURT ORDERS that the filing, registration or perfection of the Directors' Charge, the Administration Charge, the CIT DIP Charge, the DIP Lender's Charge and the Inter-Company Charge (collectively, the "Charges") shall not be required, and that the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

51. THIS COURT ORDERS that each of the Directors' Charge, the Administration Charge, the CIT DIP Charge and the DIP Lender's Charge (all as constituted and defined herein) shall constitute a charge on the Property and such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, statutory or otherwise (collectively, "Encumbrances") in favour of any Person other than the Existing CIT Security. In addition, the Inter-Company Charge shall not rank in priority to any Encumbrances existing as of the date hereof in favour of any Person.

52. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, the Existing CIT Security or any of the

Charges unless the Applicants also obtain the prior written consent of the Monitor, CIT, the DIP Lender and the beneficiaries of the Directors' Charge and the Administration Charge, or further Order of this Court.

53. THIS COURT ORDERS that the Charges, the DIP Term Sheet and the Definitive Documents, and (with respect to advances made on or after the date hereof) the Existing CIT Security, shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges and/or the DIP Lender and/or CIT thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications; (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA; (d) the provisions of any federal or provincial statutes; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "Agreement") which binds any of the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(a) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of the DIP Term Sheet or the Definitive Documents, nor the CIT Term Sheet or the amendments to the CIT Credit Agreement authorized hereby shall create or be deemed to constitute a breach by the Applicants of any Agreement to which they are a party;

(b) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the Applicants entering into the DIP Term Sheet, the creation of the Charges, or the execution, delivery or performance of the Definitive Documents, the CIT Term Sheet or the amendments to the CIT Credit Agreement authorized hereby; and

(c) the payments made by the Applicants pursuant to this Order, the DIP Term Sheet or the Definitive Documents, the CIT DIP Term Sheet, the CIT Credit Agreement and the granting of the Charges, do not and will not constitute fraudulent

preferences, fraudulent conveyances, oppressive conduct, settlements or other challengeable, voidable or reviewable transactions under any applicable law.

SERVICE AND NOTICE

54. THIS COURT ORDERS that the Monitor shall, within ten (10) business days of the date of entry of this Order, cause a notice to be sent to the Applicants' known creditors, other than employees and creditors to which the Applicants owe less than CDN$1,000.00, at their addresses as they appear on the Applicants' records, and shall promptly send a copy of this Order (a) to all parties filing a Notice of Appearance in respect of this Application, and (b) to any other interested Person requesting a copy of this Order.

55. THIS COURT ORDERS that the Applicants and the Monitor be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or electronic transmission to the Applicants' creditors or other interested parties at their respective addresses as last shown on the records of the Applicants and that any such service or notice by courier, personal delivery or electronic transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

56. THIS COURT ORDERS that the Applicants, the Monitor, and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, in accordance with the E-filing protocol of the Commercial List to the extent practicable, and the Monitor may post a copy of any or all such materials on its website at www.pwc.com/car-fraserpapers

GENERAL

57. THIS COURT ORDERS that the Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

58. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the Business or the Property.

59. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to Fraser Papers Inc. on behalf of the Applicants in any foreign proceeding including a proceeding to be commenced by the Applicants pursuant to Chapter 15 of the United States *Bankruptcy Code*, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

60. THIS COURT ORDERS that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

61. THIS COURT ORDERS that any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

62. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard Time on the date of this Order.

_____

Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE
(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 PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO **FRASER PAPERS INC.**, FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H. LLC

Applicants

FACTUM OF THE APPLICANTS

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

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Applicants

FACTUM OF THE APPLICANTS

1. This factum is filed in support of the application by Fraser Papers Inc., FPS Canada Inc., Fraser Papers Holdings Inc., Fraser Timber LTD., Fraser Papers Limited and Fraser N.H. LLC's (collectively the "**Applicants**" or the "**Fraser Group**") for an Order (the "**Initial Order**"): (i) granting a stay under the *Companies' Creditors Arrangement Act* (the "**CCAA**") in respect of all of the Applicants; (ii) approving debtor in possession financing (the "**DIP Financing**") pursuant to a credit agreement (the "**DIP Credit Agreement**") among the Applicants and Brookfield Asset Management Inc. **(the "DIP Lender")** substantially in the form of Exhibits "K" and "L" to Affidavit of J. Peter Gordon, sworn June 17, 2009 (the "**Gordon Affidavit**"); (iii) approving of a charge in favour of certain intercompany advances; (iv) approving of a charge in favour of the directors and officers of the Fraser Group (v) granting discretion to the Fraser Group to suspend certain benefit payments, pension payments and tax arrears; and (vi) granting discretion to the Fraser Group to pay certain unsecured pre-filing obligations.

PART I – OVERVIEW

2. The Fraser Group is in financial distress. It seeks to restructure its business and financial affairs, through the filing of a plan of compromise and arrangement and/or a going concern sale process. The purpose of these CCAA proceedings is to preserve value for the Fraser Group's broad cross-section of stakeholders including their employees, customers, suppliers and secured and other creditors. In addition to these CCAA proceedings, the Fraser Group intends to commence proceedings under Chapter 15, Title 11, United States Code, United States Bankruptcy Code (the "**Code**") for recognition of the Initial Order. Under the Code, Chapter 15 proceedings are ancillary proceedings initiated to support proceedings brought in another country. The Fraser Group is of the view that its restructuring will be administered most efficiently through a single, centralized process with the centre of main interest being Toronto, Ontario.

3. In order to accomplish this goal, the Fraser Group seeks stable and reliable access to debtor-in-possession financing. The DIP Financing as set out in the DIP Credit Agreement requires that the Fraser Group accept certain conditions precedent, including obtaining a Court ordered charge and the suspension of making certain payments (the "**DIP Conditions Precedent**")

4. The Fraser Group submits that the approval of the DIP Credit Agreement and the DIP Conditions Precedent are reasonable, appropriate and justified in the circumstances. The DIP Financing is necessary to preserve the opportunity to seek a viable going concern solution and sufficient safeguards are in place to protect the pre-filing collateral position of the Fraser Group's unsecured creditors and any potential prejudice in connection with the granting of the charge is

substantially outweighed by the potential benefit to stakeholders, derived from the DIP Financing.

5. Finally, the Fraser Group seeks the discretion to pay certain unsecured pre-filing obligations in order to ensure the services of key suppliers and service providers and secure the loyalty of its customer base.

PART II – THE FACTS

6. The relevant facts are set out in detail in the Gordon Affidavit and the first report of PricewaterhouseCoopers dated June 18, 2009 (the "**First Report**"), in its capacity as the proposed Court appointed monitor (the "**Monitor**"). The relevant facts are summarized as follows:

(a) Fraser Papers is a speciality paper company with integrated pulp and lumber operations. The Fraser Group operates an integrated business comprising various facilities in Canada and the United States of America (the "**U.S.**"). While the business operations include various locations in Canada and the U.S., the business is fully integrated and is not divisible based on geographic boundaries;

(b) the Fraser Group has experienced many of the market and financial challenges faced by other companies in the forestry products industry including:

(i) an inability to make certain loan repayments that are due over the next six months;

(ii) an inability to make payments to address existing pension funding deficits;

(iii) a sharp reduction in global demand for pulp and paper products which, combined with U.S. government subsidies, has resulted in substantial price deterioration;

(iv) a need to ensure that its employee costs allow the Fraser Group to become competitive; and

(v) a tightening of credit terms by Fraser Papers' suppliers.

(c) As a result of these factors the Fraser Group is faced with an immediate liquidity crisis. The Fraser Group seeks relief under the CCAA to prevent precipitous creditor action and to give it the opportunity to identify a going concern solution in a structured, coordinated manner;

(d) the DIP Financing is critical in order to allow the Fraser Group to meet its post-filing obligations and preserve an opportunity to complete a successful restructuring of its business operations;

(e) the Fraser Group has five registered pension plans in three jurisdictions (the "**Pension Plans**"). Significant declines in capital markets and foreign exchange have caused a substantial decrease in the value of the Pension Plan assets. The Fraser Group is required to make a payment in the amount of $13.6 million in 2009 to address the Pension Plan funding deficit. In addition, the Fraser Group estimates that they will be required to pay $29.7 million in 2010 to fund the pension deficit (the "**Special Payments**"). The Fraser Group is unable to pay these amounts;

(f) a condition precedent for the provision of the DIP Financing is that Fraser Group suspend funding for the "Special Payments"; and

(g) in addition to the Fraser Group's inability to pay the Special Payments, it is also unable to fund certain Legacy Benefits (as defined below). It is also unable to pay certain outstanding municipal property taxes. Payment for any of these obligations would consume the Fraser Group's available cash and deny the Fraser Group the opportunity to complete a successful restructuring.

PART III – ARGUMENT AND LAW

Jurisdiction of Courts

7. Section 3(1) of the CCAA states:

> **Application** – This Act applies in respect of a debtor company or affiliated debtor companies where the total of claims, within the meaning of section 12, against the debtor company or affiliated debtor companies exceeds five million dollars.
>
> *CCAA* (s. 3(1)).

8. The Fraser Group has total claims against it in excess of $5 million.

> Gordon Affidavit at para. 115.

9. Section 9(1) of the CCAA states:

> **Jurisdiction of court to receive applications** – Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.
>
> *CCAA* (s. 9(1)).

10. The Fraser Group entities are currently insolvent.

> Gordon Affidavit, supra at paras. 136-144.

11. Each of the entities within the Fraser Group have their head office in Canada or have assets located within a Canadian province.

Gordon Affidavit, supra at para. 23-24.

12. Sections 3(1) and 9(1) of the CCAA authorize the entities of the Fraser Group to commence an application under the CCAA. Pursuant to section 3(1) and 9(1) of the CCAA, this Court has jurisdiction to hear the Fraser Group's application.

Centre of Main Interest

13. Fraser Papers intends to commence proceedings under Chapter 15 of the Code and to have the *CCAA* proceedings recognized as a "foreign main proceeding". Fraser Papers intends to proceed with its Chapter 15 filing in the U.S. on the basis that Canada is the "center of main interest".

14. In *Nortel*, this Court was asked to determine whether Toronto, Ontario was the "centre of main interest" with respect to Nortel Networks Corporation and its subsidiaries and affiliates. The Court considered, among other things, the following factors in ultimately determining that Toronto, Ontario was the "centre of main interest":

(a) location where corporate decisions are made;

(b) location of corporate governance, including where books and records are maintained and where senior management have their primary business offices;

(c) location of employee administration, including human resource functions, pension plan administration and compensation and benefits regulation; and

(d) location of marketing and communications functions.

Nortel Networks Corp., (Re), 50 C.B.R. (5th) 77 Ontario Superior Court of Justice [Commercial List] at para. 45 [*Nortel*].

15. This Court reviewed similar facts in *Biltrite*, including:

(a) whether the applicant is managed on a consolidated basis;

(b) location where cash management and accounting function are overseen;

(c) location where pricing decisions and new business development initiatives are created; and

(d) location where treasury management functions, including management of accounts receivable and accounts payable take place.

Biltrite Rubber (1984) Inc., (Re), 2009 CarswellOnt 1541, Ontario Superior Court of Justice [Commercial List] at para. 19.

16. The business of the Fraser Group is fully integrated including between the Canadian and the U.S. operations. Its registered head office is in Toronto and all corporate, management, banking and strategic functions are undertaken from its head office in Ontario. The Fraser Group operates a functionally integrated business with its consolidated operations being managed from Toronto, Ontario. The following facts are identified in the Gordon Affidavit that establish the degree that Fraser Group and its operations is centered in Ontario:

(a) the Fraser Group operates a centralized cash management system and all centralized banking arrangements are conducted in Ontario;

(b) each Applicant has a bank account in Ontario;

(c) budgeting for each facility is approved at Fraser Papers' head office in Ontario;

(d) all corporate strategic decision-making for the Fraser Group occurs at the Fraser Papers' head office and all senior management of the Fraser Group have their primary business office in Ontario;

(e) financial reporting of the Applicants is done on a consolidated basis and the audited financial statements are prepared in Ontario;

(f) employee administration, including certain human resource functions, pension plan administration and certain compensation and benefits functions are performed and located in Ontario;

(g) treasury management functions are performed in Ontario;

(h) marketing and communications functions are undertaken at the head office;

(i) all corporate minute books for the Applicants are located and maintained in Ontario; and

(j) with the exception of a term loan made available to Fraser Papers by the Province of New Brunswick, all credit facilities of the Applicants are with lenders who manage such facilities in Toronto, Ontario.

Gordon Affidavit, supra at paras. 22-30.

17. Without the decision making, financing, strategic thinking and human resource organization that takes place in Toronto, Ontario, no single entity within the Fraser Group could continue to operate in the ordinary course.

DIP Financing

18. When the Court exercises its broad discretionary powers to make an order authorizing DIP financing, it balances prejudices among the parties which is inherent in such situations.

> *Skydome Corp., Re*, 1998 CarswellOnt 5922 (Ont. Gen.Div. (Comm. List)).

19. In *AbitibiBowater Inc. (Re)* (May 6 2009), Quebec 500-11-036133-094 (Quebec Sup. Crt) was asked to approve a DIP financing agreement. The Court narrowed this question to a determination as to whether the approval of the DIP loan appropriately balanced the interests of prejudices between stakeholders. Prior to making a determination the Court had the following general comments with respect to approving DIP Financing in a CCAA proceeding:

> No one disputes that the Court, in the context of a CCAA process, has jurisdiction and authority to grant a DIP financing super-priority, provided the requirements for such are met.
>
> It is indeed known and accepted that the CCAA's effectiveness depends on a broad and flexible exercise of the Court's jurisdiction, so as to facilitate a restructuring and continue the debtors as a going concern in the meantime. Bearing this in mind, DIP financing super-priorities are regularly granted by Canadian courts in CCAA proceedings.
>
> That notwithstanding, any protection afforded by the CCAA and its DIP financing super-priority necessarily have a prejudicial effect on the debtors' creditors. Thus, before allowing a DIP financing or priming charge, the Court must notably satisfy itself that the benefits to all creditors, shareholders and employees outweigh the potential prejudice to some creditors.
>
> *AbitibiBowater Inc. (Re)* (May 6 2009), Quebec 500-11-036133-094 (Quebec Sup. Crt), at paras. 14-16 [*Abitibi DIP*].

20. The Court in *Abitibi DIP* outlined certain factors to be considered in determining whether the granting of a DIP loan is justified. In granting an order approving the DIP loan the Court considered:

(a) whether the stakeholders support the approval of a DIP loan and in particular whether the Court appointed monitor supports the DIP loan;

(b) whether the debtor company requires the use of a DIP loan to complete a successful restructuring and or stabilize the business;

(c) whether there is a reasonable prospect of a successful restructuring;

(d) whether benefits achieved through the approval of a DIP loan are greater than the potential prejudice to other stakeholders; and

(e) whether alternative financing to a proposed DIP loan is available to a debtor company.

Abitibi DIP, *supra* at paras. 20, 21, 27 and 30.

21. The Fraser Group seeks additional financing to ensure stability of its operations and availability of sufficient cash reserves to fund its operations, disbursements and payroll costs. The Fraser Group has canvassed its existing secured lenders for additional financing and all declined. The Fraser Group believes that, with the appropriate level of funding, there is a reasonable likelihood that it can achieve a successful restructuring under the CCAA and the Code.

Gordon Affidavit, *supra* at para. 162.

22. The financial terms and conditions of the DIP Credit Agreement are competitive and reasonable, given the current capital market conditions.

First Report, Supra at para. 35

23. Under the proposed terms of the DIP Credit Agreement the DIP Financing shall rank ahead of all other creditors, except for CIT Business Credit Canada Inc. ("**CIT**"), including but not limited to the loan provided for by the Province of New Brunswick.

First Report, *supra* at para. 28-29.

24. DIP financings of a priming nature are neither unusual, nor unheard of. Canadian courts have ruled before that where a debtor seeks to obtain DIP financing the authorization of the pre-existing secured creditors is not necessary. Their consent is certainly preferable, but if a super-priority could not be granted without the consent of secured creditors, the protection of the CCAA would effectively be denied.

Abitibi DIP, *supra* at para. 37.

25. The terms and conditions of the DIP Credit Facility are fair and reasonable in the circumstances and effectively balance the goal of a successful restructuring with the potential prejudice to stakeholders.

First Report, *supra* at para. 34.

Intercompany Advances Charge

26. The Fraser Group engages in various intercompany transactions in the normal course of business. As a result, at any given time, numerous intercompany transactions exist (the "**Intercompany Transactions**") that reflect intercompany payments and receivables made in the ordinary course among the Fraser Group entities.

27. In *Nortel*, the second amended and restated initial order rendered by Justice Morawetz provided intercompany charges for certain post filing inter-company loans or other transfers

(including goods and services). In granting the charge Justice Morawetz highlighted the following factors in his reasons:

(a) the fact that there are frequent intercompany receivables arising among the operating subsidiaries and, occasionally, when such receivables are not settled on a short timeframe, such receivables may be converted into an intercompany loan;

(b) that the inter-connectivity of the Nortel Companies, Nortel employs a complex arrangement to deal with cash management and inter-company payments and the allocation of revenues, and costs among the Nortel Companies; and

(c) that inter-company sales and receivables system is highly complex and essential for the ongoing fulfillment of customer orders.

Nortel, supra at paras. 12, 14 and 15.

28. The facts that gave cause to grant an administrative charge in Nortel are sufficiently present within the Fraser Group. Due to the manner in which the Fraser Group operates as an integrated business and the existence of a centralized cash management system, there are significant inter-company amounts owing among the various members of the Fraser Group at any given time.

Gordon Affidavit, *supra* at para. 124.

29. The Fraser Group uses intercompany accounts to manage activities between its various locations, and these activities are recorded on a location (rather than a legal entity) basis. For example, the Canadian operations of Fraser Papers consist of five locations (Toronto, Thurso, Edmundston, Plaster Rock and Juniper). General ledgers are maintained for each to record all activity relating to that group. The intercompany activities among the various operations can be

broadly grouped as: (i) the purchase of goods (pulp, power, steam, chips and biomass) manufactured by one mill and sold to another; (ii) allocation of services paid by one operation but charged to another; (iii) other miscellaneous activity between locations, and (iv) daily movement of cash between individual mill and corporate bank accounts.

Gordon Affidavit, *supra* at para. 125.

30. Local bank accounts for each mill are "zero balanced" daily and cleared to the corporate head office bank accounts. Under this process, daily mill disbursements are funded by the corporate accounts. Canadian bank accounts are cleared to a Fraser Papers' account and U.S. accounts are cleared to a Fraser Holdings account. The offsets to these transfers are intercompany liabilities between the respective entities. These intercompany balances are not cleared regularly and are allowed to accumulate.

Gordon Affidavit, *supra* at para. 132.

31. Cash requirements of the U.S. operations are funded by the Intercompany Note Agreement between Fraser Papers and Fraser Holdings (as defined and described in greater detail at paragraph 108 of the Gordon Affidavit). As such, if net cash is required by one of the U.S. subsidiaries to pay third party suppliers or pay Canadian purchases from the previous month, it is borrowed by Fraser Holdings from Fraser Papers through the Intercompany Note Agreement. Fraser Papers, as needed, will borrow the necessary funds from its revolving facility with CIT.

Gordon Affidavit, *supra* at para. 133.

32. Monthly mill balances are transferred to the corporate ledgers maintained by FPS Canada (for the Canadian operations) and Fraser Madawaska (for the U.S. operations). Balances due and

from operations within each respective country are not paid but allowed to accumulate, subject to infrequent clearing. The balances among the Canadian operations are effectively offset, as they are all owned by the same legal entity. As the U.S. operations are owned by separate legal entities, they are not offset but effectively eliminated when consolidated financial reporting is prepared for the Fraser Group.

Gordon Affidavit, *supra* at para. 134.

33. Balances due between Canadian and U.S. operations as a result of the purchases of goods or services are paid in cash monthly in the month following the date of the transaction.

Gordon Affidavit, *supra* at para. 135.

34. Intercompany balances are presented in the Applicants' internal financial reporting as balances due between related parties, which eliminate upon consolidation.

Gordon Affidavit, *supra* at para. 136.

35. Intercompany charges were also granted in the following cases:

Abitib DIP, supra.

Calpine Canada Energy Limited (Re), restated initial order amended on January 16, 2006, No. 0501-17864 (Alta. Q.B.) as per Romaine J., at para. 29; and

Stelco Inc. (Re), initial order rendered on January 29, 2004, No. 04-CL-5306 (Ont. S.C.) as per Farley J., at para. 54.

Director and Officer Liability Charge

36. The purpose of a directors' charge granted by the Court in a CCAA proceeding is to provide the directors with a measure of protection to encourage them to continue in office during the course of an attempted reorganization of a troubled enterprise. This principle was

acknowledged in *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.), where Justice Farley considered the following in granting a directors' charge:

> Counsel for the Board asserted that it was important for the well being of Air Canada and all affected stakeholders that the board divert its full energy and attention to solving the Air Canada problems and coming up with a successful restructuring but that it would be counter-productive to have them worried about being crushed by overwhelming liabilities. I do recognize that Air Canada presents some significant challenges for those involved in the restructuring process and that the directors and officers could be wiped out in the event that the scales of these problems were tipped only slightly given the large amounts involved...
>
> I am of the view that... the Directors' Indemnity and Charge is a fair balancing of the interests and concerns amongst the various stakeholders.
>
> *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.) at paras. 14 and 18.

37. Janis Sarra, in her book *Rescue! The Companies' Creditors Arrangement Act*, acknowledges that directors' charges have become common. She sets out the rationale in support of a directors' charge:

> Currently, many CCAA orders include indemnification for directors with a first charge on the assets, as a means to limit their liability exposure and encourage them to stay during the workout period. Unlike a universal safe harbour that would then give rise to ex ante incentives to neglect their duty to consider the interests of creditors, the protection here is granted by the court under the supervised CCAA proceeding where creditors have notice of the indemnification and can make representations. This ability of creditors to make representations to the court in those instances where such protection is not appropriate due to the failure to consider the creditors' interest provides the proper ex ante incentives to directors to discharge their duties diligently. Stakeholders such as employees, pensioners and community members affected by environmental harms also have an opportunity to challenge the first charge and have the court make a determination as to the scope of liability protection.
>
> Janis Sara, Rescue! *The Companies' Creditors Arrangement Act* (Toronto: Carswell, 2007) at para. 154.

38. Parliament has taken steps to codify directors' charges under proposed amending legislation. Pursuant to new section 11.51 the Court would have the discretion to grant a Court ordered charge indemnifying directors or officers from obligations and liabilities.

39. The Fraser Group is faced with significant and complex issues. These issues require the focus and attention of the Fraser Group's officers and directors. These individuals are the people with intimate knowledge and the experience required to generate solutions.

Variances to the Model CCAA Order – Discretion to Discontinue Certain Payments

40. The proposed Initial Order differs from the Commercial List Model CCAA Order in several aspects which are addressed below.

41. In order to complete a successful restructuring the Fraser Group must manage the cash available to it in a strategic manner. Recognizing this fact, the DIP Lender has placed certain restrictions and limits on what expenses the Fraser Group can pay using DIP Financing. As a result, the Fraser Group seeks the discretion to cease paying the following obligations immediately upon the issuance of the Initial Order;

(a) Special Payments (as defined below) to underfunded pension plans;

(b) certain Legacy Benefits (as defined below); and

(c) certain municipal realty taxes (collectively these non-payments are referred to herein as the "**Critical Non-Payments**").

42. The CCAA is silent on what specific pre-filing obligations can be stayed. The Courts have developed law over time to fill this void. In determining whether to grant such relief the

Court must exercise its discretion in a manner consistent with achieving a successful restructuring. In *Abitibi DIP* Justice Gascon stated:

> It is indeed known and accepted that the CCAA's effectiveness depends on a broad and flexible exercise of the Court's jurisdiction, so as to facilitate a restructuring and continue the debtors as a going concern in the meantime.
>
> *Abitibi DIP, supra* at paras. 14-16.

43. In considering whether to grant specific relief the Courts are required to weigh the goal of restructuring against potential prejudice to interested parties. In *United Air Lines Inc., (Re)* 2005 CarswellOnt 1078, (Ont. Gen.Div.(Comm. List)) the debtor company asked the Court for permission to cease making regular contributions to its pension plans. In refusing to make such an Order Justice Farley noted that the debtor company had not run out of money nor of liquidity and that the debtor company had available funds to make the pension funding payments. Justice Farley concluded that the pension payments should continue on the basis that there was no evidence before His Honour that payment of the funding obligations would in any way cause any particular stress or strain on the restructuring and therefore the benefits did not justify the potential prejudice to stakeholders.

> *United Air Lines Inc., (Re)* 2005 CarswellOnt 1078, (Ont. Gen.Div.(Comm. List)) at paras. 4 and 7 [*United*].

44. As is set out in the Gordon Affidavit and shown in greater detail below, should the Fraser Group have to make payment for any one of the Critical Non-Payments, the Fraser Group would no longer be able to operate.

45. Finally, with respect to each of the Critical Non-Payments, it is noteworthy that the Fraser Group is not proposing to act in violation of section 11.3 of the CCAA. To the extent that fresh obligations arise post filing, the Fraser Group intends to pay those obligations in their full

amounts, including but not limited to any obligations for current service, post-filing property taxes, employee wages and amounts owing to service providers and suppliers.

Suspension of Special Payments to Pension Plans

46. The Superior Court has jurisdiction to decide if there is reason to order the suspension of the special payments to the fund of a supplemental pension plan.

> *AbitibiBowater Inc. (Re)* (May 8 2009), Quebec 500-11-036133-094 (Quebec Sup. Crt), at para. 27 [*Abitibi Pension*].

47. In *Collins & Aikman Automotive Canada Inc. (Re)*, [2007] O.J. No. 4186 (Ont. S.C.), the debtor companies sought an order compelling the debtor to make the special payments due to the pension plans. Justice Spence dismissed the motion on the basis that the debtor had no alternative funds available to make the special payments and the order sought would require it to use the funds of the DIP facility for a purpose which was not permitted pursuant to the initial order.

> *Collins & Aikman Automotive Canada Inc. (Re)*, [2007] O.J. No. 4186 (Ont. S.C.) as per Spence J., at paras. 87 and 91 [*Collins*].

> > Based on the analysis set out earlier in these reasons, even if it is correct to view the "not required" provision as abrogating provisions of pension plan statutory law, the Court has the jurisdiction under the CCAA to make an order under the CCAA which conflicts with, and overrides, provincial legislation. There is no apparent reason why this principle would not apply to an order made under the CCAA which conflicts with the PBA.
>
> [...]

48. In *Abitibi Pension* the debtor and affiliated companies brought a motion requesting an Order to suspend payment of "special payments" to underfunded pension plans. In making a determination the Court stated: "The core objective of the CCAA is to allow the company to

emerge from its slump and to come to a possible agreement with its creditors. To accomplish this goal, the support, and even the sacrifice of all the stakeholders is essential".

Abitibi Pension, supra, at para. 47.

49. In *Abitibi Pension* the Court determined that the test for whether a suspension of special payments is warranted is "whether the financial situation of the company warrants suspension of the special payments". The Court relied upon the Monitor's Report and statements therein that concluded that the "restructuring of Abitibi is doomed to fail" if the special payments were made. The Court ultimately decided that "the business needs oxygen in order to face the upcoming crucial months" and that "it is thus necessary to suspend payment of the special contribution".

Abitibi Pension, supra, at para. 53.

50. The Fraser Group does not have sufficient liquidity to fund the special payments to the Pension Plans.

Gordon Affidavit, *supra* at para. 81.

Suspension of Employee Benefits for Non-Employees

51. In *AbitibiBowater Inc. (Re)* (May 26 2009), Quebec 500-11-036133-094 (Quebec Sup. Crt), one of the unions brought a motion seeking to lift the stay of proceedings, so as to order the debtor companies to fulfil their obligations under two early retirement incentive programs established for the benefit of the certain retired employees. Pursuant to the terms of the initial order the debtors discontinued payment under the terms of the programs. Justice Gascon applied a balancing of convenience test and ultimately held that the termination of payment of the benefits

that amounted to pre-filing obligations was fair in the circumstances. In coming to this conclusion the Justice Gascon stated:

> ...the Court believes that, at the stay of proceedings stage, the stakeholders are better served by an equal treatment of their respective positions than by the granting of an undue advantage or preference to some.
>
> ...
>
> If the sole criteria of undue hardship and necessity for payment would suffice to lift the stay of proceedings in a CCAA restructuring, Court, debtors and monitors would likely end up devoting indefinite time and energy trying to assess the levels of prejudice caused to one or the other, instead of focusing upon the end result, that is, to develop and submit a plan and gather consensus around a fair and reasonable compromise for all.
>
> *AbitibiBowater Inc. (Re)* (May 26 2009), Quebec 500-11-036133-094 (Quebec Sup. Crt), at paras. 18 and 28 [*Abitibi Benefits*].

52. A similar approach to termination of prior employees' benefits was taken in *Mine Jeffrey*. In *Mine Jeffrey* the union appealed the decision allowing the debtor company to cease making payment of certain employee benefits. The Court of Appeal held that the debtor was not obligated to pay for any benefits prescribed in a collective agreement in respect of employees terminated immediately after the granting of the Initial Order. The Court of Appeal reasoned that termination of payments in respect of employees terminated prior to or immediately after obtaining a CCAA stay did not modify the collective agreement. The Court of Appeal stated that these terminated employees became creditors of Jeffrey Mines for the value of the benefits lost.

> *Re Mine Jeffrey Inc.*, 2003 CarswellQue 90, 35 C.C.P.B. 71 (Que. C.A.).

53. The Fraser Group, with the Monitor's assistance, intends to complete an analysis of all outstanding employee benefits that the Fraser Group owes to any employee that is not an "**Active Employee**" (as defined in the draft Initial Order) (the "**Legacy Benefits**"). The Fraser Group seeks the ability, but not the requirement, to pay these Legacy Benefits.

Suspension of Payments for Certain Municipal Property Taxes

54. The Fraser Group currently owes approximately $8.5 million in realty tax arrears to various municipalities. This is a large amount when compared to its available liquidity and to cash usage in the near term. If the Fraser Group were required to pay all outstanding realty taxes its efforts to restructure would be significantly constrained.

55. In consultation with the Monitor, the Fraser Group will be reviewing each of the mills and facilities in developing a restructuring plan. In view of its limited cash resources, the Fraser Group does not believe it is prudent to utilize proceeds of the DIP Financing to pay realty tax arrears on facilities that may not form part of their future operations or that may be sold or abandoned. The Fraser Group therefore seeks a term in the Initial Order providing discretion as to payment of realty tax arrears. In accordance with section 11.3 of the CCAA, current realty taxes on all facilities that are being utilized by the Applicants will continue to be paid from and after the commencement of this proceeding.

Variances to the Model CCAA Order – Payment of Unsecured Pre-Filing Obligations

56. The Fraser Group seeks discretion to pay certain pre-filing obligations. The Fraser Group relies heavily upon certain key suppliers and cannot achieve a successful restructuring if those suppliers do not continue to provide services. The Fraser Group also seeks discretion to continue certain ongoing Customer Programs (as defined below) (payment of key suppliers and the honouring of customer programs is referred to below as "**Critical Payments**").

57. The Court in *Re Air Canada* (2003), 45 C.B.R (4^{th}) 163, held that in exceptional circumstances, the Court may permit arrangements to be made with and payments to be made to an unsecured creditor if they are critical to the debtor being able to continue in business.

> *Re Air Canada* (2003), 45 C.B.R (4^{th}) 163 [*Air Canada*].

58. The Second Amended Initial Order in the CCAA proceeding of *AbitibiBowater Inc.* also recognized the Court's authority to grant a debtor company discretion to make payments of certain unsecured pre-filing obligations. The Abitibi Second Amended Initial Order granted the debtor discretion to maintain existing customer programs and the discretion to pay key suppliers for their pre-filing debt.

> *AbitibiBowater Inc. (Re)*, Quebec 500-11-036133-094 (Quebec Sup. Crt)), second amended initial amended on May 6, 2009, as per Gascon J., at para. 21.

59. As is set out in the Gordon Affidavit and shown in greater detail below the Fraser Group seeks the discretion to make certain payments where the Fraser Group determines (in certain instances with the consent of the Monitor) that such payments are critical and essential to the continuation of the business.

Honouring of Customer Loyalty Rebates and Programs

60. The Fraser Group operates various programs that incentivize its customers to purchase Fraser Group product at increased volumes (the "**Customer Programs**"). The Customer Programs create rebate obligations to customers upon the purchase of a requisite volume of Fraser Group product. Arguably, these rebate obligations to its customers pursuant to the Customer Programs are stayed and subject to pre-filing obligation treatment.

> Gordon Affidavit, *supra* at para. 180.

61. The forest products industry is rapidly contracting, and is highly competitive. If the Applicants do not have the ability to honour rebates earned by customers seamlessly throughout the period prior to and after the date of filing, those customers may quickly move their business to a competitor who can continue to offer volume-related incentives. The Fraser Group intends to review all such programs with the Monitor to determine which Customer Program arrangements ought to be honoured. Given the fierce competition for a contracting customer base Fraser Papers considers its ability to honour the Customer Programs as mandatory to any successful restructuring.

Gordon Affidavit, *supra* at parag. 180.

62. As noted above, the second amended initial order granted in *Abitibi DIP* provides precedent for granting a debtor company discretion to continue honouring customer loyalty programs.

Abitibi DIP, supra.

Key Suppliers and Service Providers

63. The Fraser Group operates its business in certain geographic locations where service providers to the pulp and paper industry are scarce. Scarcity is driven by the fact that there isn't enough business available to encourage competition to spend the capital required to provide competing services. The Fraser Group anticipates that some of these service providers, particularly in the freight forwarding and transportation industry, will refuse to provide continued services unless their pre-filing obligations are paid in full.

64. The Fraser Group has requested a provision in the Initial Order that allows it the discretion to deem that a supplier is a "critical supplier". This provision provides that with the

Monitor's consent and subject to the terms of the DIP Financing, the Fraser Group be permitted to make certain payments to particular suppliers, if it is determined that such suppliers are critical to the Fraser Group's ongoing business operations, and the inability to pay such amounts may jeopardize their ability to achieve a successful restructuring.

65. This suggested process for determining that a supplier is a "critical supplier" is within the law established in *Air Canada* and followed in *Abitibi*. These cases acknowledge the flexibility required to ensure that business operations continue in the ordinary course during attempts at restructuring.

Thirty Day Stay

66. The Fraser Group seeks that the Critical Order remain in effect for thirty days, pursuant to section 11 of the CCAA. The Applicants intend to pursue this restructuring with diligence. As this Court has previously noted, it is typically necessary to accomplish the following to achieve a successful restructuring:

(a) identification of the debtor's stakeholders and their interests;

(b) arranging for a process of meaningful communication with immediate relationship issues arising from a CCAA filing;

(c) dealing with immediate relationship issues arising from a CCAA filing;

(d) sharing information about the issues giving rise to the debtor's need to restructure;

(e) developing restructuring alternatives; and

(f) building a consensus around a plan of restructuring.

Stelco Inc., Re, 2004 CanLII 24933 (ON S.C.); (2004), 48 C.B.R. (4th) 299 at para. 31.

PART IV – RELIEF REQUESTED

67. The Applicants therefore request an order approving and authorizing the following the relief set out in the draft Initial Order attached to the Application Record, dated June 18, 2009.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 18 **DAY OF** JUNE, **2009.**

D.J. Miller
Counsel to the Applicants

SCHEDULE "A" - LIST OF AUTHORITIES CITED

No.	Citation
1	*Nortel Networks Corp., (Re)*, 50 C.B.R. (5th) 77 Ontario Superior Court of Justice [Commercial List]
2	*Biltrite Rubber (1984) Inc., (Re)*, 2009 CarswellOnt 1541, Ontario Superior Court of Justice [Commercial List]
3	*Skydome Corp., Re*, 1998 CarswellOnt 5922 (Ont. Gen. Div. (Comm. List))
4	*AbitibiBowater Inc. (Re)* (May 6 2009), Quebec 500-11-036133-094 (Quebec Sup. Crt.)
5	*Stelco Inc. (Re)*, initial order rendered on January 29, 2004, No. 04-CL-5306 (Ont. S.C.) as per Farley J.
6	*Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J.)
7	*United Air Lines Inc., (Re)* 2005 CarswellOnt 1078, (Ont. Gen.Div.(Comm. List))
8	*Collins & Aikman Automotive Canada Inc. (Re)*, [2007] O.J. No. 4186 (Ont. S.C.) as per Spence J.
9	*AbitibiBowater Inc. (Re)* (May 26 2009), Quebec 500-11-036133-094 (Quebec Sup. Crt.)
10	*Re Mine Jeffrey Inc.*, 2003 CarswellQue 90, 35 C.C.P.B. 71 (Que. C.A.)
11	*Re Air Canada* (2003), 45 C.B.R (4th) 163
12	*AbitibiBowater Inc. (Re)*, Quebec 500-11-036133-094 (Quebec Sup. Crt)), second amended initial amended on May 6, 2009, as per Gascon J.
13	*Stelco Inc., Re, 2004* CanLII 24933 (ON S.C.); (2004), 48 C.B.R. (4th) 299
14	*Calpine Canada Energy Limited (Re)*, restated initial order amended on January 16, 2006, No. 0501-17864 (Alta. Q.B.) as per Romaine J.
15	*AbitibiBowater Inc. (Re)* (May 8 2009), Quebec 500-11-036133-094 (Quebec Sup. Crt.)

SCHEDULE "B" - RELEVANT STATUTES

Companies' Creditors Arrangement Act, Section 3.(1)

Application – This Act applies in respect of a debtor company or affiliated debtor companies where the total of claims, within the meaning of section 12, against the debtor company or affiliated debtor companies exceeds five million dollars.

Companies' Creditors Arrangement Act, Section 9.(1)

Jurisdiction of court to receive applications – Any application under this Act may be made to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated, or, if the company has no place of business in Canada, in any province within which any assets of the company are situated.

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO FRASER PAPERS INC., FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H. LLC (collectively, the "Applicants")

Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at Toronto

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Nortel Networks Corp., Re.

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 OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: January 14, 2009

Oral reasons: January 14, 2009

Docket: 09-CL-7950

Counsel: Derrick Tay, Mario Forte, Jennifer Stam for Nortel Networks Corporation, et al

Edmond Lamek, Aubrey Kauffman for Export Development Canada

Michael Barrack, Rachelle Moncur for Flextronics Corporation

Edward A. Sellers for Directors of Nortel Networks Corporation, Nortel Networks Limited

Jay Carfagnini for Monitor, Ernst & Young Inc.

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Arrangements -- Approval by court -- Miscellaneous issues

Debtor business provided communication services worldwide, with corporate presence in several jurisdictions -- Debtor relied on FTS Ltd. for products, and for EDC for support facility -- Debtor had assets of $21.153 billion in assets and $22.355 in liabilities -- Debt included no senior secured obligations -- Debtor anticipated sharp increase in pension funding requirements in near future -- Debtor was defendant in several legal proceedings financial outcome of which was not clear -- FTS Ltd. agreed to arrangement to ensure supply, EDC agreed to certain terms regarding debtor's obligations -- Business feared for solvency and wished to engage in restructuring its interest, using both Companies' Creditors Arrangement Act and American legislation -- Debtor brought application for protection order under Companies' Creditors Arrangement Act -- Application granted -- Debtor admitted insolvency -- Debtor unlikely to meet obligations -- Arrangements with FTS Ltd. and EDC also approved -- Operations of debtor were sufficiently interconnected that implementing cross-border insolvency protocol was warranted -- Proper insolvency protocol could not be implemented without approval of American Court -- Mon-

itor instructed to undertake proceedings to have proceedings recognized in American court as foreign main proceeding -- Centre of main interest was in Toronto.

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Miscellaneous issues

Concurrent foreign proceedings -- Debtor business provided communication services worldwide, with corporate presence in several jurisdictions -- Debtor relied on FTS Ltd. for products, and for EDC for support facility -- Debtor had assets of $21.153 billion in assets and $22.355 in liabilities -- Debt included no senior secured obligations -- Debtor anticipated sharp increase in pension funding requirements in near future -- Debtor was defendant in several legal proceedings financial outcome of which was not clear -- FTS Ltd. agreed to arrangement to ensure supply, EDC agreed to certain terms regarding debtor's obligations -- Business feared for solvency and wished to engage in restructuring its interest, using both Companies' Creditors Arrangement Act and American legislation -- Debtor brought application for protection order under Companies' Creditors Arrangement Act -- Application granted -- Debtor admitted insolvency -- Debtor unlikely to meet obligations -- Arrangements with FTS Ltd. and EDC also approved -- Operations of debtor were sufficiently interconnected that implementing cross-border insolvency protocol was warranted -- Proper insolvency protocol could not be implemented without approval of American Court -- Monitor instructed to undertake proceedings to have proceedings recognized in American court as foreign main proceeding -- Centre of main interest was in Toronto.

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 -- referred to

Chapter 15 -- referred to

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

Generally -- referred to

s. 11 -- considered

s. 11(2) -- considered

s. 18.6 [en. 1997, c. 12, s. 125] -- considered

Insolvency Act, 1986, c. 45

Generally -- referred to

APPLICATION by debtor for protection under Companies' Creditors Arrangement Act.

Morawetz J.:

1 Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks International Corporation ("NNIC"), Nortel Networks Global Corporation ("NNGC"), Nortel Networks International Corporation ("NNIC") and Nortel Networks Technology Corporation ("NNTC") bring this application under the *Companies' Creditors Arrangement Act* ("*CCAA*").

2 NNC is a Canadian corporation and is the direct or indirect parent of 143 subsidiaries including the other applicants. NNC, NNL, NNIC, NNGC and NNTC are referred to as the "Applicants".

3 In addition, NNC is party to eight joint ventures operating worldwide. References to "Nortel" or the "Nortel Companies" are references to the global enterprise as a whole. References to a "Nortel Company" are references to a single entity within the Nortel Companies.

4 NNC's and NNL's principal executive offices are in Toronto, Ontario. NNTC's principal executive offices are in Ottawa, Ontario. NNL also has offices in Montreal and Ottawa with sales and support offices throughout Western and Central Canada, Quebec and Atlantic Canada. NNIC and NNGC have their registered offices in Toronto, Ontario, but apparently have no operations.

5 The Applicants seek protection under the *CCAA* to facilitate the re-organization of the Nortel Companies for the benefit of all creditors. In addition, certain of NNC's direct and indirect U.S. subsidiaries have filed voluntary petitions (the "Chapter 11 proceedings") pursuant to Chapter 11 of the United States Bankruptcy Code (the "Code"), and the directors of certain of NNL's active subsidiaries in Europe, Middle East and Africa (collectively referred to as the "ENEA Entities") and ("ENEA"), are expected to apply to the English court for administration orders for each of the ENEA Entities and (the "Administration Proceedings") pursuant to the *Insolvency Act* 1986 ("IA86"). The Applicants are also seeking this court's authorization to apply for recognition of the *CCAA* proceedings as "foreign main proceedings" under Chapter 15 of the Code. Counsel has also indicated that Nortel Networks Inc. ("NNI") and the other scheduled Chapter 11 applicants are making an application to this court pursuant to s.18.6 of the *CCAA* to recognize the Chapter 11 proceedings as "foreign proceedings" in Canada and to give effect to the stay thereunder.

6 The name Nortel is known throughout the world for leadership in the networking and communication industries, delivering cutting-edge hardware and software solutions and related services.

7 In his affidavit filed in support of this application, Mr. John Doolittle, Treasurer of NNC and NNL stated that at their peak in 2000, the Nortel companies generated approximately $30 billion of annual revenue, employed nearly 93,000 employees and had a market capitalization of over U.S. $250 billion. He also stated that with the burst of the high-tech bubble in early 2001 and the resulting significant downturn in both the telecommunications industry and the economic environment, the Nortel companies began to face an increasingly difficult competitive environment.

8 A number of steps have been taken to restructure the affairs of Nortel since 2001, but as Mr. Doolittle explains in his affidavit these measures have not provided adequate relief from the significant pressures Nortel is experiencing. The Applicants are of the view that the action which presents the greatest potential for the survival and recovery of Nortel is a comprehensive business and financial restructuring which can only be accomplished through a *CCAA* process coordinated with the Chapter 11 proceedings and the Administration Proceedings.

9 The Canadian corporate structure, the U.S. corporate structure and the European corporate structure are detailed in the affidavit of Mr. Doolittle as is the Applicants' capital structure.

10 As at January 9, 2009, Nortel's debt structure consisted of the following unsecured obligations:

Nortel Networks Corporation

- $575 million, 1.75 percent convertible notes due 2012
- $575 million, 2.125 percent convertible notes due 2014

Nortel Networks Limited and Nortel Networks Inc.

- $1 billion Libor + 4.25 percent senior notes due 2011
- $550 million, 10.125 percent senior notes due 2013
- $1.125 billion, 10.75 percent senior notes due 2016
- $200 million, 6.875 percent senior notes due 2023 (no NNI guarantee)

Nortel Networks Capital Corporation

- $150 million, 7.875 percent senior notes due 2026
- Notes do not carry NNI guarantee but are fully and unconditionally guaranteed by NNL

11 Mr. Doolittle also stated that the operation of the Nortel business is a highly complex integrated structure designed to accommodate the global nature of their business and, although many of Nortel's primary contractual external relationships with vendors are through NNL, products are ordered, delivered and paid for pursuant to internal sub-agreements with vendors and Nortel regional entities.

12 As a result of the complex structure, Mr. Doolittle states that there are frequent inter-company receivables arising among the operating subsidiaries and, occasionally, when such receivables are not settled on a short timeframe, such receivables may be converted into an inter-company loan. These loans are typically repaid in the normal course.

13 Further, as a result of the inter-connectivity of the Nortel Companies, Nortel employs a complex arrangement to deal with cash management and inter-company payments and the allocation of revenues, and costs among the Nortel Companies. By way of summary, Mr. Doolittle noted that the Applicants have a total of 39 Canadian $ and U.S. $ bank accounts, which are maintained on an entity-by-entity basis.

14 Again, according to Mr. Doolittle, the Nortel business is highly integrated with several key Nortel Companies acting as purchasing hubs for Nortel Companies around the world which results in high levels of inter-company receivables and payables, which necessitate the complex transfer pricing and inter-company settling methods employed by Nortel.

15 Mr. Doolittle goes on to explain that the inter-company sales and receivables system is highly complex and essential for the ongoing fulfillment of customer orders.

16 Accordingly, the Applicants propose to continue their buying and selling arrangements consistent with the transfer pricing model post filing. In anticipating of these insolvency proceedings, the Chapter 11 proceedings in the U.S. and the Administration in England, Mr. Doolittle stated that the Applicants have entered into discussions with NNI in the U.S. and NNUK (the head of ENEA) along with Ernst & Young LLP (UK) as proposed administrator (the "Administrator") and have reached a 30-day agreement with respect to the terms on which these arrangements would continue were proceedings to be commenced in all three jurisdictions.

17 In addition, the Applicants have critical relationships with two entities.

18 First, the Applicants rely heavily on Flextronics Telecom Systems Ltd. to supply approximately 75 percent of Nortel's products. In anticipation of this filing, and in recognition of the importance of Flextronics' continuing compliance during the proceedings, Nortel and Flextronics negotiated the terms of an agreement that will ensure ongoing supply upon filing. A copy of the agreement is contained at Exhibit B to the affidavit of Mr. Doolittle. The agreement is subject to Canadian court approval. The Monitor recommends that this court approve this amending agreement.

19 Second, Export Development Canada ("EDC") provides a support facility to Nortel. Nortel is of the view that this facility is a key component of the ability of Nortel to continue its business. EDC has agreed to provide a 30-day waiver of default and has agreed to provide up to U.S. $30 million of additional support during the 30-day waiver period, to allow EDC and Nortel to work together to see if a longer-term arrangement can be reached. The EDC waiver is subject to the condition that any support granted by EDC post-filing will be secured by a charge on the assets of Nortel (the "EDC Charge"). Nortel is agreeable to the granting of the charge and the Monitor has recommended that the EDC Charge be granted.

20 Copies of NNC's audited Consolidated Financial Statements for 2007 as well its Unconsolidated Financial Statements for the first three fiscal quarters of 2008 are filed in the Record.

21 As of September 30, 2008, the Applicants had total current assets of U.S. $21.153 billion and total current liabilities of U.S. $22.355 billion.

22 The Applicants do not have any senior secured obligations. Other than leased equipment, capital leases, sale lease arrangements related to the real estate properties and certain letters of credit which are cash collateralized, the remainder of their obligations are apparently unsecured obligations.

23 Nortel also has significant pension and post-retirement plan liabilities. Mr. Doolittle states that an upcoming valuation will reflect a significant decline in the value of the assets held in Nortel pension plans due to the recent adverse conditions in the financial markets globally. As a result, Nortel anticipates that its pension plan funding requirements in 2009 will increase in a very substantial and material manner.

24 Mr. Doolittle also states that the Applicants have third-party trade debt of approximately U.S. $160 million. He also indicated that the Applicants are defendants in various legal proceedings for which the Applicants are unable to ascertain the ultimate aggregate amount of liability. Further, the Applicants have other debt of approximately $414 million relating to various contractual commitments.

25 The Applicants have acknowledged that they are insolvent. In addition to the information referenced above, the Chapter 11 applicants are seeking protection pursuant to Chapter 11 of the Code, which is a default under the high-yield notes. Mr. Doolittle has acknowledged that NNL and NNC do not have sufficient funds to pay any accelerated amounts on the high-yield notes and defaults under the high-yield notes lead to a default under support facility provided by EDC as well as other convertible notes.

26 Further, Mr. Doolittle acknowledges that the Applicants are cognizant of the significant pension deficits in England (the contributions to which have been guaranteed by NNL) and Canada, which, if accelerated they would not be able to fulfill.

27 Ernst & Young Inc. ("E&Y") was retained by the Applicants on September 26, 2008 to advise as to the financial status of the Applicants.

28 E&Y has consented to act as the Monitor (the "Monitor") of the Applicants in the *CCAA* proceedings.

29 E&Y has filed a report in its capacity as proposed Monitor (the "Report"). The Report provides additional detail as to the current financial status of Nortel and as well it contains the recommendations of the Monitor in respect of the proposed form of *CCAA* order.

30 The Record filed in support of the application also contains the required cash-flow forecast, which in this case is a 13-week cash-flow forecast that estimates the Applicants' financing requirements.

31 The proposed form of order provides for a number of charges and financial thresholds which are described in both the affidavit of Mr. Doolittle and in the Report.

32 These charges include an Administrative Charge, a Directors' and Officers' Charge, and Inter-Company Charge, and a Carling Facility Charge to support cash loans from NNI to NNL.

33 With respect to the Carling Facility Charge, Mr. Doolittle states that, at the present time, most of Nortel's cash in North America is with NNI. NNL requires access to $200 million of that cash to ensure that NNL has access to adequate funding for this process. It is therefore contemplated that as part of its first-day hearings, NNI will seek U.S. Bankruptcy Court approval to advance up to U.S. $200 million on a revolving basis to NNL (the "NNI Loan") which will be secured by the Carling Facility Charge.

34 The Applicants have also disclosed that the directors in the past have elected to receive remuneration by way of allocation of share units. The proposed Monitor has been advised by the Applicants that, in the future, all directors will be remunerated by way of cash payments (at current cash-equivalent levels, less $25,000), subject to court approval.

35 In its report, the Monitor has recommended that the Applicants be granted the benefit of protection under the *CCAA* and, as well, the Monitor is supportive of the charges and financial thresholds proposed in the draft order. The priority of the various charges is specified in the order.

36 Having reviewed the record and having heard submissions, I am satisfied that the Applicants qualify as debtor corporations within the meaning of the *CCAA*.

37 The Applicants clearly have obligations in excess of the qualifying limit and have acknowledged that they are insolvent.

38 The jurisdiction of this court to receive the *CCAA* application has been established.

39 The Applicants seek an initial order under s.11 of the *CCAA*. The required Statement of Projected Cash Flow and the other financial documents required under s.11(2) have been filed. The application was not opposed by any party appearing.

40 Counsel to Flextronics, EDC and the Board of Directors all expressed their support for the granting of the requested relief. The Monitor expressed its approval to the requested form of order.

41 I am satisfied that it is appropriate that the Applicants be granted protection under the *CCAA* and an order shall issue to that effect, which order also approves the amending agreement with Flextronics and the granting of the EDC Charge. The draft order is based on the Model Order and the modifications as proposed are acceptable.

42 Although none of the Applicants have filed for Chapter 11 protection in the United States, and none of the Chapter 11 entities have filed as debtor companies under the *CCAA*, it is recognized that Nortel's operations are connected in many ways such that, in my view, it is desirable to implement a cross-border insolvency protocol. The initial order seeks approval of such a protocol which establishes the basis for communication and cooperation between the Canadian and U.S. courts, while confirming their independence. The form of protocol is acceptable to this court and is, accordingly, approved. However, this cross-border insolvency protocol cannot be implemented without the approval of the U.S. court.

43 The Applicants have also requested that the Monitor be directed to commence proceedings under Chapter 15 of the Code to have the *CCAA* proceedings recognized as "foreign main proceedings". The effect of the Chapter 15 proceedings would be to give effect to this initial order in the United States. The Applicants anticipate that the Monitor will be appointed as the Applicants' foreign representative in respect of such Chapter 15 proceedings.

44 The Monitor is of the view that the Applicants should be authorized to seek such recognition. I am in agreement with these submissions and the Monitor is accordingly authorized to seek such recognition under Chapter 15 of the Code.

45 In considering whether these *CCAA* proceedings should be recognized as "foreign main proceedings", Mr. Doolittle at paragraph 189 of his affidavit provides comprehensive reasons for the basis for his conclusion that the Applicants' centre of main interest ("COMI") is in Toronto, Ontario.

46 An order shall issue to give effect to the foregoing.

47 I would like to express my appreciation to all parties involved in this process. It is clear that significant effort was expended by all concerned in the preparation of the materials. The detail contained in the affidavit of Mr. Doolittle as well as the proposed Monitor's report was of great assistance to the court.

Application granted.

END OF DOCUMENT

TAB 2

2009 CarswellOnt 1541

Biltrite Rubber (1984) Inc., Re
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C., c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BILTRITE RUBBER (1984) INC. AND BILTRITE RUBBER, INC. (Applicants)
Ontario Superior Court of Justice [Commercial List]
Morawetz J.
Heard: March 12, 2009
Judgment: March 20, 2009
Docket: CV-09-0867-00CL

Counsel: Jason Wadden, Logan Willis for Applicants

Jay Swartz for Monitor, RSM Richter, Inc.

Jessica Caplan, Mario Forte for Royal Bank of Canada

Subject: Insolvency

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Miscellaneous issues.

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 15 -- referred to

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

Generally -- referred to

s. 2 "debtor company" -- referred to

s. 11(2) -- referred to

Morawetz J.:

1 The Applicants move for an Initial Order under the *CCAA* with the objective of ensuring that they can operate as a going concern while seeking to effectuate a restructuring or a sale of assets.

2 Biltrite Rubber (1984) Inc. ("Biltrite") and Biltrite Rubber, Inc. ("Biltrite US") collectively do business under the trade name "Biltrite Industries", and are collectively referred to as "Biltrite Group".

3 Biltrite is an Ontario company with a head office located in Toronto. Biltrite owns or controls all of the Biltrite Group's operating assets and liabilities situated in Canada.

4 Biltrite owns all of the shares of Biltrite US. Biltrite is a co-borrower with Biltrite US of the Biltrite Group's secured bank debt.

5 Biltrite US is a company incorporated under the laws of Ohio with its business headquarters in the same premises as Biltrite in Toronto. Biltrite has no material assets in Canada; however it has a bank account in Toronto, which contained approximately US $100 as of March 6, 2009.

6 The Biltrite Group has acknowledged that it is insolvent. Each of Biltrite and Biltrite US have liabilities well in excess of $5 million. The total amount owing to the secured creditor, Royal Bank of Canada ("RBC"), as of March 6, 2009 is $17.2 million. Biltrite Group's lending facility with RBC is in default. Biltrite Group has been operating under various Forbearance Agreements since March 2008.

7 Biltrite Group has recently been attempting to recapitalize through either a sale/leaseback agreement or through a refinancing. Attempts to recapitalize have been unsuccessful.

8 Biltrite Group submits that a filing under the CCAA is necessary in order to maintain existing customers and thereby preserve the value of the business.

9 I am satisfied that the Applicants are "debtor companies" within the meaning of section 2 of the *CCAA*. In this respect, I accept the submission of counsel for the Applicants that Biltrite US has met the threshold statutory requirements of the *CCAA*, albeit on a technical basis.

10 The Applicants' required statement of projected cash flow and other financial documents required under subsection 11(2) of the *CCAA* have been filed.

11 RBC has indicated that it is only willing to provide further funding in the context of a restructuring or sale of the Biltrite Group pursuant to the *CCAA* Proceedings on a first priority basis ("DIP Financing"). It is expected that, without RBC's continuing support, the Biltrite Group would have to cease operations.

12 RBC has also made its support for the *CCAA* Proceedings conditional upon the Monitor carrying out a sale process. The Initial Order contemplates that the Monitor will carry out the Sales Process and that such Sales Process will be carried out in parallel to the restructuring efforts.

13 RSM Richter Inc. is the proposed Monitor and a Report of the Proposed Monitor has been filed.

14 The Proposed Monitor has commented that it believes that the terms of the DIP Facility are reasonable and, as well, that the Sales Process is appropriate in this situation given the Company's liquidity issues and the size of its business.

15 Biltrite has also proposed that the Initial Order provide for an Administrative Charge to a maximum of $750,000 and a Director's Charge to a maximum of $450,000. These charges are in addition to the DIP Lenders' Charge. It seems to me that, in the circumstances, these charges are necessary.

16 Biltrite has also proposed a Key Employee Retention Program ("KERP") for certain critical employees. Based on discussions with management, it is the Proposed Monitors' view that these employees are critical to the

performance of the business and further that the payments contemplated by the KERP are reasonable in the circumstances.

17 In my view, the granting of an Initial Order is appropriate. The Order shall incorporate the charges referenced above in order of the priority described in the draft order. Approval is also provided for the DIP Facility, the Sales Process and the Key Employee Retention Program.

18 RSM Richter Inc. is appointed Monitor and the Stay Termination Date is established as April 13, 2009. The Order shall issue in the form presented.

19 Counsel to the Applicants advised that the Biltrite Group, with the support of RBC and the assistance of the Monitor as foreign representative, intend to concurrently commence proceedings in respect of the Biltrite Group under Chapter 15 of the US Bankruptcy Code for recognition of the Initial Order. The Biltrite Group has decided to pursue the Chapter 15 Proceedings due to its expediency and efficiency in addressing the Biltrite Group's assets and business in the United States and based on its view that Canada is the appropriate principal jurisdiction in which to pursue and implement the sale or restructuring of the Biltrite Group. The Applicants submit that the facts outlined at paragraph 114-118 of the affidavit of Mr. James Chang support this position.

END OF DOCUMENT

TAB 3

16 C.B.R. (4th) 118

C
1998 CarswellOnt 5922

Skydome Corp., Re
In the Matter of Skydome Corporation, Skydome Food Services Corporation and SAI Subco Inc.
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, R.S.O. 1990, c. B.16, as Amended
In the Matter of a Proposed Plan of Compromise or Arrangement of Skydome Corporation, Skydome Food Services Corporation and SAI Subco Inc.
Ontario Court of Justice, General Division (Commercial List)
Blair J.
Judgment: November 27, 1998
Docket: 98-CL-3179

Counsel: David E. Baird, Michael B. Rotsztain and Richard A. Conway, for Applicants.

R.G. Marantz, Q.C., and Andrew Diamond, for Respondents Province of Ontario and Stadium Corporation.

Derrick Tay and John Porter, for Trustee for Bondholders and Bondholder.

James Dube and Craig Thornburn, for Respondents The Toronto Blue Jays Baseball Club.

Alex Ilchenko, for Respondent Ticketmaster Canada Ltd.

Ronald Slaght, for Respondent McDonald's Restaurants.

Subject: Insolvency; Corporate and Commercial

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

Three related corporations were involved in operation of sporting and entertainment facility -- Corporations became insolvent because of changes in sporting, entertainment and economic environment, non-payment of disputed municipal taxes, competition from other facilities, heavy debt load, and costly negotiations with sports team that was facility's primary user -- Corporations brought application for protection under Companies' Creditors Arrangement Act -- Corporations sought as part of declaration court's approval of interim lease, and authorization of super priority loan from sports team in order to finance necessary operating expenses and essential capital expenditures -- Corporations also sought authorization to withdraw sum from capital reserve account that was held as part of security arrangements regarding outstanding indebtedness to group of bondholders -- Applic-

ation granted -- Facility held large number of functions that drew millions of people to city throughout year and employed large number of employees -- Substantial economic and financial effects would result to city, merchants, suppliers, entertainers and employees in tourist industry if facility were shut down -- Broader public dimension was required to be considered in determining application -- Authority existed in case law for granting of super priority -- Proposed interim lease and super priority were so closely integrated that one could not be approved without other -- Interim lease was key to ability of corporations to pursue attempt to put forward plan that would be acceptable to creditors -- Importance of stability in situation in connection with presence of sports team and ability to attract other functions outweighed other concerns that could arise in relation to negotiation and execution of interim lease -- Corporations proposed to make appropriate use of withdrawn reserve funds, and bondholders would not be prejudiced as many of proposed expenditures were for matters that had priority over bondholders -- It is acceptable under Act for creditor's security to be weakened as part of balancing of prejudices between parties -- Circumstances existed to make initial order under Act appropriate, and it was fair and reasonable to grant order requested -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Cases considered by Blair J:

> Anvil Range Mining Corp., Re (1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List]) -- applied
>
> Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) -- 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.) -- referred to
>
> Westar Mining Ltd., Re, 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331 (B.C. S.C.) -- considered

Statutes considered:

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

> Generally -- referred to
>
> s. 8 -- considered
>
> s. 11 [rep. & sub. 1997, c. 12, s. 124] -- referred to
>
> s. 11(6) [en. 1997, c. 12, s. 124] -- considered

APPLICATION by related corporations for protection under Companies' Creditors Arrangement Act.

Endorsement. ***Blair J:***

1 Skydome Corporation, Skydome Food Services and SAI Subco Inc. -- all related and presently insolvent companies -- apply for the protection of the Court available in appropriate circumstances under the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

2 Once considered to be the Crown Jewel of the sports and entertainment facility world the Skydome, it seems, has developed a few financial fissures. It has insufficient funds or sources of funds to meet all of its on-

going liabilities as they become due. The same is true for all 3 Applicants, which I shall refer to generically in this endorsement as "The Skydome" unless the context requires otherwise. Various reasons are put forward for this in the materials, but in summary they are the following:

> 1. Changes in the sporting, entertainment and economic environment in recent years have place financial strains on the operations of the facility. These changes include, but are not limited to, declining revenues as a result of a significant downturn in attendance at Blue Jays games since the halcyon World Series days of the early 1990's, and the cost of competing for entertainment providers in an environment where the entertainers must be paid in U.S. dollars but the revenue is received in weakened Canadian dollars.
>
> 2. Non-payment of Municipal taxes of approximately $3.6 million (Skydome contests its liability for such taxes in the sense that it has been engaged in a lengthy battle with the taxing authorities over the proper assessment base for its municipal taxes);
>
> 3. The Skydome now faces competition from other entertainment facilities in this City and elsewhere.
>
> 4. The Applicants carry a very heavy debt load, which is the legacy of the construction of the domed stadium and the initial development and marketing of the Skydome.
>
> 5. In connection with the latter, there are various outstanding executory contracts which provide benefits to those who were involved in supporting the initial Sydome venture, in continuing consideration of that support, but which as a result reduce the benefits provided by revenues that can be generated by the Skydome now.
>
> 6. Because renters of Skyboxes were called upon to pay first and last years rent in advance, there are no revenues coming in for the last year of the 10 year leases which are now about to expire; and,
>
> 7. The Skydome faces a major negotiating battle with its primary source of financial life, the Blue Jays, over the Blue Jays sub-lease (or, more accurately, license) of the premises.

3 This latter problem has been resolved, subject to approval and granting of CCAA protection, through the execution of an Interim Licensing Agreement (which I will call the Interim Lease, since everyone else does), under which the Blue Jays will remain in the Skydome for a further one year period (subject to a right to renew for a further one year period) on the same terms as those contained in the present lease which expires at the end of this year. There is also an agreement *in principal only* between Skydome and the Baseball Club with respect to a long-term 10 year arrangement; but this arrangement has not yet been finalized and, indeed, its negotiation and acceptance is proposed to be made the subject of the Plan of Arrangement which the Applicants are hoping to be able to put forward.

4 The Applicants seek the usual declaratory relief that is sought on these applications; namely, an order declaring that they are corporations to which the Act applies; and a broad stay order which, although there are quibbles with certain provisions in it, is more or less of the sort generally sought and granted when Initial Orders are made under s. 11 of the CCAA. They also ask for the appointment of PricewaterhouseCoopers Inc. as monitor. In addition, however, and as part of the package, the Applicants ask the Court to approve the Interim Lease and authorize the parties to enter into it, and they ask the Court to authorize a "Super Priority" loan of up to $3.5 million from the Blue Jays in order to finance their necessary operating expenses, and certain capital expendit-

ures which they say are essential, and as well the costs of restructuring. Finally, they seek additional authorization to withdraw the sum of $1,260,000 from a capital reserve account with Montreal Trust Company of Canada -- which reserve fund is held as part of the security arrangements regarding $58 million of outstanding indebtedness to a group of Skydome Bondholders. The withdrawal would be for the purpose of making necessary capital expenditures with respect to YK2 compliance enhancements, improvements to the Skydome sound system and renovation regarding the Skydome Hotel.

5 No one seriously submits that it is in anyone's interests for the Skydome to be shut down or, indeed, for the Blue Jays not to continue to play ball from that facility. It would be folly to suggest otherwise, at least for the moment. The Skydome is a popular facility which draws about 4 million people to its various functions throughout the year -- there have been 270 such events in 1998. It has 160 full-time employees and 1100 part-time employees who work there during the baseball season. Without going into to them in detail, there are very substantial economic and financial ripple effects for merchants, suppliers, entertainers, people working and employed in the tourist industry in Toronto, and Governments in the form of tax revenues of various sorts from the continued operation of the Skydome. It is said, for instance, that Skydome related activities generate $326 million in revenues for the economy of the GTA and $45 million in sales taxes for the Province of Ontario.

6 Thus there is a broader public dimension which must be considered and weighed in the balance on this Application as well as the interests of those most directly affected: see *Re Anvil Range Mining Corp.*, unreported decision of Ontario Court of Justice General Division August 20, 1998 [reported at(1998), 7 C.B.R. (4th) 51 (Ont. Gen. Div. [Commercial List])]. As was stated in that case:

> The Court in its supervisory capacity has a broader mandate. In a receivership such as this one which works well into the social and economic fabric of a territory, that mandate must encompass having an eye for the social consequences of the receivership too. These interests cannot override the lawful interests of secured creditors ultimately, but they can and must be weighed in the balance as the process works its way through.

7 The Anvil Range case concerned a CCAA proceeding which had been turned into a receivership, but the same principles apply in my view to a case such as this. While it may be engaging a trifle in hyperbole to raise the interests of Blue Jays fans to the level of "the social and economic fabric" of the region, they too can't be ignored altogether and the true economic ramifications of a failed Skydome are surely something that must be considered.

8 The two issues that raised the most concern were those dealing with the "Super Priority" loan and with the use of the capital reserve fund for the purposes requested. What is at stake here is protection of the Bondholders (who say their outstanding loan, with default ramifications taken into account is about $70 million) and the Province of Ontario (which has secured loans behind that of the Bondholders totalling about $24 million) with regard to a potential $3.5 million loan and the reduction of the Bondholders' security by less than $1.3 million. While these numbers are large numbers to the ordinary person they are really not very significant numbers relevant to the overall numbers involved.

9 There is ample authority in previous decisions of the Court for the granting of a Super Priority in CCAA situations -- even to shareholders who are advancing funds -- and I see no reason in principle why such a Super Priority should not be approved here. Although the Bondholders oppose the Interim Lease -- indeed it is really at the heart of their objections -- the Province does not. The two are so closely integrated in the proposal being put

forward by the Applicants that I do not see how one can be approved (the Interim Lease) and the other (the Super Priority Loan) not.

10 The Interim Lease is key to the ability of the Skydome to pursue its attempt to put forward a Plan that will be acceptable to its creditors, including the Bondholders who will have the opportunity to vote and to approve or reject that Plan. The proposed Plan, as I have indicated, will include a Long-Term Lease component. The Bondholders main complaint, it seems to me, is that they have been excluded from the negotiation process -- as they see it -- to this point, and that their consent was not sought with respect to the Interim Lease. Mr. Tay did not say what the response would have been had the consent been sought. The Bondholders are also suspicious that the object of this exercise is to solidify the position of the major shareholders of the Skydome -- Labatts and the CIBC -- who are also part owners of the Blue Jays, by putting in place an Interim Lease that will be binding for up to two years regardless of whether the CCAA proceedings succeed or not, and which will in any event put them under subtle pressures to approve a final Plan with a final lease that they might otherwise have been able to resist.

11 There is no evidence to support such a suggestion. Whether there is anything in it or not I do not know, but one of the characteristics of a CCAA restructuring is that by nature, it leaves the debtor company in possession and in charge of the show while it attempts to work out an acceptable arrangement with its creditors. If there are underlying business agenda in that process, they are not precluded; whether they ultimately succeed or fail will depend upon the dynamics of the negotiating game that will follow.

12 In weighing all of these factors, I am satisfied that the importance of stability in the situation at the Skydome for the next year or two in connection with not only the Blue Jays presence but also the ability to attract other revenue generating functions, outweighs other concerns that may arise in relation to the negotiation and execution of the Interim Lease.

13 As to the use of the funds in the capital reserve held by Montreal Trust, it makes sense in my view for them to be used for the purposes suggested by the Applicants. The Capital reserve fund withdrawal will be used for the YK2 enhancements, the improvements in the sound system, and the Hotel renovation -- all of which will preserve the overall security. A significant portion of the total funds to be advanced, including the super-priority loan -- which were deposited in the first place in order to -- will be used to pay Municipal taxes and Rent which are matters that have priority over the Bondholders in any event. Thus there is little overall prejudice in that regard. I am satisfied that the Court has the authority either under s. 8 of the CCAA or under its broad discretionary powers in such proceedings, to make such an order. This is not a situation where someone is being compelled to advance further credit. What is happening is that the creditor's security is being weakened to the extent of its reduction in value. It is not the first time in restructuring proceedings where secured creditors -- in the exercise of balancing the prejudices between the parties which is inherent in these situations -- have been asked to make such a sacrifice. Cases such as *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.) are examples of the flexibility which courts bring to situations such as this. See also *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 17 C.B.R. (3d) 1 (Ont. Gen. Div.).

14 What subsection 11(6) of the CCAA requires for purposes of an Initial Order is that the applicant satisfy the court "that circumstances exist that make such an order appropriate". I am satisfied that such circumstances exist here and that it is fair and reasonable to grant the Order requested, although the detailed terms of the Order may require further clarification which the lateness of the day precludes for the present.

15 Mr. Tay raised a substantial issue when he pointed out that the Order as presently drafted, when read in conjunction with the Term Sheet reflecting the agreement between the Skydome and the Blue Jays for the Super Priority loan, could lead to a situation where, if the CCAA proceeding fails, the Blue Jays (called in that context "the CCAA Lender") could move to put in a receiver and to realize upon their security without further court order. I would not have approved such a provision in the circumstances, but it is not necessary to make such a determination because Mr. Dube undertook to the Court on behalf of the Blue Jays that they would not seek to do so without approval of the Court.

16 Mr. Slaght argued on behalf of Macdonalds that the super priority should not extend to his client's lease regarding the food outlets. While I agree that the position of Macdonalds is somewhat different than that of other secured creditors -- because Macdonalds must continue to pay a percentage of revenue as rent, and thus pour new monies in -- I don't think that that circumstance is in itself sufficient to make distinctions from the position of other secured creditors.

17 As to other matters respecting the form of the Order, I will make the change suggested by Mr. Marantz and accepted by Mr. Baird regarding the necessity of consent of all secured creditors to any out of ordinary course disposition by the Skydome during the CCAA period. Other details I leave to counsel to agree to and to come back for a variation of the Order at a later date.

18 Accordingly, an Initial Order is granted as sought, subject to the foregoing.

Application granted.

END OF DOCUMENT

TAB 4

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **MAY 6, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Petitioners

And
ERNST & YOUNG INC.
Monitor

REASONS FOR JUDGMENT
ON ABITIBI PETITIONERS' MOTION FOR APPROVAL OF A DIP FINANCING (# 39)
AND SECOND AMENDED INITIAL ORDER

INTRODUCTION

[1] In the context of the restructuring process undertaken by AbitibiBowater Inc. under the protection of the *CCAA*[1], the Abitibi Petitioners[2] seek[3]:

---

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

2 For purposes of this Judgment, all capitalized terms, unless otherwise defined herein, have the same meaning as set out in the paragraphs of the Second Amended Initial Order found at the end of these reasons.

3 Motion for Approval of a DIP Financing in Respect of the Abitibi Petitioners.

a) An order authorizing them to enter into an ACI DIP Agreement[4] and a Guarantee Offer[5];

b) Amendments to the First Amended Initial Order to provide for the necessary orders in connection with the ACI DIP Facility; and

c) Other minor amendments to the First Amended Initial Order, most of which are either uncontested or mere clarifications.

[2] In short, the ACI DIP Facility at issue includes:

1) A Loan Agreement between the DIP Lender, the Bank of Montreal, and the borrowers, Abitibi-Consolidated Inc. (**ACI**) and Donohue Corporation (**DCorp**), providing a $100,000,000 USD super-priority senior secured debtor-in-possession credit facility; and

2) A Loan Guarantee by Investissement Québec (**IQ**) authorized by the Government of Québec.

[3] While barely a few days ago, a large number of issues raised by numerous contesting parties against the ACI DIP Facility were still outstanding, thanks to the efforts of counsels, and with the help and guidance of the Monitor, just one difficulty remains and requires resolution by Judgment of this Court. These efforts include those of today by IQ's counsel.

[4] The difficulty still pending concerns the ACI Term Lenders. They oppose the ACI DIP Facility sought[6]. They feel it is premature, unnecessary, and falling short of the applicable criteria for it to be granted.

[5] Subsidiarily, they contend that the wording of the Subrogation ACI DIP Charge[7], negotiated amongst counsels and approved by all the other interested parties, is insufficient to adequately protect their interest.

[6] Finally, the Term Lenders insist upon the inclusion of an Adequate Protection Charge to compensate them for the inevitable deterioration of their position as a result of their security being used and continuing to be used by the Abitibi Petitioners during the restructuring process.

[7] It is worth noting that the contestations initially filed by the Senior Secured Note holders[8] and by some construction liens holders[9] have been in essence withdrawn at this stage, pursuant to the negotiation process undertaken since last Thursday.

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4 Exhibit R-1.
5 Exhibit R-2.
6 Contestation of Respondents dated May 4, 2009 (proceeding number 74 of the Court Record).
7 Paragraph 61.10 of the Second Amended Initial Order sought here.
8 Contestation of April 30, 2009 (proceeding number 47 of the Court Record).
9 Motion to Vary of April 29, 2009 (proceeding number 32 of the Court Record).

THE QUESTIONS AT ISSUE

[8] The questions that the Court needs to resolve are accordingly the following ones:

1) Should the ACI DIP Facility of $100,000,000 USD be granted?
2) Do paragraphs 61.10 and 61.11 of the Second Amended Initial Order sought here constitute a reasonable compromise under the circumstances in view of the priming nature of the ACI DIP Facility?
3) Are there any other paragraphs of the Second Amended Initial Order sought that require modifications?

[9] Before turning to these three (3) questions, a brief overview of the significant terms of the ACI DIP Facility is appropriate. As well, a short summary of the Monitor's reports[10] dealing with the ACI DIP Facility is also necessary. Mr. Morrison from Ernst & Young, the Monitor appointed by the Court, was the only witness heard on this application.

THE ACI DIP FACILITY

[10] The main characteristics of the ACI DIP Facility are detailed at pages 6 to 12 of the Third Report of the Monitor. They can be summarized as follows:

1) The ACI DIP Facility consists of a $100,000,000 USD commitment, subject to a minimum availability of $12,500,000 USD to be maintained at all times. The proceeds are to be used for working capital and other general corporate purposes. The term is April 30, 2010, but it must be repaid by the earliest of November 1st, 2009 or the filing of a plan either in Canada or in the US.

2) The proposed fee structure, which encompasses both the returns to the DIP Lender and, for a portion of the Upfront fees, to IQ, includes:

   - Upfront fees of $4,400,000 USD;
   - An interest rate of LIBOR plus 1.75%, subject to a 3% LIBOR floor. A U.S. base rate option is also available. Interest accrues daily and is to be paid monthly in arrears;
   - An undrawn fee of 0.525% per year.

3) The borrowers assume all legal and out-of-pocket expenses of the DIP Lender and IQ in connection with the ACI DIP Facility.

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[10] They include the Third Report of the Monitor dated April 27, 2009 and the Second Supplemental Report of the Monitor dated May 4, 2009.

4) The ACI DIP Facility is not subject to the stay imposed upon all creditors by the Initial Order such that, upon the occurrence of any default, the DIP Lender is free to exercise all its recourses and realize upon all its collateral.

5) The other significant features of the ACI DIP Facility consist of provisions in regard to the following issues:

   a) A facility of up to $10,000,000 USD may be available to DCorp, provided it obtains the appropriate orders from the U.S. Bankruptcy Court;

   b) The borrowings by ACI and DCorp under the Facility are guaranteed by certain other Abitibi Petitioners and secured by a first-priority charge granted on a post-petition super-priority basis on all present and after acquired property, including the proceeds from the sale of property of both the ACI Group or the DCorp Group;

   c) The ACI DIP Charge is subordinated only to the ACI Administration Charge, the Abitibi D&O First Tranche, and the interest of the Securitization Agent in the accounts receivable sold under the Securitization Program;

   d) Because the maximum amount of $100,000,000 USD provided for in the IQ Loan Guarantee is in respect of principal and interest, a minimum availability of $12,500,000 USD is required to be maintained at all times under the Facility;

   e) The borrowers can make voluntary prepayments of the Facility at any time, and must make certain mandatory prepayments with the net cash proceeds of asset sales, insurance claims and expropriation claims;

   f) The borrowings must be repaid in full at the earliest of the acceleration of the Facility or occurrence of a specified event of default, the effective date of a *CCAA* or Chapter 11 plan, or the unenforceability of the IQ Loan Guarantee;

   g) The borrowers have ongoing reporting obligations to both the DIP Lender and IQ twice on a weekly basis, first, for rolling cash flow forecasts detailing cash receipts and cash disbursements, and second, for combined weekly cash flow results.

THE MONITOR'S REPORTS

[11] In his third report and second supplemental report, the Monitor discusses the ACI DIP Facility. In a nutshell, the Monitor is of the view that:

a) ACI needs to raise DIP financing to ensure stability of its operations and availability of sufficient cash reserves to fund its operations disbursements and payroll costs; and

b) The financial terms and conditions of the $100,000,000 USD funding are competitive and reasonable, given the current capital market conditions.

[12] In his reports, the Monitor adds that, pursuant to lengthy negotiations and discussions, and following concessions made by many, most of the concerns or objections voiced by various stakeholders have been either alleviated or resolved through acceptable compromises.

ANALYSIS AND DISCUSSION

1) Should the DIP be granted?

[13] In the Court's opinion, the answer to the first question is yes.

[14] No one disputes that the Court, in the context of a *CCAA* process, has the jurisdiction and authority to grant a DIP financing super-priority, provided the requirements for such are met.

[15] It is indeed known and accepted that the *CCAA*'s effectiveness depends on a broad and flexible exercise of the Court's jurisdiction, so as to facilitate a restructuring and continue the debtors as a going concern in the meantime[11]. Bearing this in mind, DIP financing super-priorities are regularly granted by Canadian courts in *CCAA* proceedings.

[16] That notwithstanding, any protection afforded by the *CCAA* and its DIP financing super-priority necessarily have a prejudicial effect on the debtors' creditors. Thus, before allowing a DIP financing or priming charge, the Court must notably satisfy itself that the benefits to all creditors, shareholders and employees outweigh the potential prejudice to some creditors.

[17] Over the years, Courts in this country, including this one[12], have listed various factors one should consider before granting a DIP financing. These factors are not cast in stone. They are indeed normally presented as non-exhaustive guidelines. As anything within the realm of the *CCAA*, they evolve with time. They should be approached with flexibility.

[18] Just a few years back, some courts were still wondering whether or not they had the authority to grant such priorities. Today, it appears to be well settled that such authority exists. In the near future, these priorities will be part of the new legislative

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11 *Stelco Inc. (Bankruptcy), Re*, (2005), 9 C.B.R. (5th) 135, 2005 CanLII 8671 (ON C.A.).

12 See *Mecachrome International inc. (Arrangement relatif à)*, S.C. Montreal, n° 500-11-035041-082, 2009-01-13, Gascon J., at paragr. 31-33; *MEI Computer Technology Group Inc. (Arrangement relatif à)*, [2005] R.J.Q. 1558 (S.C.), at paragr. 25.

provisions adopted by Parliament for inclusion in the *CCAA*. This shows that nothing is definite or absolute in terms of DIP financing in a *CCAA* restructuring process.

[19] With the necessary adaptations, the Court considers that the applicable factors or guidelines are met by ACI under the circumstances.

[20] First, the ACI DIP Facility enjoys huge support from most stakeholders, as well as favourable endorsement from the Monitor.

[21] Second, the evidence given by the Monitor, which the Court accepts, is sufficient to establish that the need for the DIP financing is essential for the ongoing operations and successful restructuring of ACI.

[22] The Monitor explains that the ACI DIP Facility will stabilize the business and bring most-needed comfort to key suppliers and customers.

[23] Based on his experience, he considers that ACI's levels of cash flow and liquidity are not high enough. His assessment is not based upon speculation or mere apprehension. He relies upon the market cycles, movements, variances and volatility within the industry at stake. He takes into consideration the average weekly fixed cash disbursements for payroll and key vendors. He finally considers as well his own experience in terms of large restructurings and the level of liquidity normally maintained by peer companies in the same industry.

[24] From that standpoint, the Court accepts Mr. Morrison's comment that a business such as this one cannot take the risk of a lack of liquidity that could entail the missing of a payroll payment or the turning away of key suppliers' deliveries.

[25] Third, along the same lines, the circumstances do support the urgent need for such financing. Urgency is a relative factor. It is not an absolute and static concept. Notably in view of its size and complexity, the situation of ACI is peculiar. One cannot expect an organization such as this one to wait to the last minute and call the firemen once the fire has started. Reasonable caution is required. When such prudence is reasoned, articulated and explained as it is here, it is sufficient to justify the immediate need alleged.

[26] The Court cannot ignore that it took no less than three weeks of intensive work, negotiations and discussions to reach this hearing on the present ACI DIP Facility, and yet, there are still some unresolved issues that the Court must rule upon. ACI does not have the luxury of waiting to the last minute, and the Court agrees with that assessment.

[27] Fourth, there is no doubt that considering the support of many at this stage, there is a reasonable prospect of a successful restructuring. Indeed, at this point, the Term Lenders stand alone as opposing parties to the request sought.

[28] As well, the term of the facility is relatively short, and the amounts somewhat reasonable when compared to other large restructurings such as Quebecor World or Air Canada.

[29] Moreover, here, the first tranche available under the facility is limited $30,000,000 USD. In view of paragraph 61.11 of the order sought, a party such as the Term Lenders will be able to apply to the Court to oppose future borrowing requests should they consider such to be inappropriate. If need be, they could thus seek interim order to prevent future advances before they are disbursed.

[30] Fifth, it is the Court's view that the benefits of the ACI DIP Facility and super-priority for all stakeholders outweigh the potential prejudice to the Term Lenders. The facility stabilizes the continued operations of the debtors. This adds value to the whole business. Thus, it potentially adds value as well to the collateral of the Term Lenders essentially composed of the short-term assets.

[31] Of course, the priming nature of the DIP facility causes some prejudice to the Term Lenders. No perfect solution exists in such situations. It is a question of balance. Here, the balance definitely tilts towards the benefits that the facility brings.

[32] Furthermore, from a practical standpoint, the Court notes that the compromise offered in terms of subrogation rights and opportunity to contest future borrowing requests alleviates, albeit only in part, the prejudice suffered by the Term Lenders.

[33] In addition, the Court cannot ignore either the assessment of the Term Lenders' collateral value. Even in the context of a liquidation scenario, such as the one detailed at page 14 of the Monitor's third report, it still leaves a positive margin of some $60,000,000 USD over and above what is owed to the Term Lenders. This is enough to at least cover, if worst comes to worst, the initial draw of $30,000,000 USD.

[34] If one looks at the assessment of this collateral value outside of the liquidation scenario, the margin is even bigger. All this, in a context where the ACI DIP Facility of $100,000,000 USD is said to be a bridge to the receipt of proceeds from the contemplated sales of the MPCo and ACH hydro assets expected by November 1st, 2009. ACI intends to repay the ACI DIP Facility from the proceeds of these sales or other sales of non-core assets under consideration.

[35] This is not perfect, obviously. But, this is not enough either to say that the Term Lenders prejudice outweighs the benefits that stability brings to the ongoing operations of the business.

[36] Finally, the reality is such that, in the current credit market, no DIP financing is available to ACI without such priming nature. No one brings forward a better solution.

[37] DIP financings of a priming nature are neither unusual, nor unheard of. Canadian courts have ruled before that where a debtor seeks to obtain DIP financing, the

authorization of the pre-existing secured creditors is not necessary. Their consent is certainly preferable, but if a super-priority could not be granted without the consent of secured creditors, the protection of the *CCAA* would effectively be denied[13].

[38] In essence, the Term Lenders suggest to wait and see. With respect, the Court prefers the Monitor's view and to cautiously move forward. The potential cost of the gamble is not worth the risk. That is even more true when one considers the obvious broader public dimension in a case such as this one.

[39] All in all, the Court is satisfied that it is just and equitable to approve the DIP facility at this stage.

2) What about paragraphs 61.10 and 61.11? Is this enough?

[40] Turning to the compromise offered by ACI and acceptable to all save for the Term Lenders, the Court considers that paragraphs 61.10 and 61.11 are adequate as they stand.

[41] The Term Lenders do not quarrel with paragraph 61.11. However, they would like to see a more detailed order in terms of the steps to follow in the event of the subrogation clause (paragraph 61.10) coming into play.

[42] With respect, the Court agrees with counsels for the other interested parties that it is better to leave this issue open and subject to future determination by subsequent application to the Court. Trying to predict at this stage the best formula for the most equitable outcome may not lead to the best results.

[43] As for the Adequate Protection Charge in the event of the diminishing of value of the Term Lenders' collateral because of the ongoing operations of ACI, the Court finds the request unfounded, and in fact questionable.

[44] On the one hand, it appears that the value of the Term Lenders' collateral is better served by the ongoing operations than by an immediate liquidation of ACI. On the other hand, the U.S. concept of Adequate Protection Charge is seldom, if ever, applied in Canadian courts. It has been issued here in the context of the Bowater Petitioners for a single reason. That is, to mirror the U.S. order approving such a charge in the context of the Chapter 11 proceedings. This hardly stands as valid precedent for the Term Lenders' request in the context of ACI.

3) What else?

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[13] See in this respect *Hunters Trailer & Marine Ltd. (Re)*, 2001 ABQB 546 (CanLII), at paragr. 32 (Wachowich J.); *Parc Industriel Laprade inc.* c. *Conporec inc.*, [2008] R.J.Q. 2590 (C.A.), at paragr. 16 (Thibault J.A.), confirming *Conporec Inc. (Arrangement relatif à)*, 2008 QCCS 4813, at paragr. 50 to 54 (Parent J.); *United Used Auto & Truck Parts Ltd. (Re)*, (2000), 73 B.C.L.R. (3rd) 236, at paragr. 29 (B.C. C.A.); *Temple City Housing Inc. (Companies' Creditors Arrangement Act)*, 2007 ABQB 786 (CanLII), at paragr. 14 (Romaine J.).

[45] Only a few remarks remain with respect to some of the modifications sought.

[46] First, the Court is satisfied with the explanations of IQ's counsel with respect to Clause 6.13 of Annex A to Exhibit R-2. The intent there is not to overrule the corporate decisions of ACI, nor to interfere with the conduct of its business. Neither is this clause included to second-guess the Court's approval of the steps taken by ACI in the context of its restructuring.

[47] Second, the Court is satisfied with the wording of paragraph 61.11 as it stands. The Court understands the concerns of IQ in this respect. However, the reading of the paragraph indicates that it is for those who want to contest a borrowing request to react. It is for them to move before a disbursement is made. Without a Court interim order staying a disbursement, the terms of the ACI DIP Facility simply apply.

[48] Third, in terms of the amount of the charge for the $100,000,000 USD ACI DIP Facility, the Court is not satisfied with the explanations provided to support the level of $200,000,000 CAN that is sought. The Monitor does not understand the figure. The explanations offered by ACI's counsel are vague and speculative at best, with no supporting evidence.

[49] As this Court stated before in the *Mecachrome*[14] matter, and as Justice Morawetz reiterated in the *InterTAN* case[15], the burden of presenting sufficient support for the protection sought rests upon the Petitioners. There is no convincing evidence of any sort to justify a charge to the extent of $200,000,000 CAN for a facility not exceeding $100,000,000 USD.

[50] Under the ACI DIP Facility, interest is to be paid monthly in arrears, while the maximum available amount is in reality $87,500,000 USD. Even factoring in a reasonable cushion for accrued interest and for the exchange rate between the U.S. and Canadian dollars in the event a realization becomes necessary, a figure of more than $140,000,000 CAN is hardly justifiable.

[51] Even there, a 40% cushion over and above the maximum amount of the facility is close to twice the level of the similar cushion sought by Fairfax for the BI DIP facility (a $600,000,000 USD facility versus a $728,760,000 CAN charge).

[52] The charge at paragraph 61.3 will therefore be limited to an amount of $140,000,000 CAN.

[53] Finally, for the modification sought by Fairfax at paragraph 56.1, small corrections are needed. In the opinion of the Court, the requirements should refer to a certified copy

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[14] *Mecachrome International inc. (Arrangement relatif à), S.C. Montreal, nº 500-11-035041-082, 2009-01-13, Gascon J.*, at paragr. 37 to 51.

[15] *InterTAN Canada Ltd. (Re)*, 2008 CarswellOnt 8040, Initial Order rendered on November 26, 2008, No. CV-0800007841-00 CL (Ont. S.C.), at paragr. 57ff (Morawetz J.).

of this order instead of mere copies. Also, what will be provided to the Registrars should include the required applications that the law demands.

4) Summary

[54] It is appropriate to summarize.

[55] The Court agrees to issue the Second Amended Initial Order with the modifications sought at paragraphs 30, 52, 53, 54, 56, 61.1 and 61.2, 61.4 to 61.8, 61.10, 61.11, 89, 92.1, 92.2 and 95, as they stand.

[56] The order includes some corrections to the wording of paragraph 56.1. The order also refers to an amount of $140,000,000 CAN instead of $200,000,000 CAN at paragraph 61.3.

[57] Lastly, the references to the Court Appointed Officer are deleted from paragraphs 61.9 and 76, and as agreed, paragraphs 77.1 to 77.5 are not included.

FOR THE REASONS GIVEN ORALLY AND REGISTERED, THE COURT:

[1] **GRANTS** the Petition.

[2] **ISSUES** an order pursuant to Sections 4, 5, 11 and 18.6 of the CCAA (the "**Order**"), divided under the following headings:

a) Service

b) Application of the CCAA

c) Effective Time

d) Plan of Arrangement

e) Recognition of U.S. Proceedings

f) Procedural Consolidation

g) Stay of Proceedings against the Petitioners, the Partnerships, the Property, the Directors or others

h) Possession of Property and Carrying on Business

i) Securitization Program

j) Restructuring

k) Directors Indemnification and Charge

TAB 5

Action No. 0501-17864

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

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

AND IN THE MATTER OF

CALPINE CANADA ENERGY LIMITED, CALPINE CANADA POWER LTD., CALPINE CANADA ENERGY FINANCE ULC, CALPINE ENERGY SERVICES CANADA LTD., CALPINE CANADA RESOURCES COMPANY, CALPINE CANADA POWER SERVICES LTD., CALPINE CANADA ENERGY FINANCE II ULC, CALPINE NATURAL GAS SERVICES LIMITED, AND 3094479 NOVA SCOTIA COMPANY

APPLICANTS

BEFORE THE HONOURABLE	)	AT THE COURTHOUSE, IN THE CITY
MADAM JUSTICE B.E.C. ROMAINE	)	OF CALGARY, IN THE PROVINCE OF
IN CHAMBERS	)	ALBERTA, ON TUESDAY, THE 20TH
	)	DAY OF DECEMBER, 2005

I hereby certify this to be a true copy of the original Order
Dated this 23 day of Jan 2006
for Clerk of the Court

RESTATED INITIAL ORDER
AMENDED JANUARY 16, 2006

UPON the ex-parte application of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company, (the "Applicants"); AND UPON having read (i) the Petition, (ii) the Affidavit of Toby Austin sworn December 20, 2005, filed, and the exhibits thereto, including the projected cash flow statement and the financial statements for the past year of the Applicants (the "Austin Affidavit"), and (iii) the consent of Ernst & Young Inc. (the "Monitor") to act as monitor as contemplated hereunder, all filed; on hearing the submissions of counsel for the Applicants and CCAA Parties, the Monitor, on being advised that none of the other persons who might be

interested in these proceedings was served with notice of this Application; and on being satisfied that circumstances exist that make this Order appropriate:

Service

1. THIS COURT ORDERS that the time for service of the Petition herein and this Application be and it is hereby abridged and that this Application is properly returnable today and further that service thereof upon any interested party other than the persons served with the Petition and the Austin Affidavit is hereby dispensed with.

Application of the CCAA

2. THIS COURT ORDERS AND DECLARES that the Applicants are "affiliated debtor companies" within the meaning of the CCAA and the CCAA applies to each of the Applicants.

Plan of Arrangement

3. THIS COURT ORDERS that the Applicants shall have exclusive authority to prepare and file, and are hereby authorized and permitted to file, with this Court and submit to creditors one or more plans of compromise or arrangement under the CCAA (collectively, the "Plan") between, among others, the Applicants or any of them and one or more classes of their respective creditors as the Applicants may deem appropriate on or before the Stay Date (as subsequently defined) or such other time or times as may be allowed by this Court.

Stay of Proceedings

4. THIS COURT ORDERS that, until and including January 19, 2006, or such later date as the Court may order (the "Stay Date", and the period from the date hereof to the Stay Date being referred to as the "Stay Period"), no suit, complaint, action, grievance, arbitration, application, proceeding, enforcement process, right or remedy (judicial or extra-judicial, statutory or non-statutory) shall be commenced, proceeded with or continued (collectively, the "Proceedings") by any person, firm, corporation, government, administrative or regulatory body or other entity or organization (including, without limitation, any former, existing or future or related shareholders, creditors (whether related, affiliated or otherwise), customers, suppliers, employees, pensioners,

unions, regulators, contracting parties, lessors, licensors, co-venturers or partners of any of the Applicants) (collectively, "Persons" and individually a "Person") against or in respect of any of:

(a) the Applicants;

(b) Calpine Energy Services Canada Partnership, (an Alberta partnership comprised of Canada Energy Services Canada Ltd. and Calpine Canada Resources Company, each an Applicant hereunder ("CESC Partnership"));

(c) Calpine Canada Natural Gas Partnership (an Alberta partnership comprised of Calpine Canada Resources Company and Calpine Canada Power Ltd., each an Applicant hereunder ("CCNG Partnership"));

(d) Calpine Canadian Saltend Limited Partnership (with its general partner the Applicant 3094479 Nova Scotia Company acting on behalf of this partnership, "Saltend" and collectively with CESC Partnership and CCNG Partnership, the "CCAA Parties"); or

(e) any of the present or future property, assets, rights, undertaking, estate and effects of any nature beneficially owned by any of the Applicants or CCAA Parties wheresoever located, and whether held directly or indirectly (collectively, the "Property"),

and all Proceedings already commenced against or in respect of the Applicants or CCAA Parties or any of the Property are hereby stayed and suspended and the continuation thereof is restrained unless the prior written consent of the applicable Applicant or CCAA Party, as the case may be, and the Monitor is obtained or leave of this Court is granted.

5. THIS COURT ORDERS that, during the Stay Period, the right of any Person:

(a) to commence or continue realization steps or proceedings in respect of any security interest, encumbrance, lien, charge, mortgage or other security held in relation to, or any trust attaching to, any of the Property (including, without limitation, the right of any Person to take any step in asserting or perfecting any right or interest therein or to exercise any right of registration of securities,

distress, seizure, repossession, revendication, stoppage in transit, foreclosure or sale); and

(b) to assert, enforce or exercise any right, option or remedy available to it arising by law, under any agreement or otherwise (including, without limitation, any right under section 224(1.2) of the Income Tax Act (Canada) or substantially similar provision under provincial law (subject to section 11.4 of the CCAA); any right of dilution, buy-out, divestiture, forced sale, demand, acceleration, termination, suspension, modification, cancellation, set-off or consolidation of accounts; any right of first refusal; any right to give notice of assignment of a claim; or any right to revoke any qualification or registration), against or in respect of any of the Applicants or CCAA Parties or any of the Property or arising out of, relating to or triggered by the occurrence of any default or non-performance by or the insolvency of any of the Applicants or CCAA Parties, the making or filing of these proceedings or any allegation, admission or evidence in these proceedings,

is hereby stayed and restrained unless the prior written consent of the applicable Applicant or CCAA Party, as the case may be, and the Monitor is obtained or leave of this Court is granted.

6. THIS COURT ORDERS that, without limiting the generality of paragraphs 4 and 5 but subject to the provisions of paragraph 9 hereof, cash or cash equivalents placed on deposit by an Applicant or a CCAA Party with any Person during the Stay Period, whether in an operating account or otherwise and whether for its own account or for the account of any other entity, shall not be applied by such Person in reduction or repayment of amounts owing to such Person as of the date of this Order or which may become due on or before the expiry of the Stay Period or in satisfaction of any interest or charges accruing in respect thereof, provided that nothing in this paragraph 6 shall prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by an Applicant or CCAA Party and properly honoured by the financial institution, or (ii) holding the amount of any cheques or other instruments deposited into an Applicant's or CCAA Party's account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

7. THIS COURT ORDERS that, subject to the provisions of paragraph 9 hereof, during the Stay Period, all Persons having agreements or other arrangements with any of the Applicants or CCAA Parties or in connection with any of the Property, whether written or oral (including, without limitation, contracts for the supply of goods or services to or by any of the Applicants or CCAA Parties, insurance policies, partnership agreements, joint venture agreements, tolling agreements, operating agreements, outsourcing agreements, commercial leases, equipment leases and licences):

(a) are hereby restrained from accelerating, terminating, cancelling, suspending, withdrawing, failing to renew or extend on reasonable terms, modifying or otherwise interfering with such agreements or other arrangements or the rights of such Applicant or such CCAA Party or any other Person thereunder or exercising any other remedy provided for under such agreements or arrangements, including without limitation any licences, permits, approvals or consents in respect of such Applicant or such CCAA Party or in connection with such Property, and without limitation to the foregoing, the operation of any provision of any such agreement or other arrangement that purports to accelerate, terminate, cancel, suspend or modify such agreement or arrangement as a result of the occurrence of any default or non-performance by or the insolvency of any of the Applicants or CCAA Parties, the making or filing of these proceedings or any allegation, admission or evidence in these proceedings is hereby stayed and restrained;

(b) are hereby restrained from modifying, discontinuing or otherwise interfering with the supply of any good, service, or other benefit by or to such Person thereunder (including, without limitation, any modification of, discontinuance of or interference with any telephone numbers, any directors' and officers' insurance, any form of telecommunications service or any oil, gas, electricity or other utility supply); and

(c) shall continue to perform and observe the terms and conditions contained in such agreements or other arrangements (including, without limitation, the payment of all sums to be paid in respect of services performed or to be performed by an Applicant or a CCAA Party),

so long as such Applicant or such CCAA Party pays the normal prices or charges for such goods and services received after the date of this Order as such prices or charges become due in accordance with present payment practices or as may be hereafter negotiated (other than deposits, stand-by fees or similar items which such Applicant or such CCAA Party shall not be required to pay), unless the prior written consent of the applicable Applicant or CCAA Party, as the case may be, and the Monitor is obtained or the leave of this Court is granted.

8. THIS COURT ORDERS that, during the Stay Period, no landlord of any of the Applicants or CCAA Parties shall:

(a) exercise any right to terminate or accelerate rent due under a lease with such Applicant or such CCAA Party;

(b) interfere with the quiet possession of real property by such Applicant or such CCAA Party;

(c) exercise any right of distraint, or take possession of any premises leased to such Applicant or such CCAA Party unless those premises have been abandoned by such Applicant or such CCAA Party;

(d) interfere with the removal of inventory, chattels and equipment from premises leased by such Applicant or such CCAA Party; or

(e) hinder in any way the orderly liquidation of any Property from premises leased by such Applicant or such CCAA Party,

all subject to paragraph 9 hereof and the obligation, if any, of such Applicant or such CCAA Party to pay occupation rent for the period commencing with the date of this Order and while such Applicant or such CCAA Party enjoys actual occupation of leased premises, at the presently payable rental rate calculated on a *per diem* basis, or otherwise as may be negotiated by such Applicant or such CCAA Party from time to time.

9. THIS COURT ORDERS that notwithstanding paragraphs 4 to 8 hereof:

(a) in the case of agreements for the supply of goods, services, the use of leased or licensed property or other valuable consideration to an Applicant or CCAA Party, no Person is prohibited, solely by the terms of this Order, from requiring immediate payment for any goods, services, use of leased or licensed property or other valuable consideration to be provided to such Applicant or such CCAA Party after the date of this Order;

(b) no Person is required, solely by the terms of this Order, to make further advances of money or credit to an Applicant or a CCAA Party;

(c) no Person is prohibited, solely by the terms of this Order, from commencing or continuing any action, suit or proceeding against any person other than an Applicant or a CCAA Party who is obligated under a letter of credit or guarantee in relation to an Applicant or a CCAA Party;

(d) no Person is prohibited, solely by the terms of this Order, from exercising any right to terminate, amend or claim any accelerated payment under an "eligible financial contract" (as that term is defined in section 11.1 of the CCAA) and, for greater certainty, when an eligible financial contract entered into before the date of this Order is terminated on or after the date of this Order, the setting off of obligations between an Applicant or a CCAA Party, as the case may be, and the Person (as parties thereto) in accordance with the provisions of the eligible financial contract and the CCAA is permitted but paragraphs 4 to 8 of this Order will apply to restrain any step or proceeding against such Applicant or such CCAA Party or any of the Property in respect of a claim for any "net termination value" (as defined in section 11.1 of the CCAA) owing to the Person); and

(e) no Person is prohibited, solely by the terms of this Order, from exercising such rights of set-off as are permitted under section 18.1 of the CCAA.

10. THIS COURT ORDERS that to the extent any rights or obligations, or time or limitation periods (including, without limitation, the time to file grievances), relating to an Applicant or a

CCAA Party or any of the Property may expire or terminate with the passage of time (other than the term of any lease of real property), the term of such rights or obligations or time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period and, without limitation to the foregoing, in the event that an Applicant or a CCAA Party becomes bankrupt or a receiver within the meaning of section 243(2) of the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") is appointed in respect of an Applicant or a CCAA Party, the period between the date of this Order and the day on which the Stay Period in respect of such Applicant or such CCAA Party ends shall not be calculated in determining the 30-day periods referred to in sections 81.1 and 81.2 of the BIA.

11. THIS COURT ORDERS that no Person may commence or continue any action, suit or other proceeding against any former, present or future director or officer of an Applicant or a CCAA Party or any other person by applicable legislation that is deemed to be or is treated similar to a director of an Applicant or a CCAA Party or that presently or in the future manages the business and affairs of an Applicant or a CCAA Party (each, a "Director", and collectively the "Directors") in respect of any claim against such Director that arose before the commencement of these proceedings and that relates to obligations of such Applicant or such CCAA Party where such Director is or is alleged to be, under any law, liable in his or her capacity as such for the payment of such obligations until further order of this Court or until the Plan, if one is filed, is sanctioned by the Court or is refused by the creditors or the Court.

12. THIS COURT ORDERS that no Person shall commence or continue any proceeding against any of the directors, officers, employees, legal counsel or financial advisers of the Applicants, the CCAA Parties or the Monitor, for or in respect of the Restructuring (as defined herein) or the creation and implementation of the Plan without first obtaining leave of this Court, upon seven days' written notice to the Applicants' counsel of record and to all those referred to in this paragraph whom it is proposed be named in such proceedings.

13. THIS COURT ORDERS that from 4:01 o'clock p.m. (Calgary time) on the date of this Order (the "Effective Time") to the time of the granting of this Order, any act or action taken or notice given by any Person in furtherance of its rights to commence or continue realization or take or enforce any other step or remedy in respect of any of the Applicants, the CCAA Parties, the Directors (to the extent such act, action taken or notice given would otherwise be stayed by

paragraphs 4 through 8 if it occurred after the making of this Order) or the Property, will be deemed not to have been taken or given as the case may be.

Possession of Property and Carrying on Business

14. THIS COURT ORDERS that, subject to the terms of this Order, the Applicants and the CCAA Parties shall remain in possession of the Property until further order in these proceedings.

15. THIS COURT ORDERS that the Applicants and the CCAA Parties shall continue to carry on business, including the business of any person, firm, joint venture or corporation owned by an Applicant or a CCAA Party, in a manner consistent with the commercially reasonable preservation of the Property and their collective businesses, except as otherwise specifically authorized or directed by this Order or any further order in these proceedings.

16. THIS COURT ORDERS that, without limitation to paragraph 15 hereof, the Applicants and the CCAA Parties are authorized to continue to retain or employ any employees, agents, servants, solicitors, advisers and consultants who are retained or employed as of the date of this Order, with liberty to retain or employ such further employees, agents, servants, solicitors, auditors, advisers and consultants as the Applicants and the CCAA Parties, as applicable, deem necessary or desirable to carry on their respective businesses, to carry out the terms of this Order or for the purposes of the Plan.

17. THIS COURT ORDERS that the Applicants and the CCAA Parties, as applicable, shall remit, in accordance with legal requirements, or pay when due:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province or Territory thereof or any foreign jurisdiction which are required to be deducted from employees' wages including, without limitation, amounts in respect of employment insurance, Canada Pension Plan and income taxes;

(b) amounts accruing and payable by an Applicant or a CCAA Party in respect of employment insurance, Canada Pension Plan, workers compensation, employer health taxes and similar obligations of any jurisdiction with respect to employees; and

(c) all goods and services taxes and all provincial or other applicable sales taxes payable or collectable by an Applicant or a CCAA Party in connection with the sale of goods and services by such Applicant or such CCAA Party.

18. THIS COURT ORDERS that, from and after the date of this Order, each of the Applicants and the CCAA Parties, as applicable, shall be entitled to pay all reasonable costs and expenses incurred by it in carrying on its business prior to and after the date of this Order and in carrying out the provisions of this Order, in each case when due and payable, which costs and expenses may include, without limitation:

(a) the cost of goods and services actually supplied to any of the Applicants or the CCAA Parties;

(b) all outstanding and future wages, salaries, commissions, vacation pay, bonuses, pension and other benefits, reimbursement of expenses (including, without limitation, amounts charged by employees to credit cards) and other amounts accruing due to current, former or future employees, officers or directors or individuals that provide or have provided services to an Applicant or a CCAA Party as individual contractors, and all outstanding and future severance pay, termination pay and other like amounts due to current, former or future employees if terminated in the ordinary course as the relevant Applicant or CCAA Party may in its discretion determine;

(c) all outstanding and future contributions to or payments in respect of any pension or benefit plans sponsored by any of the Applicants or the CCAA Parties;

(d) all outstanding and future fees and disbursements of the Monitor, the Monitor's and the Applicants' and the CCAA Parties' respective legal counsel;

(e) all outstanding and future fees and disbursements of any financial and other advisers retained by the Applicants or the CCAA Parties in respect of these proceedings;

(f) all outstanding and future fees and disbursements of the Applicants' or the CCAA Parties' respective directors;

(g) without limitation to paragraph 17, all outstanding and future priority claims of the federal or provincial Crown or a municipality in respect of an Applicant or a CCAA Party or any of the Property which may have priority over any security held by other Persons, including, without limitation, amounts owing in respect of provincial sales taxes, federal goods and services taxes, income tax source deductions and other analogous withholdings, Canada Pension Plan, and Quebec Pension Plan and employment insurance contributions, employer health taxes, obligations to any workers' compensation authority, obligations in respect of any provincial or federal environmental legislation, gross receipts taxes, and realty or excise or other taxes;

(h) all outstanding and future premiums on existing or future directors' and officers' liability insurance, including, without limitation, any premiums in connection with any extended reporting period;

(i) rent and other payments required pursuant to any leases of real property under existing arrangements in respect of the period after the date of this;

(j) all outstanding and future amounts due from an Applicant or a CCAA Party under any charge, debit or credit card arrangements, including, without limitation, arrangements with American Express, MasterCard or Visa;

(k) all expenses and capital expenditures incurred after the date of this Order in the ordinary course of business or necessary for environmental compliance or to preserve the Property or the business of an Applicant or a CCAA Party, including, without limitation, payments on account of service, maintenance, repairs, insurance and security;

(l) principal, interest and other payments to holders of security in respect of any of the Property if the amount secured by such security is, in the reasonable opinion of the applicable Applicant or CCAA Party, with the concurrence of the Monitor, less than or equal to the fair value of such security after having regard to, among other things, the priority of such security; and

(m) any other amounts the payment of which is provided for by the terms of this Order,

provided that, unless provided in subparagraphs (a) to (l) listed above, the Applicants and the CCAA Parties shall only be entitled (but not required) to pay costs and expenses that were incurred before the date of this Order with the approval of the Monitor or upon further order in these proceedings.

Restructuring

19. THIS COURT ORDERS that, to facilitate the orderly restructuring of their respective businesses and affairs (the "Restructuring"), the Applicants and the CCAA Parties, as applicable, shall have the right to:

(a) in the case of the Applicants, cease, downsize or shut down any of their respective operations or locations as they deem appropriate and make provision for the consequences thereof in the Plan;

(b) pursue all avenues to market and sell (subject to paragraph 19(c)), all or material parts of the Property of the Applicants or the CCAA Parties, in whole or part;

(c) sell, convey, transfer, assign, lease, or in any other manner dispose of the Property or any part or parts thereof:

(i) in the ordinary course of business without the specific approval of the Court;

(ii) out of the ordinary course of business without the specific approval of the Court but with the Monitor's approval, provided that the sale or transaction price in each case does not exceed $1 million or $5 million in the aggregate; and

(iii) otherwise, subject to prior approval of the Court;

(d) in the case of the Applicants, terminate the employment of such of their respective employees or temporarily or permanently lay off such of their respective

employees as they deem appropriate and, to the extent any amounts owing in respect thereof are not paid in the ordinary course as such Applicant may in its discretion determine (including, without limitation, amounts on account of notice, termination or severance pay), to make provision for any consequences thereof in the Plan;

(e) subject to paragraphs 21 and 22, vacate or abandon any leased real property and/or repudiate any lease and ancillary agreements related to any leased premises as they deem appropriate, provided that the applicable Applicant or CCAA Party gives the relevant landlord at least seven (7) days' prior written notice, on such terms as may be agreed between the Applicant or the CCAA Party, as the case may be, and such landlord, or failing such agreement, in the case of any of the Applicants, to make provision for any consequences thereof in the Plan;

(f) repudiate such of their respective arrangements or agreements of any nature whatsoever, whether oral or written, as they deem appropriate on such terms as may be agreed between the applicable Applicant or CCAA Party, as the case may be, and the relevant counter-party, or failing such agreement, in the case of any of the Applicants, to make provision for the consequences thereof in the Plan and to negotiate any new or replacement agreements or arrangements; and

(g) settle claims of customers and suppliers that are in dispute, with the approval of the Monitor.

20. THIS COURT ORDERS that any sale of Property made pursuant to paragraph 19(c) of this Order shall be deemed not to be a sale in bulk and shall be exempt from the application of, and deemed not to be in contravention of any laws of any Province of Canada prohibiting, restricting or regulating the sale of such Property.

21. THIS COURT ORDERS that, if leased premises are vacated or abandoned by an Applicant or a CCAA Party pursuant to paragraph 19(e), the relevant landlord shall be entitled to take possession of any such leased premises without waiver of, or prejudice to, any claims or rights of such landlord against such Applicant or such CCAA Party in respect of the vacating or abandoning of such leased premises, and such landlord shall be entitled to notify such Applicant

or such CCAA Party of the basis on which it is taking possession and gain possession of and release any such leased premises to third parties on such terms as any such landlord may determine, subject to such landlord's obligation, if any, to mitigate any damages claimed in connection therewith.

22. THIS COURT ORDERS THAT an Applicant or a CCAA Party shall provide to any relevant landlord notice of such Applicant's or such CCAA Party's intention to remove any fixtures or leasehold improvements at least seven (7) days prior to the date of intended removal from any leased premises vacated or abandoned by such Applicant or such CCAA Party. The relevant landlord shall be entitled to have a representative present at the leased premises to observe such removal and, if the landlord disputes such Applicant's or such CCAA Party's entitlement to remove any item under the provisions of the lease, such items shall remain on the premises and shall be dealt with as agreed to between any applicable secured creditors, such landlord and such Applicant or such CCAA Party, or by further order of this Court on five (5) days' notice to such parties. If such Applicant or such CCAA Party has otherwise vacated the leased premises, it shall not be considered to be in occupation of such location pending resolution of any such dispute.

23. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, the Applicants and the CCAA Parties are permitted in the course of these proceedings to disclose personal information of identifiable individuals in their possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to their advisers (individually, a "Third Party"), to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or a transaction in furtherance thereof, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the Applicants or CCAA Parties, as the case may be, binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Applicants or the CCAA Parties, as the case may be, or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation

and implementation of the Plan or a transaction in furtherance thereof, such Third Party shall be entitled to continue to use the personal information in a manner which is in all material respects identical to the prior use of such personal information by the Applicants or the CCAA Parties, as the case may be.

Financing and Banking Services

24. THIS COURT ORDERS that the Applicants and the CCAA Parties shall be entitled to continue to utilize their banking arrangements currently in place with any financial institution with whom they have or may in the future have banking arrangements, and that any present or future bank providing banking arrangements shall:

(a) not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under such banking arrangements, or as to the use or application by the Applicants or CCAA Parties of funds transferred, paid, collected or otherwise dealt with in the banking arrangements;

(b) be entitled to provide the banking arrangements without any liability, whether statutory, contractual, trust, proprietary or otherwise, in respect thereof to any person, corporation or other entity whatsoever, other than the Applicants or the CCAA Parties or their respective affiliates, pursuant to the terms of the documentation applicable to the banking arrangements; and

(c) be, in its capacity as provider of the banking arrangements, an unaffected creditor with regard to any claims or expenses it may suffer or incur in connection with the provision of the banking arrangements.

25. THIS COURT ORDERS that, without limiting the generality of paragraph 6 hereof, all banks and financial institutions at which an Applicant or a CCAA Party maintains a bank account are hereby restrained from stopping, withholding, redirecting or otherwise interfering with any amount in such account(s) or setting off (subject to paragraph 9(e) hereof) or applying such amounts against any indebtedness owing to that bank or financial institution by an Applicant or a CCAA Party, or from discontinuing, failing to renew on terms no more onerous

than those existing prior to these proceedings, altering, interfering with or terminating such banking arrangements.

26. THIS COURT ORDERS that, notwithstanding any other provision of this Order, the Applicants and the CCAA Parties be and are hereby authorized to borrow, repay and reborrow from their existing lenders, with the approval of the Monitor, such amounts from time to time as the relevant Applicant or CCAA Party may consider necessary or desirable.

Payments, Advances and Transfers to Foreign Affiliates

27. THIS COURT ORDERS that no payments, advances or transfers of funds shall be made by any of the Applicants or the CCAA Parties to Calpine Corporation or any related or affiliated corporation or entity located outside of Canada without further order of this Court.

Advances to Other Applicants and CCAA Parties

28. THIS COURT ORDERS that any Applicant or CCAA Party is authorized to borrow, repay and reborrow (such party being a "New Inter-Company Borrower") from any other Applicant or CCAA Party (such party being a "New Inter-Company Lender"), with approval of the Monitor, such amounts from time to time as it may consider necessary or desirable on a revolving basis (the "New Inter-Company Advances") pursuant to a promissory note issued in favour of the New Inter-Company Lender as evidence thereof, to fund its ongoing expenditures and to pay such other amounts as are permitted by the terms of this Order.

29. THIS COURT ORDERS that all of the property of a New Inter-Company Borrower is hereby charged by a lien, mortgage and security interest the ("New Inter-Company Advances Charge") in favour of the New Inter-Company Lender as security for the obligations of the New Inter-Company Borrower to the New Inter-Company Lender with respect to the New Inter-Company Advances made to it. The New Inter-Company Advances Charge shall have the priority established by paragraphs 40 and 41.

30. THIS COURT ORDERS that the claims of the New Inter-Company Lender pursuant to the New Inter-Company Advances shall not be compromised or arranged pursuant to the Plan or these proceedings, but unless otherwise ordered, the exercise of any remedies by the New Inter-

Company Lender in respect thereof under the New Inter-Company Advances Charge shall be subject to the stay provided for in this Order.

Directors and Officers Indemnification and Charge

31. THIS COURT ORDERS that, in addition to any existing indemnities, the Applicants and the CCAA Parties shall indemnify each of the Directors and each Person who in the future is requested by an Applicant or a CCAA Party to act as a director, and who is acting or does act or is deemed or treated by applicable legislation to be acting as a director, officer or person of a similar position (a "Responsible Person") from and against the following (collectively, "D&O Claims"):

(a) all costs (including, without limitation, full defence costs), charges, expenses, claims, liabilities and obligations of any nature whatsoever which may arise as a result of any sale of all or part of the Property, the Plan, his or her association with an Applicant or a CCAA Party as a Director or Responsible Person in each case on or after the date hereof (including, without limitation, an amount paid to settle an action or satisfy a judgment in a civil, criminal, administrative or investigative action or proceeding to which such Director or Responsible Person may be made a party by reason of being or having been a Director or Responsible Person (as the case may be), provided that such Director or Responsible Person (i) acted honestly and in good faith with a view to the best interests of such Applicant or such CCAA Party (as the case may be) and (ii) in the case of a criminal or administrative action or proceeding that is enforced by monetary penalty, such Director or Responsible Person had reasonable grounds for believing his or her conduct was lawful) except to the extent that such Director or Responsible Person has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct; and

(b) all costs (including without limitation, full defence costs), charges, expenses, claims, liabilities and obligations relating to the failure of an Applicant or a CCAA Party at any time to make payments of the nature referred to in paragraphs 17 or 18(b), (c) or (f) of this Order or to pay amounts in respect of employee or

former employee entitlements to wages, vacation pay, termination pay, severance pay, pension or other benefits or any other amount for services performed, whether incurred or accruing prior to, on or after the date of this Order and that he or she sustains or incurs by reason of or in relation to his or her association with such Applicant or such CCAA Party as a Director or Responsible Person (as the case may be), except to the extent that such Director or Responsible Person has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct,

provided that the foregoing shall not constitute a contract of insurance and shall not constitute other valid and collectible insurance as such term may be used in any existing policy of insurance issued in favour of any of the Applicants or CCAA Parties or any of the Directors or Responsible Persons.

32. THIS COURT ORDERS that as security for the obligation of the Applicants and CCAA Parties to indemnify the Directors and Responsible Persons pursuant to paragraph 30, the Directors and Responsible Persons be and they are hereby granted a fixed lien on, mortgage and hypothec of, and security interest in the property of the Applicant or the CCAA Party in respect of which their actions as a Director or Responsible Person are being called into question to an aggregate maximum of $1,000,000.00 (the "D&O Charge"), having the priority established by paragraphs 40 and 41. Such D&O Charge shall not constitute or form a trust. Such D&O Charge, notwithstanding any language in any applicable policy of insurance to the contrary, shall only apply to the extent that the Directors and Responsible Persons do not have coverage under the provisions of any applicable directors' and officers' insurance which shall not be excess insurance to the D&O Charge.

Appointment and Powers of the Monitor

33. THIS COURT ORDERS that the Monitor be and it is hereby appointed as officer of this Court to monitor the businesses and affairs of the Applicants and the CCAA Parties with the powers and duties set out herein and in the CCAA until discharged by this Court, and that the Monitor shall:

(a) send notice of the making of this Order, within 10 days after the date hereof, to every known creditor of each Applicant and each CCAA Party having a claim of more than $250 against it advising that such creditor may obtain a copy of this Order on the internet at the website of the Monitor (the "Website") and if such creditor is unable to obtain it by that means, such creditor may request a copy from the Monitor and the Monitor shall so provide it. Such notice shall be sufficient to comply with subsection 11(5) of the CCAA;

(b) assist the Applicants, to the extent required by the Applicants, in dealing with their respective creditors and other interested Persons during the Stay Period;

(c) assist the Applicants and the CCAA Parties, to the extent required by the Applicants and the CCAA Parties, with the preparation of cash flow projections and any other projections or reports and the development, negotiation and implementation of the Plan;

(d) advise and assist the Applicants and the CCAA Parties, to the extent required by the Applicants and the CCAA Parties, in reviewing the Applicants' and the CCAA Parties' businesses and assessing opportunities for cost reduction, revenue enhancement and operating efficiencies;

(e) assist the Applicants and the CCAA Parties, to the extent required by the Applicants and the CCAA Parties, with the Restructuring, in efforts to sell, convey, transfer, assign, lease or in any other manner dispose of the Property or any part or parts thereof, and in their negotiations with their respective creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

(f) report to the Court on the state of the businesses and financial affairs of the Applicants and the CCAA Parties or developments in these proceedings or any related proceedings at such times as required by the CCAA and at such other times as considered appropriate by the Monitor or as the Court may order;

(g) report to the Court and interested parties, including but not limited to affected creditors pursuant to the Plan, with respect to the Monitor's assessment of, and recommendation in respect of, the Plan;

(h) be at liberty to obtain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

(i) be at liberty to engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceedings, under this Order or under the CCAA;

(j) be at liberty to serve as a "foreign representative" of the Applicants and the CCAA Parties in any proceedings outside of Canada;

(k) be at liberty to give any consents or approvals as are contemplated by this Order; and

(l) perform such other duties as are required by this Order, the CCAA or the Court from time to time,

but shall not otherwise interfere with the business carried on by the Applicants and the CCAA Parties, and the Monitor is not empowered to take possession of the Property nor to manage any of the business or affairs of any of the Applicants and the CCAA Parties.

34. THIS COURT ORDERS that the Applicants and the CCAA Parties and their respective directors, officers, employees and agents and all other Persons having notice of this Order shall forthwith provide the Monitor with unrestricted access to all of the Property, including, without limitation, the premises, books, records, data (including data in electronic form) and all other financial documents of each of the Applicants and the CCAA Parties in connection with the Monitor's duties and responsibilities hereunder.

35. THIS COURT ORDERS that the Monitor may provide creditors and other relevant stakeholders of the Applicants and the CCAA Parties with information in response to reasonable requests made by them in writing addressed to the Monitor and copied to the Applicants' and the CCAA Parties' counsel. The Monitor shall not have any duties or liabilities in respect of such information disseminated by it pursuant to the provisions of this Order or the CCAA, other than as provided in paragraph 36. In the case of information that the Monitor has been advised by an Applicant or a CCAA Party is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person without the consent of such Applicant or such CCAA Party unless otherwise directed by this Court.

36. THIS COURT ORDERS that the Monitor shall not be, nor be deemed to be, an employer or a successor employer of the employees of any of the Applicants or the CCAA Parties or a related employer in respect of any of the Applicants or the CCAA Parties within the meaning of any federal, provincial or municipal legislation governing employment, labour relations, pay equity, employment equity, human rights, health and safety or pensions or any other statute, regulation or rule of law or equity for any similar purpose whatsoever and, further, that the Monitor shall not be, nor be deemed to be, in occupation, possession, charge, management or control of the Property or business or affairs of any of the Applicants or the CCAA Parties pursuant to any federal, provincial or municipal legislation, statute, regulation or rule of law or equity which imposes liability on the basis of such status including, without limitation, the *Environmental Protection and Enhancement Act*, RSA 2000 c. E-12, the *Occupational Health and Safety Act*, RSA 2000 c. O-2, or similar other federal or provincial legislation.

37. THIS COURT ORDERS that, in addition to the rights and protections afforded to the Monitor under the CCAA, elsewhere in this Order or as an officer of the Court, the Monitor shall not incur any liability or obligation as a result of its appointment, the fulfilment of its duties or its carrying out of the provisions of this Order (including, without limitation, with respect to any report or any information provided to claimants), save and except any liability or obligation arising from the gross negligence or wilful misconduct of the Monitor, and no action or other proceedings shall be commenced against the Monitor relating to its appointment or its conduct as Monitor or carrying out the provisions of any order of this Court, except with prior leave of this Court, on at least 7 days' notice to the Monitor and its counsel and upon further order securing,

as security for costs, the solicitor and his own client costs of the Monitor, if any, in connection with any such action or proceeding. The entities related to or affiliated with the Monitor referred to in paragraph 32(h) shall also be entitled to the protections, benefits and privileges afforded to the Monitor pursuant to this paragraph.

38. THIS COURT ORDERS that the Applicants and the CCAA Parties shall pay the fees and disbursements of each of the Monitor, the Monitor's legal counsel, the Applicants' and the CCAA Parties' legal counsel and the Applicants' and the CCAA Parties' financial and other advisers, whether incurred before or after the making of this Order, and shall provide each with a reasonable retainer on account of such fees and disbursements if so requested.

39. THIS COURT ORDERS that the Monitor, counsel to the Monitor and the Applicants' and the CCAA Parties' legal counsel, as security for the professional fees and disbursements incurred both before and after the making of this Order in respect of these proceedings, general corporate and litigation matters, the Plan and the Restructuring in accordance with the provisions hereof, shall be entitled to the benefit of and are hereby granted a lien on, mortgage and hypothec of, and security interest in the Property to an aggregate maximum of $2,000,000.00 (the "Administration Charge"), having the priority established by paragraphs 40 and 41.

Priorities and General Provisions Relating to CCAA Charges

40. THIS COURT ORDERS that the priorities of the New Inter-Company Advances Charge, the Administration Charge and the D&O Charge (collectively, the "CCAA Charges"), as between them with respect to any Property to which they apply, shall be as follows:

(a) first, the Administration Charge;

(b) second, the New Inter-Company Advances Charge; and

(c) third, the D&O Charge.

41. THIS COURT ORDERS that each of the CCAA Charges shall rank in priority to any and all other liens, charges, security interests, encumbrances or security of whatever nature or kind (the "Encumbrances") affecting any of the Property, except the following:

(a) existing purchase-money security interests registered in accordance with applicable personal property security legislation and recognized under such legislation as being entitled to priority over the security of the existing lenders in place as of the date hereof;

(b) in respect of any real property, existing (i) zoning, use and building by-laws and ordinances, federal, provincial or municipal by-laws and regulations as to the use of such Property; (ii) notices of lease; (iii) subdivision agreements, site plan control agreements, development agreements, servicing agreements and other similar agreements with municipal and other governmental authorities; and (iv) permits, reservations, restrictions, covenants, servitudes, watercourse, rights of water, rights of access or user licenses, easements, rights-of-way and rights in the nature of easements;

(c) future purchase-money security interests registered in accordance with applicable personal property security legislation and recognized under such legislation as being entitled to the priority of purchase-money security interests; and

(d) Encumbrances in respect of the Property of an Applicant or a CCAA Party arising by operation of law (other than as a result of a default in payment or performance of an obligation by such Applicant or such CCAA Party) without any grant of a security interest by such Applicant or such CCAA Party and that are given priority over prior fixed charges by statute law in the event of the bankruptcy of such Applicant or such CCAA Party.

42. THIS COURT ORDERS that the Applicants and the CCAA Parties shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Applicants or CCAA Parties, as the case may be, obtain the prior written consent of the Monitor and the prior approval of the Court, and any Encumbrances granted by the Applicants or CCAA Parties contrary to this Order shall be void.

43. THIS COURT ORDERS that each of the CCAA Charges shall attach, as of the Effective Time of this Order, to all present and future Property of the applicable Applicants or CCAA Parties (including, without limitation, any lease, sub-lease, offer to lease, licence, permit or other

contract) notwithstanding any requirement for the consent of the lessor or other party to any such lease, licence, permit or contract or any other Person or the failure to comply with any other condition precedent.

44. THIS COURT ORDERS that the necessity for giving or obtaining any consent or the failure to comply with any condition precedent, each as referred to in the previous paragraph, is hereby dispensed with and the absence of any such consent or fulfillment of condition precedent shall not cause a breach or default under any such lease licence, permit or contract.

45. THIS COURT ORDERS that the CCAA Charges shall be valid and enforceable and not be rendered invalid or unenforceable and the rights and remedies of the beneficiaries of the CCAA Charges shall not otherwise be limited or impaired in any way by: (i) the pendency of these proceedings and the declaration of insolvency made herein; (ii) any petition for a receiving order issued pursuant to the BIA in respect of any of the Applicants or the CCAA Parties or any receiving order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of any of the Applicants or the CCAA Parties; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing agreement, lease, sub-lease, offer to lease or other arrangement which binds any of the Applicants or CCAA Parties (a "Third Party Agreement"), and notwithstanding any provision to the contrary in any Third Party Agreement:

(a) the creation of any of the CCAA Charges shall not create or be deemed to constitute a breach by any of the Applicants or the CCAA Parties of any Third Party Agreement to which it is a party; and

(b) none of the beneficiaries of the CCAA Charges shall have liability to any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

46. THIS COURT ORDERS that notwithstanding: (i) the pendency of these proceedings and the declaration of insolvency made in these proceedings; (ii) any petition for a receiving order issued pursuant to the BIA in respect of any of the Applicants or CCAA Parties and any receiving order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of any of the Applicants or CCAA Parties; and (iii) the provisions

of any federal or provincial statute, and the payments or disposition of Property made by the Applicants or CCAA Parties pursuant to this Order and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

47. THIS COURT ORDERS that the beneficiaries of the CCAA Charges shall not be required to file, register, record or perfect the CCAA Charges and that the CCAA Charges shall be valid and enforceable as against all Property of the applicable Applicants and CCAA Parties and against all Persons (including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of any or all of the Applicants or the CCAA Parties) for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the creation of the CCAA Charges hereby, notwithstanding any failure to file, register, record or perfect the CCAA Charges.

General

48. THIS COURT ORDERS that this Order and the proceedings in this Application leading to the making of this Order, including the contents of any Affidavit filed in this Application, shall not, in and of themselves, constitute or be relied upon in evidence or otherwise as constituting a default or failure to comply by any of the Applicants or any Person owned directly or indirectly by an Applicant or a CCAA Party under any statute, regulation, licence, permit, contract, permission, covenant, agreement, undertaking or other instrument or requirement.

49. THIS COURT ORDERS that, except as otherwise specified herein, the Applicants and CCAA Parties are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective addresses as last shown on the records of the Applicants and the CCAA Parties and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

55. THIS COURT ORDERS that this Order and any other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

56. THIS COURT ORDERS that the Monitor, with the prior consent of the Applicants, shall be at liberty and is hereby authorized and empowered to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders in other jurisdictions which aid and complement this Court in carrying out the terms of this Order and any subsequent orders made in these proceedings and, without limitation to the foregoing, for the purposes of obtaining an order under the U.S. Bankruptcy Code, the Monitor shall act and be deemed to be the foreign representative of the Applicants. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

57. THIS COURT ORDERS that any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating amongst the various assets of the Applicants and CCAA Parties, the charges referred to in paragraph 40 of the Initial Order.

58. THIS COURT SEEKS AND REQUESTS the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian Federal Court or administrative body and any Federal or State Court or administrative body in the United States of America or elsewhere to act in aid of and to be complementary to this Court in carrying out the term of this Order.

J.C.C.Q.B.A.

ENTERED THIS 23rd DAY
OF JANUARY, 2006.

V.A. BRANDT (COURT SEAL)

Clerk of the Court

Action No.: 0501-17864 2005

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF

**CALPINE CANADA ENERGY LIMITED,
CALPINE CANADA POWER LTD.,
CALPINE CANADA ENERGY FINANCE ULC,
CALPINE ENERGY SERVICES CANADA LTD.,
CALPINE CANADA RESOURCES COMPANY,
CALPINE CANADA POWER SERVICES LTD.,
CALPINE CANADA ENERGY FINANCE II ULC,
CALPINE NATURAL GAS SERVICES LIMITED,
AND 3094479 NOVA SCOTIA COMPANY**

RESTATED INITIAL ORDER
AMENDED JANUARY 16, 2006

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TAB 6

04-CL-5306
Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	**THURSDAY, THE 29TH DAY**
	)	
MR. JUSTICE FARLEY	)	**OF JANUARY, 2004**

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

INITIAL ORDER

THIS MOTION, made by Stelco Inc. ("Stelco") and the other Applicants listed on Schedule "A" (collectively, the "Applicants") for an order:

(a) dispensing with service of the Notice of Application, Notice of Motion and Motion Record on any interested party other than:

(i) CIT Business Credit Canada Inc. ("CIT"), as agent for the lenders pursuant to an amended and restated financing agreement dated November 20, 2003 (the "Existing Stelco Financing Agreement") between Stelco, as borrower, and CIT Business Credit Canada Inc., General Electric Capital Canada Inc. and Fleet Capital Canada Corporation, as lenders (collectively, whether in such capacities as an agent or lender, the "Existing Stelco Lenders");

(ii) CIT Business Credit Canada Inc., as agent for the lenders pursuant to the commitment letter dated January 28, 2004 (as the same may be amended from time to time, the "DIP Term Sheet") between Stelco, as borrower, and CIT Business Credit Canada Inc., General Electric Capital Canada Inc. and Fleet Capital Canada Corporation, as lenders (collectively, whether in such capacities as an agent or lender, the "DIP Lenders");

(iii) Canadian Imperial Bank of Commerce ("CIBC"), as the provider of banking services, Visa card services and an overdraft facility pursuant to the letter loan agreement dated November 20, 2003, as confirmed and acknowledged by the confirmation and acknowledgement agreement dated as of January 28, 2004 (the "CIBC Confirmation Agreement"), as may be amended from time to time (collectively, the "Stelco Banking Services Agreement") between Stelco, Stelpipe Ltd. ("Stelpipe"), Stelwire Ltd. ("Stelwire"), CIT and CIBC;

(iv) the United Steelworkers of America (the "USWA");

(v) the Superintendent of Financial Services of Ontario (the "Superintendent"); and

(vi) EDS Canada Inc. ("EDS").

(b) declaring that the Applicants are "affiliated debtor companies" within the meaning of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") and that the CCAA applies to each of the Applicants;

(c) in respect of each Applicant, staying all proceedings and remedies taken or that might be taken in respect of such Applicant, any of its property or any default by such Applicant without leave of the Court, except as set forth herein;

(d) authorizing the Applicants to carry on business in a manner consistent with the preservation of their property and to make certain payments in connection with their respective businesses and the proceedings herein;

(e) appointing a chief restructuring officer;

(f) appointing Ernst & Young Inc. as monitor of the Applicants;

(g) permitting the Applicants to file with the Court a plan or plans of compromise or arrangement between the Applicants and their respective creditors or some of them;

(h) authorizing the Applicants to enter into arrangements with the Existing Stelco Lenders and the DIP Lenders to finance their continued operations and expenses during these proceedings; and

(i) granting certain other ancillary relief;

was heard this day at 393 University Avenue, Toronto.

ON READING (i) the Notice of Motion, (ii) the unissued Notice of Application, (iii) the affidavit of William Vaughan sworn January 29, 2004 and the exhibits thereto, including the projected cash flow statement and the financial statements for the past year of the Applicants (the "Vaughan Affidavit"), and (iv) the consent of Ernst & Young Inc. (the "Monitor") to act as monitor as contemplated hereunder, all filed; on hearing the submissions of counsel for the Applicants, the Monitor, the Existing Stelco Lenders, the DIP Lenders, CIBC, the USWA, the Superintendent, EDS Canada Inc., and the Informal Committee of Bondholders; on being advised that none of the other persons who might be interested in these proceedings was served with the Notice of Application, Notice of Motion or the Motion Record herein; and on being satisfied that circumstances exist that make this Order appropriate.

Service

1. THIS COURT ORDERS that the time for service of the Notice of Application, the Notice of Motion and the Motion Record herein be and it is hereby abridged and that this Motion is properly returnable today and further that service thereof upon any interested party other than the persons served with the Motion Record herein is hereby dispensed with.

Application of the CCAA

2. THIS COURT ORDERS AND DECLARES that the Applicants are "affiliated debtor companies" within the meaning of the CCAA and that the CCAA applies to each of the Applicants.

Plan of Arrangement

3. THIS COURT ORDERS that the Applicants shall have exclusive authority to prepare and file, and are hereby authorized and permitted to file, with this Court and submit to their respective creditors one or more plans of compromise or arrangement under the CCAA (collectively, the "Plan") between, among others, the Applicants or any of them and one or more classes of their respective creditors as the Applicants may deem appropriate on or before the Stay Date (as subsequently defined) or such other time or times as may be allowed by this Court.

Stay of Proceedings

4. THIS COURT ORDERS that, until and including February 27, 2004, or such later date as the Court may order (the "Stay Date", and the period from the date hereof to the Stay Date being referred to as the "Stay Period"), no suit, complaint, action, grievance, arbitration, application, proceeding, enforcement process, right or remedy (judicial or extra-judicial, statutory or non-statutory) shall be commenced, proceeded with or continued (collectively, the "Proceedings") by any person, firm, corporation, government, administrative or regulatory body or other entity or organization (including, without limitation, any former, existing or future shareholders, creditors, customers, suppliers, employees, pensioners, unions, regulators, contracting parties, lessors, licensors, co-venturers or partners of any of the Applicants) (collectively, "Persons" and individually a "Person") against or in respect of any of the Applicants or any of the present or future property, assets, rights, undertaking, estate and effects of any nature of any of the Applicants wheresoever located, and whether held directly or indirectly, as principal or nominee, beneficially or otherwise (collectively, the "Property"), and all Proceedings already commenced against or in respect of the Applicants or any of the Property are hereby stayed and suspended and the continuation thereof is restrained unless the prior written consent of the applicable Applicant and the Monitor is obtained or leave of this Court is granted.

5. THIS COURT ORDERS that, during the Stay Period, the right of any Person:

(a) to commence or continue realization steps or proceedings in respect of any security interest, encumbrance, lien, charge, mortgage or other security held in relation to, or any trust attaching to, any of the Property (including, without limitation, the right of any Person to take any step in asserting or perfecting any right or interest therein or to exercise any right of registration of securities, distress, seizure, repossession, revendication, stoppage in transit, foreclosure or sale); and

(b) to assert, enforce or exercise any right, option or remedy available to it arising by law, under any agreement or otherwise (including, without limitation, any right under section 224(1.2) of the *Income Tax Act* (Canada) or substantially similar provision under provincial law (subject to section 11.4 of the CCAA); any right of dilution, buy-out, divestiture, forced sale, demand, acceleration, termination, suspension, modification, cancellation, set-off or consolidation of accounts; any right of first refusal; any right to give notice of assignment of a claim; or any right to revoke any qualification or registration), against or in respect of any of the Applicants or any of the Property or arising out of, relating to or triggered by the occurrence of any default or non-performance by or the insolvency of any of the Applicants, the making or filing of these proceedings or any allegation, admission or evidence in these proceedings,

is hereby stayed and restrained unless the prior written consent of the applicable Applicant and the Monitor is obtained or leave of this Court is granted.

6. THIS COURT ORDERS that, without limiting the generality of paragraph 4 but other than in respect of amounts owing to the Existing Stelco Lenders and the DIP Lenders or to CIBC under the Stelco Banking Services Documents (as defined herein) (but subject always to the provisions of the blocked account arrangements entered into between CIBC, certain of the Applicants and CIT (as agent for the Existing Stelco Lenders), cash or cash equivalents placed on deposit by an Applicant with any Person during the Stay Period, whether in an operating account or otherwise and whether for its own account or for the account of any other entity, shall

not be applied by such Person in reduction or repayment of amounts owing to such Person as of the date of this Order or which may become due on or before the expiry of the Stay Period or in satisfaction of any interest or charges accruing in respect thereof, provided that nothing in this paragraph 6 shall prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by an Applicant and properly honoured by the financial institution, or (ii) holding the amount of any cheques or other instruments deposited into an Applicant's account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

7. THIS COURT ORDERS that, during the Stay Period, all Persons having agreements or other arrangements with any of the Applicants or in connection with any of the Property, whether written or oral (including, without limitation, contracts for the supply of goods or services to or by any of the Applicants, insurance policies, partnership agreements, joint venture agreements, tolling agreements, operating agreements, outsourcing agreements, commercial leases, equipment leases and licences):

(a) are hereby restrained from accelerating, terminating, cancelling, suspending, withdrawing, failing to renew or extend on reasonable terms, modifying or otherwise interfering with such agreements or other arrangements or the rights of such Applicant or any other Person thereunder or exercising any other remedy provided for under such agreements or arrangements, including without limitation any licences, permits, approvals or consents in respect of such Applicant or in connection with such Property, and without limitation to the foregoing, the operation of any provision of any such agreement or other arrangement that purports to accelerate, terminate, cancel, suspend or modify such agreement or arrangement as a result of the occurrence of any default or non-performance by or the insolvency of any of the Applicants, the making or filing of these proceedings or any allegation, admission or evidence in these proceedings is hereby stayed and restrained;

(b) are hereby restrained from modifying, discontinuing or otherwise interfering with the supply of any good, service, or other benefit by or to such Person thereunder

(including, without limitation, any modification of, discontinuance of or interference with any telephone numbers, any directors' and officers' insurance, any form of telecommunications service or any oil, gas, electricity or other utility supply); and

(c) shall continue to perform and observe the terms and conditions contained in such agreements or other arrangements (including, without limitation, the payment of all sums to be paid in respect of services performed or to be performed by an Applicant),

so long as such Applicant pays the normal prices or charges for such goods and services received after the date of this Order as such prices or charges become due in accordance with present payment practices or as may be hereafter negotiated (other than deposits, stand-by fees or similar items which such Applicant shall not be required to pay), unless the prior written consent of the applicable Applicant and the Monitor is obtained or the leave of this Court is granted.

8. THIS COURT ORDERS that, during the Stay Period, no landlord of any of the Applicants shall:

(a) exercise any right to terminate or accelerate rent due under a lease with such Applicant;

(b) interfere with the quiet possession of real property by such Applicant;

(c) exercise any right of distraint, or take possession of any premises leased to such Applicant unless those premises have been abandoned by such Applicant;

(d) interfere with the removal of inventory, chattels and equipment from premises leased by such Applicant; or

(e) hinder in any way the orderly liquidation of any Property from premises leased by such Applicant,

all subject to paragraph 9 hereof and the obligation, if any, of such Applicant to pay occupation rent (only if rent was agreed to be payable as between the landlord and such Applicant in the

30 days preceding the making of this Order), for the period commencing with the date of this Order and while such Applicant enjoys actual occupation of leased premises, at the presently payable rental rate calculated on a *per diem* basis, or otherwise as may be negotiated by such Applicant from time to time.

9. THIS COURT ORDERS that notwithstanding paragraphs 4 to 8 hereof:

(a) in the case of agreements for the supply of goods, services, the use of leased or licensed property or other valuable consideration to an Applicant, no Person is prohibited, solely by the terms of this Order, from requiring immediate payment for any goods, services, use of leased or licensed property (other than as contemplated by paragraph 21(b)) or other valuable consideration to be provided to such Applicant after the date of this Order;

(b) no Person is required, solely by the terms of this Order, to make further advances of money or credit to an Applicant;

(c) no Person is prohibited, solely by the terms of this Order, from commencing or continuing any action, suit or proceeding against any person other than an Applicant who is obligated under a letter of credit or guarantee in relation to an Applicant;

(d) no Person is prohibited, solely by the terms of this Order, from exercising any right to terminate, amend or claim any accelerated payment under an "eligible financial contract" (as that term is defined in section 11.1 of the CCAA) and, for greater certainty, when an eligible financial contract entered into before the date of this Order is terminated on or after the date of this Order, the setting off of obligations between an Applicant and the Person (as parties thereto) in accordance with the provisions of the eligible financial contract and the CCAA is permitted (but paragraphs 4 to 8 of this Order will apply to restrain any step or proceeding against such Applicant or any of the Property in respect of a claim for any "net termination value" (as defined in section 11.1 of the CCAA) owing to the Person); and

(e) no Person is prohibited, solely by the terms of this Order, from exercising such rights of set-off as are permitted under section 18.1 of the CCAA.

10. THIS COURT ORDERS that to the extent any rights or obligations, or time or limitation periods (including, without limitation, the time to file grievances), relating to an Applicant or any of the Property may expire or terminate with the passage of time (other than the term of any lease of real property), the term of such rights or obligations or time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period and, without limitation to the foregoing, in the event that an Applicant becomes bankrupt or a receiver within the meaning of section 243(2) of the *Bankruptcy and Insolvency Act* (Canada) (the "BIA") is appointed in respect of an Applicant, the period between the date of this Order and the day on which the Stay Period in respect of such Applicant ends shall not be calculated in determining the 30-day periods referred to in sections 81.1 and 81.2 of the BIA.

11. THIS COURT ORDERS that no Person may commence or continue any action, suit or other proceeding against any former, present or future director or officer of an Applicant or any other person by applicable legislation that is deemed to be or is treated similar to a director of an Applicant or that presently or in the future manages the business and affairs of an Applicant (each, a "Director", and collectively the "Directors") in respect of any claim against such Director that arose before the commencement of these proceedings and that relates to obligations of such Applicant where such Director is or is alleged to be, under any law, liable in his or her capacity as such for the payment of such obligations until further order of this Court or until the Plan, if one if filed, is sanctioned by the Court or is refused by the creditors or the Court.

12. THIS COURT ORDERS that no Person shall commence or continue any proceeding against any of the directors, officers, employees, legal counsel or financial advisers of the Applicants, the CRO (as defined herein), the Monitor, the Existing Stelco Lenders, the DIP Lenders or CIBC, or the legal counsel or financial advisers to the Existing Stelco Lenders, the DIP Lenders or CIBC, for or in respect of the Restructuring (as defined herein) or the creation and implementation of the Plan without first obtaining leave of this Court, upon seven days' written notice to the Applicants' counsel of record and to all those referred to in this paragraph whom it is proposed be named in such proceedings.

13. THIS COURT ORDERS that from 12:01 o'clock a.m. (Toronto time) on the date of this Order (the "Effective Time") to the time of the granting of this Order, any act or action taken or notice given by any Person in furtherance of its rights to commence or continue realization or take or enforce any other step or remedy in respect of any of the Applicants, the Directors (to the extent such act, action taken or notice given would otherwise be stayed by paragraph 12 if it occurred after the making of this Order) or the Property, will be deemed not to have been taken or given as the case may be.

Possession of Property and Carrying on Business

14. THIS COURT ORDERS that, subject to the terms of this Order, the Applicants shall remain in possession of the Property until further order in these proceedings.

15. THIS COURT ORDERS that the Applicants shall continue to carry on business, including the business of any person, firm, joint venture or corporation owned by an Applicant, in a manner consistent with the commercially reasonable preservation of the Property and their collective businesses, except as otherwise specifically authorized or directed by this Order or any further order in these proceedings.

16. THIS COURT ORDERS that, without limitation to paragraph 15 hereof, the Applicants are authorized to continue to retain or employ any employees, agents, servants, solicitors, advisers and consultants who are retained or employed as of the date of this Order, with liberty to retain or employ such further employees, agents, servants, solicitors, auditors, advisers and consultants as the Applicants deem necessary or desirable to carry on their respective businesses, to carry out the terms of this Order or for the purposes of the Plan.

17. THIS COURT ORDERS that the Applicants are authorized to complete any outstanding transactions and engage in new transactions with each other and with any of their respective affiliates and other entities, partnerships and joint ventures in which they have a material direct or indirect ownership interest (collectively with the Applicants, the "Stelco Group"), subject to the following:

(a) the Applicants may continue on and after the date hereof to buy and sell goods and services and allocate, collect and pay costs, including without limitation head

office expenses and shared goods and services, from and to each other and from and to the other members of the Stelco Group in the ordinary course of business on terms consistent with existing arrangements or past practice (including, without limitation, pursuant to tolling agreements);

(b) Stelco, with the prior approval of the Monitor, may (but is not obligated to) (i) make advances to and make payments on behalf of other members of the Stelco Group to fund their operations and expenses on terms consistent with existing arrangements or past practice, provided that such other member of the Stelco Group agrees that it will not exercise any rights of set-off in respect of any such advance and any pre-filing claim of such member of the Stelco Group against Stelco, and (ii) make payments to other members of the Stelco Group in respect of goods and services provided prior to the date hereof (including, without limitation tolling fee payments) where the payment is of benefit to Stelco having regard to the preservation of Stelco's business and Property, the Restructuring (as defined herein) and its direct or indirect ownership interest in such member; and

(c) other than as permitted elsewhere by this Order, none of the Applicants shall enter into any new transactions outside the ordinary course of business with any other member of the Stelco Group unless such new arrangements: (i) are on commercially reasonable terms as determined by such Applicant, and (ii) are approved by the Monitor.

Chief Restructuring Officer

18. THIS COURT ORDERS that the engagement of Stonecrest Capital Inc. and Hap Stephen, Chairman and Chief Executive Officer of Stonecrest Capital Inc., as Chief Restructuring Officer of the Applicants (collectively, the "CRO") be and is hereby approved.

19. THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfilment of its duties, save and except any liability or obligation arising from the gross negligence or wilful misconduct of the CRO, and no action or other proceedings shall be commenced against the CRO relating to its appointment or its conduct as CRO, except with prior

leave of this Court, on at least 7 days' notice to the CRO and its counsel and upon further order securing, as security for costs, the solicitor and his own client costs of the CRO, if any, in connection with any such action or proceeding and provided further that the liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by it in connection with this proceeding.

20. THIS COURT ORDERS that any claims that the CRO may have against the Applicants shall not be compromised or arranged pursuant to the Plan or these proceedings.

Payment of Creditors

21. THIS COURT ORDERS that the Applicants are hereby directed, except as authorized by this Order or any further order in these proceedings:

(a) to make no payments to any Person on account of any amount owing by an Applicant as of the date of this Order;

(b) to make no rental or other payments on account of personal property leased or licensed to an Applicant as of the date of this Order, except in respect of and to the extent that such Applicant continues to make use of such property after the date hereof and the lessor or licensor is entitled to require immediate payment for such use pursuant to section 11.3(a) of the CCAA; and

(c) to grant no mortgage, charge or other security upon or in respect of any of the Property, other than purchase-money security interests that are created in compliance with (i) the provisions of the *Personal Property Security Act* (Ontario) or other similar provincial or federal legislation if applicable and, (ii) paragraph 67 of this Order.

22. THIS COURT ORDERS that the Applicants shall remit, in accordance with legal requirements, or pay when due:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province or Territory thereof or any foreign jurisdiction which are required

to be deducted from employees' wages including, without limitation, amounts in respect of employment insurance, Canada Pension Plan and income taxes;

(b) amounts accruing and payable by an Applicant in respect of employment insurance, Canada Pension Plan, workers compensation, employer health taxes and similar obligations of any jurisdiction with respect to employees; and

(c) all goods and services taxes and all provincial or other applicable sales taxes payable or collectable by an Applicant in connection with the sale of goods and services by such Applicant.

23. THIS COURT ORDERS that, from and after the date of this Order, the Applicants shall be entitled to pay all reasonable costs and expenses incurred by the Applicants in carrying on their respective businesses, in carrying out the provisions of this Order and for the purposes of the Plan and the Restructuring (as defined below), in each case when due and payable, which costs and expenses may include, without limitation:

(a) the cost of goods and services actually supplied to any of the Applicants after the date of this Order;

(b) all outstanding and future wages, salaries, commissions, vacation pay, pension and other benefits, reimbursement of expenses (including, without limitation, amounts charged by employees to credit cards) and other amounts accruing due to current, former or future employees, officers or directors or individuals that provide or have provided services to an Applicant as individual contractors, and all outstanding and future severance pay, termination pay and other like amounts due to current, former or future employees if terminated in the ordinary course as the relevant Applicant may in its discretion determine;

(c) all outstanding and future contributions to or payments in respect of any pension or benefit plans sponsored by any of the Applicants;

(d) all outstanding and future fees and disbursements of the Monitor, the Monitor's and the Applicants' respective legal counsel, independent counsel to the board of

directors of Stelco, the CRO, and any financial and other advisers retained by the Applicants in respect of the Plan, the Restructuring or these proceedings;

(e) all outstanding and future fees and disbursements of the Applicants' respective directors;

(f) without limitation to paragraph 22, all outstanding and future priority claims of the federal or provincial Crown or a municipality in respect of an Applicant or any of the Property which may have priority over any security held by other Persons, including, without limitation, amounts owing in respect of provincial sales taxes, federal goods and services taxes, income tax source deductions and other analogous withholdings, Canada Pension Plan, and Quebec Pension Plan and employment insurance contributions, employer health taxes, obligations to any workers' compensation authority, obligations in respect of any provincial or federal environmental legislation, gross receipts taxes, and realty or excise or other taxes;

(g) all outstanding and future premiums on existing or future directors' and officers' liability insurance, including, without limitation, any premiums in connection with any extended reporting period;

(h) rent and other payments required pursuant to any leases of real property under existing arrangements in respect of the period after the date of this Order while an Applicant is in actual occupation of such real property;

(i) all outstanding and future amounts due from an Applicant under any charge, debit or credit card arrangements, including, without limitation, arrangements with American Express, MasterCard or Visa;

(j) all expenses and capital expenditures incurred after the date of this Order in the ordinary course of business or necessary for environmental compliance or to preserve the Property or the business of an Applicant, including, without limitation, payments on account of service, maintenance, repairs, insurance and security;

(k) principal, interest and other payments to holders of security in respect of any of the Property if the amount secured by such security is, in the reasonable opinion of the applicable Applicant with the concurrence of the Monitor, less than or equal to the fair value of such security after having regard to, among other things, the priority of such security; and

(l) any other amounts the payment of which is provided for by the terms of this Order,

provided that, unless provided in subparagraphs (a) to (l) listed above, the Applicants shall only be entitled (but not required) to pay costs and expenses that were incurred before the date of this Order with the approval of the Monitor or upon further order in these proceedings.

Restructuring

24. THIS COURT ORDERS that, to facilitate the orderly restructuring of their respective businesses and affairs (the "Restructuring"), the Applicants shall have the right to:

(a) permanently or temporarily cease, downsize or shut down any of their respective operations or locations as they deem appropriate and make provision for the consequences thereof in the Plan;

(b) pursue all avenues to market and sell (subject to paragraph 24(c)), all or material parts of the Property of the Applicants, in whole or part;

(c) sell, convey, transfer, assign, lease, or in any other manner dispose of the Property or any part or parts thereof:

(i) in the ordinary course of business without the specific approval of the Court;

(ii) pursuant to any agreement or arrangement that was entered into prior to the date hereof with an arm's length purchaser in good faith and for valuable consideration;

(iii) out of the ordinary course of business without the specific approval of the Court, provided that the sale or transaction price in each case does not exceed $5 million or $10 million in the aggregate; and

(iv) otherwise, subject to prior approval of the Court;

provided that, in all cases, the Applicants apply any proceeds thereof in accordance with the Accommodation Agreement, the DIP Term Sheet and the DIP Documents (each as defined herein);

(d) terminate the employment of such of their respective employees or temporarily or permanently lay off such of their respective employees as they deem appropriate and, to the extent any amounts owing in respect thereof are not paid in the ordinary course as such Applicant may in its discretion determine (including, without limitation, amounts on account of notice, termination or severance pay), to make provision for any consequences thereof in the Plan;

(e) subject to paragraphs 26 and 27, vacate or abandon any leased real property and/or repudiate any lease and ancillary agreements related to any leased premises as they deem appropriate, provided that the applicable Applicant gives the relevant landlord at least seven (7) days' prior written notice, on such terms as may be agreed between the Applicant and such landlord, or failing such agreement, to make provision for any consequences thereof in the Plan;

(f) repudiate such of their respective arrangements or agreements of any nature whatsoever (other than arrangements with the Existing Stelco Lenders in connection with the Existing Stelco Financing Documents (as defined herein), the DIP Lenders in connection with the DIP Facility and the DIP Documents (as defined herein) and CIBC in connection with the Stelco Banking Services Agreement), whether oral or written, as they deem appropriate on such terms as may be agreed between the applicable Applicant and the relevant counter-party, or failing such agreement, to make provision for the consequences thereof in the Plan and to negotiate any new or replacement agreements or arrangements; and

(g) settle claims of customers and suppliers that are in dispute, with the approval of the Monitor.

25. THIS COURT ORDERS that any sale of Property made pursuant to paragraph 24(c) of this Order shall be deemed not to be a sale in bulk and shall be exempt from the application of, and deemed not to be in contravention of, any laws of any Province of Canada prohibiting, restricting or regulating the sale of such Property including, without limitation, the *Bulk Sales Act* (Ontario).

26. THIS COURT ORDERS that, if leased premises are vacated or abandoned by an Applicant pursuant to paragraph 24(e), the relevant landlord shall be entitled to take possession of any such leased premises without waiver of, or prejudice to, any claims or rights of such landlord against such Applicant in respect of the vacating or abandoning of such leased premises, and such landlord shall be entitled to notify such Applicant of the basis on which it is taking possession and gain possession of and re-lease any such leased premises to third parties on such terms as any such landlord may determine, subject to such landlord's obligation, if any, to mitigate any damages claimed in connection therewith.

27. THIS COURT ORDERS THAT an Applicant shall provide to any relevant landlord notice of such Applicant's intention to remove any fixtures or leasehold improvements at least seven (7) days prior to the date of intended removal from any leased premises vacated or abandoned by such Applicant. The relevant landlord shall be entitled to have a representative present at the leased premises to observe such removal and, if the landlord disputes such Applicant's entitlement to remove any item under the provisions of the lease, such items shall remain on the premises and shall be dealt with as agreed to between any applicable secured creditors, such landlord and such Applicant, or by further order of this Court on five (5) days' notice to such parties. If such Applicant has otherwise vacated the leased premises, it shall not be considered to be in occupation of such location pending resolution of any such dispute.

28. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, the Applicants are permitted in the course of these proceedings to disclose personal information of identifiable individuals in their possession or control to stakeholders or prospective investors, financiers, buyers or strategic

partners and to their advisers (individually, a "Third Party"), to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or a transaction in furtherance thereof, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the Applicants binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Applicants or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation and implementation of the Plan or a transaction in furtherance thereof, such Third Party shall be entitled to continue to use the personal information in a manner which is in all material respects identical to the prior use of such personal information by the Applicants.

Financing and Banking Services

Banking Services

29. THIS COURT ORDERS that Stelco, Stelpipe and Stelwire are hereby authorized to continue to obtain and utilize the "Banking Services", the "Corporate Visa Facility" and the "Overdraft Facility", as each such term is defined in the Stelco Banking Services Agreement (collectively referred to as the "Banking Arrangements"), provided by CIBC pursuant to and on the terms and conditions set out in the Stelco Banking Services Agreement and the other agreements, instruments and documents referred to therein or now or hereafter held by CIBC in connection therewith, including, without limitation, the "Account Documents" (as defined in the Stelco Banking Services Agreement), any blocked account arrangements entered into between CIBC, certain of the Applicants and CIT (as agent for the Existing Stelco Lenders) and the CIBC Visa documentation (collectively, the "Stelco Banking Services Documents") and that, without limitation to the foregoing and notwithstanding any other provision of this Order, each of Stelco, Stelpipe and Stelwire:

(a) is hereby authorized to borrow, repay and reborrow such amounts from time to time as it may consider necessary or desirable under the revolving Overdraft Facility in the principal amount not exceeding $8,000,000 and the Corporate Visa

Facility in the principal amount not exceeding $400,000 provided by CIBC pursuant to the Stelco Banking Services Documents;

(b) shall pay all amounts from time to time owing to CIBC on account of principal, interest, fees, cost and expenses or other amounts pursuant to the Stelco Banking Services Documents; and

(c) shall perform all of its other obligations under the Stelco Banking Services Documents.

30. THIS COURT ORDERS that the Stelco Banking Services Agreement is hereby ratified and confirmed and Stelco, Stelpipe and Stelwire are hereby authorized to enter into such confirmations of and amendments to the Stelco Banking Services Documents and such additional agreements as may be required by CIBC and CIT (as agent for the Existing Stelco Lenders and the DIP Lenders) from time to time in connection therewith.

31. THIS COURT ORDERS that notwithstanding any other provisions of this Order, CIBC, in its capacity as provider of the Banking Arrangements, shall be:

(a) subject to the provisions of any blocked account agreements entered into with certain of the Applicants and CIT (as agent for the Existing Stelco Lenders), authorized to provide and operate all or any of the Banking Arrangements in the ordinary course of its business in accordance with the Stelco Banking Services Documents and its practice in connection with such Banking Arrangements immediately prior to the making of this Order (subject to such modifications as may be agreed between CIBC and CIT (as agent for the Existing Stelco Lenders and the DIP Lenders) and Stelco, Stelpipe and Stelwire from time to time), including without limitation,

(i) to apply deposits, cheques, wire or electronic transfers, drafts, negotiable instruments and all other forms of payments (collectively "Deposits") now held in or hereafter credited to the accounts of Stelco, Stelpipe and

Stelwire in payment of amounts now or hereafter outstanding under the Overdraft Facility free and clear of the CCAA Charges (as defined herein),

(ii) to debit, charge back or set-off from the accounts of Stelco, Stelpipe and Stelwire free and clear of the CCAA Charges (as defined herein): (A) any Deposits made to such account(s) (whether on, before or after the making of this Order) that are dishonoured on or after the date of this Order; and (B) to pay all amounts from time to time owing to CIBC on account of principal, interest, fees, costs, expenses or other amounts pursuant to the Stelco Banking Services Documents, including the fees and disbursements of CIBC's counsel on a full indemnity basis;

(b) an unaffected creditor in these proceedings and any Plan with respect to the Banking Arrangements (including, without limitation, any debts, liabilities, claims, losses, costs or expenses CIBC may suffer or incur in connection with the provision of the Banking Arrangements) such that the claims of CIBC pursuant to the Stelco Banking Services Documents shall not be compromised or arranged pursuant to these proceedings and any Plan but, unless otherwise ordered, the exercise of any remedies by CIBC against Stelco, Stelpipe or Stelwire or their Property (other than in accordance with paragraph 31(a) above) arising under the Stelco Banking Services Documents shall be subject to the stay provided for in this Order except for:

(i) the right of CIBC to refuse to make any further advance or provide any further credit to Stelco in accordance with the provisions of the Stelco Banking Services Documents, or to process or clear any cheque, wire or electronic transfer, drafts, negotiable instruments or other forms of payment without adequate cash balances in the appropriate account of Stelco, Stelpipe or Stelwire or without sufficient credit availability;

(ii) the exercise by CIBC of any right to demand payment, accelerate and give notices under or in respect of the Stelco Banking Services Documents in accordance with the provisions thereof or applicable law provided that

CIT as agent for the Existing Stelco Lenders and for the DIP Lenders is notified in writing in accordance with the provisions of the Stelco Banking Services Documents;

(iii) the right of CIBC to terminate all or any of the Banking Arrangements in accordance with the provisions of the Stelco Banking Services Documents provided that CIT as agent for the Existing Stelco Lenders and for the DIP Lenders is notified in writing in accordance with the provisions of the Stelco Banking Services Documents; and

(iv) the right of CIBC to automatically terminate the Corporate Visa Facility and the Overdraft Facility immediately upon the termination of the notice periods contained in paragraphs 43 and 51 hereof for the Existing Stelco Lenders and DIP Lenders, respectively.

32. THIS COURT ORDERS that, in respect of the Banking Arrangements, CIBC shall:

(a) not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Banking Arrangements, or as to the use or application by Stelco or the other members of the Stelco Group of funds transferred, paid, collected or otherwise dealt with in the Banking Arrangements; and

(b) be entitled to provide the Banking Arrangements without any liability, whether statutory, contractual, trust, proprietary or otherwise, in respect thereof to any Person whatsoever, other than the Existing Stelco Lenders (to the extent of the agreements between CIBC and such lenders), the DIP Lenders (to the extent of the agreements between CIBC and such lenders) and the Applicants, pursuant to the terms of the Stelco Banking Services Documents and this Order.

33. THIS COURT ORDERS that the Applicants shall be entitled to continue to utilize their banking arrangements currently in place with The Toronto-Dominion Bank and, subject to the consent of the Existing Stelco Lenders and DIP Lenders, any other financial institution with

whom they have or may in the future have banking arrangements, and that any present or future bank providing banking arrangements shall:

(a) not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under such banking arrangements, or as to the use or application by the Applicants of funds transferred, paid, collected or otherwise dealt with in the banking arrangements;

(b) be entitled to provide the banking arrangements without any liability, whether statutory, contractual, trust, proprietary or otherwise, in respect thereof to any person, corporation or other entity whatsoever, other than the Applicants or their affiliates and the Existing Stelco Lenders and the DIP Lenders, pursuant to the terms of the documentation applicable to the banking arrangements; and

(c) be, in its capacity as provider of the banking arrangements, an unaffected creditor with regard to any claims or expenses it may suffer or incur in connection with the provision of the banking arrangements.

34. THIS COURT ORDERS that, without limiting the generality of paragraph 6 hereof, except in accordance with the Existing Stelco Financing Documents, the DIP Documents and the Stelco Banking Services Documents, all banks and financial institutions at which an Applicant maintains a bank account are hereby restrained from stopping, withholding, redirecting or otherwise interfering with any amount in such account(s) or setting off (subject to paragraph 9(e) hereof) or applying such amounts against any indebtedness owing to that bank or financial institution by an Applicant, or from discontinuing, failing to renew on terms no more onerous than those existing prior to these proceedings, altering, interfering with or terminating such banking arrangements.

Existing Stelco Financing Agreement and Accommodation Agreement

35. THIS COURT ORDERS that, notwithstanding any other provision of this Order, the execution and delivery of the accommodation and amending agreement dated as of the date hereof (the "Accommodation Agreement") by Stelco, Stelwire and Stelpipe to the Existing

and shall perform all of their other obligations to the Existing Stelco Lenders pursuant to the Existing Stelco Financing Documents and this Order.

40. THIS COURT ORDERS that the Property of the Applicants is hereby charged by a lien, mortgage, hypothec and security interest (such lien, mortgage, hypothec and security interest, together with any mortgage, hypothec or security interest created by the Existing Stelco Financing Documents, the "Existing Stelco Lenders Charge") in favour of the Existing Stelco Lenders as security for all obligations of the Applicants to the Existing Stelco Lenders with respect to all amounts owing (including principal, interest and the Existing Stelco Lenders Expenses) under or in connection with the Existing Stelco Financing Documents. The Existing Stelco Lenders Charge shall have the priority established by paragraphs 65 and 66.

41. THIS COURT ORDERS that the claims of the Existing Stelco Lenders pursuant to the Existing Stelco Financing Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the Existing Stelco Lenders shall be treated as unaffected creditors in these proceedings and in any Plan.

42. THIS COURT ORDERS that the Existing Stelco Lenders may:

(a) notwithstanding any other provision of this Order, take such steps from time to time as they may deem necessary or appropriate to register, record or perfect the Existing Stelco Lenders Charge and the Existing Stelco Financing Documents in all jurisdictions where they deem it is appropriate; and

(b) notwithstanding paragraph 43, refuse to make any advance to Stelco in accordance with the provisions of the Existing Stelco Financing Documents.

43. THIS COURT ORDERS that, the Existing Stelco Lenders shall not take any enforcement steps under the Existing Stelco Financing Documents or the Existing Stelco Lenders Charge without providing at least 3 business days written notice (the "Notice Period") of a default thereunder to Stelco, CIBC and the Monitor. Upon expiry of such Notice Period, the Existing Stelco Lenders shall be entitled to take any and all steps under the Existing Stelco Financing Documents, the Existing Stelco Lenders Charge and otherwise permitted at law without the

requirement of sending any demands, statutory or otherwise, including, without limiting the generality of the foregoing, under section 244 of the BIA.

DIP Facility

44. THIS COURT ORDERS that, notwithstanding any other provision of this Order, Stelco be and is hereby authorized to borrow, repay and reborrow from the DIP Lenders such amounts from time to time as Stelco may consider necessary or desirable, up to a maximum principal amount of $75 million outstanding at any time (in addition to any amounts borrowed under the Existing Stelco Financing Documents), on the terms and conditions as set forth in the DIP Term Sheet attached to the Vaughan Affidavit and in the DIP Documents (as defined below), to fund the ongoing expenditures of Stelco and to pay such other amounts as are permitted by the terms of this Order and the DIP Documents (as defined below) (the "DIP Facility").

45. THIS COURT ORDERS that, notwithstanding any other provision of this Order, each of the Applicants (other than Stelco) is hereby deemed to guarantee repayment of all amounts owing by Stelco under the DIP Term Sheet and the DIP Documents and the performance of all of Stelco's obligations thereunder, provided that the liability of each of CHT Steel and Welland Pipe pursuant to such guarantee and its guarantee pursuant to paragraph 37 shall be limited to the amount of the Stelco Advances (as defined herein) owing by it, if any, to Stelco from time to time.

46. THIS COURT ORDERS that, notwithstanding any other provision of this Order, the Applicants are hereby authorized to execute and deliver such credit agreements, guarantees, security documents and other definitive documents (collectively, as same may be amended from time to time and together with the guarantees pursuant to paragraph 45, the "DIP Documents") as may be required by the DIP Lenders in connection with the DIP Facility and the DIP Term Sheet, and the Applicants are hereby authorized to perform all of their obligations under the DIP Documents.

47. THIS COURT ORDERS that, notwithstanding any other provision of this Order, the Applicants shall pay to the DIP Lenders when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel

and all other advisers to or agents of the DIP Lenders on a full indemnity basis (the "DIP Lenders Expenses")) under the DIP Documents and shall perform all of their other obligations to the DIP Lenders pursuant to the DIP Term Sheet, the DIP Documents and this Order.

48. THIS COURT ORDERS that all of the Property of the Applicants is hereby charged by a lien, mortgage, hypothec and security interest (such lien, mortgage, hypothec and security interest, together with any lien, mortgage, hypothec or security interest created by the DIP Documents, the "DIP Lenders Charge") in favour of the DIP Lenders as security for all obligations of the Applicants to the DIP Lenders with respect to all amounts owing (including principal, interest and the DIP Lenders Expenses) under or in connection with the DIP Term Sheet and the DIP Documents. The DIP Lenders Charge shall have the priority established by paragraphs 65 and 66.

49. THIS COURT ORDERS that the claims of the DIP Lenders pursuant to the DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the DIP Lenders shall be treated as unaffected creditors in these proceedings and in any Plan.

50. THIS COURT ORDERS that the DIP Lenders may:

(a) notwithstanding any other provision of this Order, take such steps from time to time as they may deem necessary or appropriate to register, record or perfect the DIP Lenders Charge and the DIP Documents in all jurisdictions where they deem it is appropriate; and

(b) notwithstanding paragraph 51, refuse to make any advance to Stelco in accordance with the provisions of the DIP Term Sheet and the DIP Documents.

51. THIS COURT ORDERS that the DIP Lenders shall not take any enforcement steps under the DIP Documents, the DIP Lenders Charge without providing at least 3 business days written notice (the "Notice Period") of a default thereunder to Stelco, CIBC and the Monitor. Upon expiry of such Notice Period, the DIP Lenders shall be entitled to take any and all steps under the DIP Documents and the DIP Lenders Charge and otherwise permitted at law without the requirement of sending any demands, statutory or otherwise, including, without limiting the generality of the foregoing, under section 244 of the BIA.

Stelco Advances to Other Applicants

52. THIS COURT ORDERS that each of CHT Steel, Stelpipe, Stelwire and Welland Pipe is authorized to borrow, repay and reborrow from Stelco (subject to paragraph 17(b)) such amounts from time to time as it may consider necessary or desirable on a revolving basis (together with any amounts owing by it to Stelco pursuant to ordinary course transactions permitted by paragraph 17(a), the "Stelco Advances") on the terms and conditions set forth in any demand promissory note issued in favour of Stelco as evidence thereof (in form and content satisfactory to Stelco), to fund its ongoing expenditures and to pay such other amounts as are permitted by the terms of this Order.

53. THIS COURT ORDERS that each of CHT Steel, Stelpipe, Stelwire and Welland Pipe is hereby authorized to execute and deliver such promissory notes, security agreements and other documents as may reasonably be required by Stelco in connection with the Stelco Advances made to it, and each of CHT Steel, Stelpipe, Stelwire and Welland Pipe is hereby authorized to perform all of its obligations to Stelco thereunder.

54. THIS COURT ORDERS that all of the Property of each of CHT Steel, Stelpipe, Stelwire, and Welland Pipe is hereby charged by a lien, mortgage, hypothec and security interest (such lien, mortgage, hypothec and security interest together with any lien, mortgage, hypothec and security interest created pursuant to any agreement delivered pursuant to paragraph 17(b), the "Stelco Advances Charge") in favour of Stelco as security for the obligations of CHT Steel, Stelpipe, Stelwire or Welland Pipe (as the case may be) to Stelco with respect to the Stelco Advances made to it, and such Stelco Advances Charge (and any security documents executed in connection therewith) shall be assigned by Stelco to the Existing Stelco Lenders and the DIP Lenders. The Stelco Advances Charge shall have the priority established by paragraphs 65 and 66.

55. THIS COURT ORDERS that the claims of Stelco (and of the Existing Stelco Lenders and the DIP Lenders resulting from the assignment of the Stelco Advances Charge) pursuant to the Stelco Advances shall not be compromised or arranged pursuant to the Plan or these proceedings, but unless otherwise ordered, the exercise of any remedies by Stelco (but not of the

Existing Stelco Lenders or the DIP Lenders) in respect thereof under the Stelco Advances Charge shall be subject to the stay provided for in this Order.

Directors and Officers Indemnification and Charge

56. THIS COURT ORDERS that, in addition to any existing indemnities, the Applicants shall indemnify each of the Directors and each Person who was or in the future is requested by an Applicant to act, and who is acting or did or does act or is deemed or treated by applicable legislation to be acting or to have acted, as a director, officer or person of a similar position (a "Responsible Person") of another entity in which an Applicant has a direct or indirect interest (an "Associated Entity") from and against the following (collectively, "D&O Claims"):

(a) all costs (including, without limitation, full defence costs), charges, expenses, claims, liabilities and obligations of any nature whatsoever which may arise as a result of any sale of all or part of the Property, the Plan, his or her association with an Applicant or Associated Entity as a Director or Responsible Person in each case on or after the date hereof (including, without limitation, an amount paid to settle an action or satisfy a judgment in a civil, criminal, administrative or investigative action or proceeding to which such Director or Responsible Person may be made a party by reason of being or having been a Director or Responsible Person (as the case may be), provided that such Director or Responsible Person (i) acted honestly and in good faith with a view to the best interests of such Applicant or Associated Entity (as the case may be) and (ii) in the case of a criminal or administrative action or proceeding that is enforced by monetary penalty, such Director or Responsible Person had reasonable grounds for believing his or her conduct was lawful) except to the extent that such Director or Responsible Person has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct; and

(b) all costs (including without limitation, full defence costs), charges, expenses, claims, liabilities and obligations relating to the failure of an Applicant or an Associated Entity at any time to make payments of the nature referred to in paragraphs 22 or 23(b), (c) or (f) of this Order or to pay amounts in respect of

employee or former employee entitlements to wages, vacation pay, termination pay, severance pay, pension or other benefits or any other amount for services performed, whether incurred or accruing prior to, on or after the date of this Order and that he or she sustains or incurs by reason of or in relation to his or her association with such Applicant or Associated Entity as a Director or Responsible Person (as the case may be), except to the extent that such Director or Responsible Person has actively participated in the breach of any related fiduciary duties or has been grossly negligent or guilty of wilful misconduct,

provided that the foregoing shall not constitute a contract of insurance and shall not constitute other valid and collectible insurance as such term may be used in any existing policy of insurance issued in favour of any of the Applicants or Associated Entities or any of the Directors or Responsible Persons.

57. THIS COURT ORDERS that as security for the obligation of the Applicants to indemnify the Directors and Responsible Persons pursuant to paragraph 56, the Directors and Responsible Persons be and they are hereby granted a fixed lien on, mortgage and hypothec of, and security interest in the Property (the "D&O Charge"), having the priority established by paragraphs 65 and 66. Such D&O Charge shall not constitute or form a trust. Such D&O Charge, notwithstanding any language in any applicable policy of insurance to the contrary, shall only apply to the extent that the Directors and Responsible Persons do not have coverage under the provisions of any applicable directors' and officers' insurance which shall not be excess insurance to the D&O Charge. In respect of any D&O Claim that is asserted against any of the Directors and Responsible Persons, if the Directors and Responsible Persons against whom the D&O Claim is asserted (collectively, the "Respondent Directors") do not receive satisfactory confirmation from the applicable insurer within 21 days of delivery of notice of the D&O Claim to the applicable insurer confirming that the applicable insurer will provide coverage for and indemnify the Respondent Directors against the D&O Claim then, without prejudice to the subrogation rights hereinafter referred to, the Applicants shall pay the amount of the D&O Claim as it becomes payable by the Respondent Directors and, failing such payment, the Respondent Directors shall be entitled to enforce the D&O Charge; provided that the Respondent Directors shall reimburse the Applicants to the extent that they subsequently receive insurance proceeds in

respect of the D&O Claim paid by the Applicants, and provided further that the Applicants shall, in the event of such payment being made, be subrogated to the rights of the Respondent Directors to pursue recovery thereof from the applicable insurer as if no such payment had been made.

Appointment and Powers of the Monitor

58. THIS COURT ORDERS that the Monitor be and it is hereby appointed as officer of this Court to monitor the businesses and affairs of the Applicants with the powers and duties set out herein and in the CCAA until discharged by this Court, and that the Monitor shall:

(a) send notice of the making of this Order, within 10 days after the date hereof, to every known creditor of each Applicant having a claim of more than $250 against it advising that such creditor may obtain a copy of this Order on the internet at the website of counsel for the Applicants (www.mccarthy.ca/en/ccaa (the "Website") and if such creditor is unable to obtain it by that means, such creditor may request a copy from the Monitor and the Monitor shall so provide it. Such notice shall be sufficient to comply with subsection 11(5) of the CCAA;

(b) assist the Applicants, to the extent required by the Applicants, in dealing with their respective creditors and other interested Persons during the Stay Period;

(c) assist the Applicants, to the extent required by the Applicants, with the preparation of its cash flow projections and any other projections or reports and the development, negotiation and implementation of the Plan;

(d) advise and assist the Applicants, to the extent required by the Applicants, in reviewing the Applicants' businesses and assessing opportunities for cost reduction, revenue enhancement and operating efficiencies;

(e) assist the Applicants, to the extent required by the Applicants, with the Restructuring and in their negotiations with their respective creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

(f) report to the Court on the state of the businesses and financial affairs of the Applicants or developments in these proceedings or any related proceedings at such times as required by the CCAA and at such other times as considered appropriate by the Monitor or as the Court may order;

(g) report to the Court and interested parties, including but not limited to affected creditors pursuant to the Plan, with respect to the Monitor's assessment of, and recommendation in respect of, the Plan;

(h) be at liberty to obtain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

(i) be at liberty to engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceedings, under this Order or under the CCAA;

(j) be at liberty to serve as a "foreign representative" of the Applicants in any proceedings outside of Canada;

(k) be at liberty to give any consents or approvals as are contemplated by this Order; and

(l) perform such other duties as are required by this Order, the CCAA or the Court from time to time,

but shall not otherwise interfere with the business carried on by the Applicants, and the Monitor is not empowered to take possession of the Property nor to manage any of the business or affairs of any of the Applicants.

59. THIS COURT ORDERS that the Applicants and their respective directors, officers, employees and agents and all other Persons having notice of this Order shall forthwith provide the Monitor with unrestricted access to all of the Property, including, without limitation, the

premises, books, records, data (including data in electronic form) and all other financial documents of each the Applicants in connection with the Monitor's duties and responsibilities hereunder.

60. THIS COURT ORDERS that the Monitor may provide creditors and other relevant stakeholders of the Applicants with information in response to reasonable requests made by them in writing addressed to the Monitor and copied to the Applicants' counsel. The Monitor shall not have any duties or liabilities in respect of such information disseminated by it pursuant to the provisions of this Order or the CCAA, other than as provided in paragraph 62. In the case of information that the Monitor has been advised by an Applicant is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person without the consent of such Applicant unless otherwise directed by this Court.

61. THIS COURT ORDERS that the Monitor shall not be, nor be deemed to be, an employer or a successor employer of the employees of any of the Applicants or a related employer in respect of any of the Applicants within the meaning of any federal, provincial or municipal legislation governing employment, labour relations, pay equity, employment equity, human rights, health and safety or pensions or any other statute, regulation or rule of law or equity for any similar purpose whatsoever and, further, that the Monitor shall not be, nor be deemed to be, in occupation, possession, charge, management or control of the Property or business or affairs of any of the Applicants pursuant to any federal, provincial or municipal legislation, statute, regulation or rule of law or equity which imposes liability on the basis of such status including, without limitation, the *Environmental Protection Act* (Ontario), the *Canadian Environmental Protection Act*, the *Ontario Water Resources Act* or the *Occupational Health and Safety Act* (Ontario) or similar other federal or provincial legislation.

62. THIS COURT ORDERS that, in addition to the rights and protections afforded to the Monitor under the CCAA, elsewhere in this Order or as an officer of the Court, the Monitor shall not incur any liability or obligation as a result of its appointment, the fulfilment of its duties or its carrying out of the provisions of this Order (including, without limitation, with respect to any report or any information provided to claimants), save and except any liability or obligation arising from the gross negligence or wilful misconduct of the Monitor, and no action or other

proceedings shall be commenced against the Monitor relating to its appointment or its conduct as Monitor or carrying out the provisions of any order of this Court, except with prior leave of this Court, on at least 7 days' notice to the Monitor and its counsel and upon further order securing, as security for costs, the solicitor and his own client costs of the Monitor, if any, in connection with any such action or proceeding and provided further that the liability of the Monitor hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by it in connection with this proceeding. The entities related to or affiliated with the Monitor referred to in paragraph 58(h) shall also be entitled to the protections, benefits and privileges afforded to the Monitor pursuant to this paragraph.

63. THIS COURT ORDERS that the Applicants shall pay the fees and disbursements of each of the Monitor, the CRO, the Monitor's legal counsel, independent counsel to the board of directors of Stelco, the Applicants' legal counsel and the Applicants' financial and other advisers, whether incurred before or after the making of this Order, and shall provide each with a reasonable retainer in advance on account of such fees and disbursements if so requested.

64. THIS COURT ORDERS that the Monitor, the CRO, counsel to the Monitor, independent counsel to the board of directors of Stelco and the Applicants' legal counsel, as security for the professional fees and disbursements incurred both before and after the making of this Order in respect of these proceedings, the Plan and the Restructuring in accordance with the provisions hereof, shall, in addition to the retainers referred to paragraph 63, be entitled to the benefit of and are hereby granted a lien on, mortgage and hypothec of, and security interest in the Property (the "Administration Charge"), having the priority established by paragraphs 65 and 66, and that in the case of the CRO, the Administration Charge shall also apply in respect of any indemnity the Applicants may give to the CRO in respect of the CRO's services to the Applicants (the "CRO Indemnity").

Priorities and General Provisions Relating to CCAA Charges

65. THIS COURT ORDERS that the priorities of the Existing Stelco Lenders Charge, the DIP Lenders Charge, the Stelco Advances Charge, the Administration Charge and the D&O Charge (collectively, the "CCAA Charges"), as between them with respect to any Property to which they apply, shall be as follows:

(a) first, the Administration Charge in respect of all amounts secured thereby other than the CRO Indemnity, up to a maximum amount of $5 million;

(b) second, the Existing Stelco Lenders Charge in respect of the Property of Stelco, Stelpipe and Stelwire subject to the security of the Existing Stelco Lenders in place as of the date hereof (the "Primary Collateral") and the DIP Lenders Charge in respect of all other Property;

(c) third, the DIP Lenders Charge in respect of the Primary Collateral and the Existing Stelco Lenders Charge in respect of all other Property;

(d) fourth, the Administration Charge in respect of the balance, if any, of amounts secured thereby;

(e) fifth, the D&O Charge; and

(f) sixth, the Stelco Advances Charge.

66. THIS COURT ORDERS that each of the CCAA Charges shall rank in priority to any and all other liens, charges, security interests, encumbrances or security of whatever nature or kind (the "Encumbrances") affecting any of the Property, except the following:

(a) existing purchase-money security interests registered in accordance with applicable personal property security legislation and recognized under such legislation as being entitled to priority over the security of the Existing Stelco Lenders in place as of the date hereof;

(b) in respect of any real property, existing (i) zoning, use and building by-laws and ordinances, federal, provincial or municipal by-laws and regulations as to the use of such Property, (ii) notices of lease, (iii) subdivision agreements, site plan control agreements, development agreements, servicing agreements and other similar agreements with municipal and other governmental authorities, and (iv) permits, reservations, restrictions, covenants, servitudes, watercourse, rights of water, rights of access or user licenses, easements, rights-of-way and rights in the nature of easements;

(c) future purchase-money security interests registered in accordance with applicable personal property security legislation and recognized under such legislation as being entitled to the priority of purchase-money security interests, provided the creation of any such security interests has been permitted pursuant to the terms of the Existing Stelco Financing Documents and the DIP Documents; and

(d) Encumbrances in respect of the Property of an Applicant arising by operation of law (other than as a result of a default in payment or performance of an obligation by such Applicant) without any grant of a security interest by such Applicant and that are given priority over prior fixed charges by statute law in the event of the bankruptcy of such Applicant.

67. THIS COURT ORDERS that, except as otherwise expressly provided for herein or in the DIP Documents or the Existing Stelco Financing Documents, the Applicants shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Applicants obtain the prior written consent of the DIP Lenders, the Existing Stelco Lenders and the Monitor and the prior approval of the Court, and any Encumbrances granted by the Applicants contrary to this Order shall be void.

68. THIS COURT ORDERS that each of the CCAA Charges shall attach, as of the Effective Time of this Order, to all present and future Property of the applicable Applicants (including, without limitation, any lease, sub-lease, offer to lease, licence, permit or other contract) notwithstanding any requirement for the consent of the lessor or other party to any such lease, licence, permit or contract or any other Person or the failure to comply with any other condition precedent.

69. THIS COURT ORDERS that the necessity for giving or obtaining any consent or the failure to comply with any condition precedent, each as referred to in the previous paragraph, is hereby dispensed with and the absence of any such consent or fulfillment of condition precedent shall not cause a breach or default under any such lease licence, permit or contract.

70. THIS COURT ORDERS that the DIP Documents, the Accommodation Agreement, the CIBC Confirmation Agreement and the CCAA Charges shall be valid and enforceable and not be

rendered invalid or unenforceable and the rights and remedies of the Existing Stelco Lenders and the DIP Lenders and the other beneficiaries of the CCAA Charges thereunder, as applicable, shall not otherwise be limited or impaired in any way by: (i) the pendency of these proceedings and the declaration of insolvency made herein; (ii) any petition for a receiving order issued pursuant to the BIA in respect of any of the Applicants or any receiving order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of any of the Applicants; or (iii) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing agreement, lease, sub-lease, offer to lease or other arrangement which binds any of the Applicants (a "Third Party Agreement"), and notwithstanding any provision to the contrary in any Third Party Agreement:

(a) neither the creation of any of the CCAA Charges nor the execution, delivery, perfection, registration or performance of the DIP Documents, the CIBC Confirmation Agreement or the Accommodation Agreement shall create or be deemed to constitute a breach by any of the Applicants of any Third Party Agreement to which it is a party; and

(b) none of the DIP Lenders or the Existing Stelco Lenders (and any agent on their behalf) and the other beneficiaries of the CCAA Charges shall have liability to any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges or the execution, delivery or performance of the DIP Documents, the CIBC Confirmation Agreement or the Accommodation Agreement.

71. THIS COURT ORDERS that notwithstanding: (i) the pendency of these proceedings and the declaration of insolvency made in these proceedings, (ii) any petition for a receiving order issued pursuant to the BIA in respect of any of the Applicants and any receiving order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of any of the Applicants, and (iii) the provisions of any federal or provincial statute, the DIP Documents, the CIBC Confirmation Agreement and the Accommodation Agreement shall constitute legal, valid and binding obligations of the Applicants enforceable against them in

accordance with the terms thereof, and the payments or disposition of Property made by the Applicants pursuant to this Order, the DIP Documents or the Accommodation Agreement, and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

72. THIS COURT ORDERS that the beneficiaries of the CCAA Charges shall not be required to file, register, record or perfect the CCAA Charges and that the CCAA Charges shall be valid and enforceable as against all Property of the applicable Applicants and against all Persons (including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of any or all of the Applicants) for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the creation of the CCAA Charges hereby, notwithstanding any failure to file, register, record or perfect the CCAA Charges.

General

73. THIS COURT ORDERS that this Order and the proceedings in this Application leading to the making of this Order, including the contents of any Affidavit filed in this Application, shall not, in and of themselves, constitute or be relied upon in evidence or otherwise as constituting a default or failure to comply by any of the Applicants or any Person owned directly or indirectly by an Applicant under any statute, regulation, licence, permit, contract, permission, covenant, agreement, undertaking or other instrument or requirement.

74. THIS COURT ORDERS that, except as otherwise specified herein, the Applicants are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective addresses as last shown on the records of the Applicants and that any such service shall be deemed to be received on the date of delivery if by personal delivery or electronic transmission, on the following business day if delivered by courier, or three business days after mailing if by ordinary mail.

75. THIS COURT ORDERS that the Applicants may serve any court materials in these proceedings (including, without limitation, application records, motion records, facta and orders) on all represented parties electronically, by emailing a PDF or other electronic copy of such materials (other than any book of authorities) to counsels' email addresses as recorded on the service list, and posting a copy of the materials to the Website as soon as practicable thereafter, provided that the Applicants shall deliver hard copies of such materials to any party requesting same as soon as practicable thereafter.

76. THIS COURT ORDERS that any party in these proceedings (other than the Applicants) may serve any court materials (including, without limitation, application records, motion records, facta and orders) electronically, by emailing a PDF or other electronic copy of all materials (other than any book of authorities) to counsels' email addresses as recorded on the service list; provided that such party shall deliver both PDF or other electronic copies and hard copies of full materials to counsel to the Applicants and the Monitor and to any other party requesting same and the Applicants shall cause a copy to be posted to the Website, all as soon as practicable thereafter.

77. THIS COURT ORDERS that, unless otherwise provided herein or ordered by this Court, no document, order or other material need be served on any Person in respect of these proceedings unless such Person has served a Notice of Appearance on the solicitors for the Applicants and the Monitor and has filed such notice with this Court.

78. THIS COURT ORDERS that the Applicants or the Monitor may, from time to time, apply to this Court for directions in the discharge of their respective powers, duties and rights hereunder or in respect of the proper execution of this Order on notice only to each other.

79. THIS COURT ORDERS that any interested Person may apply to this Court on February 13, 2004 or such later date as this Court may direct, to vary or rescind this Order or seek other relief upon seven (7) days' notice to the Applicants, the Monitor and to any other party likely to be affected by the Order sought or upon such other notice, if any, as this Court may order.

80. THIS COURT ORDERS that this Order and any other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

81. THIS COURT ORDERS that the Applicants be and are hereby authorized and directed to issue their Notice of Application herein forthwith upon the making of this Order.

82. THIS COURT ORDERS that the Monitor, with the prior consent of the Applicants, shall be at liberty and is hereby authorized and empowered to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders in other jurisdictions which aid and complement this Court in carrying out the terms of this Order and any subsequent orders made in these proceedings and, without limitation to the foregoing, for the purposes of obtaining an order under section 304 of the U.S. Bankruptcy Code, the Monitor shall act and be deemed to be the foreign representative of the Applicants. All courts and administrative bodies of all such jurisdictions are hereby respectively requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

83. THIS COURT SEEKS AND REQUESTS the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian Federal Court or administrative body and any Federal or State Court or administrative body in the United States of America and any Court or administrative body in the United Kingdom or elsewhere to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

Registrar

ENTERED AT / INSCRIT À TORONTO
ON/BOOK NO:
LE/DANS LE REGISTRE NO:
JAN 2 9 2004
PER/PAR:

SCHEDULE "A"

APPLICANTS

CHT Steel Company Inc.
Stelco Inc.
Stelpipe Ltd.
Stelwire Ltd.
Welland Pipe Ltd.

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

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT WITH RESPECT TO STELCO INC. AND THOSE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Court File No. 04-CC-5306

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at TORONTO

INITIAL ORDER

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Solicitors for the Applicants

tdo-tic #8657199 v.14

TAB 7

42 C.B.R. (4th) 173

C

2003 CarswellOnt 2464

Air Canada, Re
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended
In the Matter of Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended
In the Matter of a Plan of Compromise or Arrangement of Air Canada and those Subsidiaries Listed on Schedule "A"
Application Under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended
Ontario Superior Court of Justice [Commercial List]
Farley J.
Heard: May 14, 2003
Judgment: May 20, 2003
Docket: 03-CL-4932

Counsel: Alex MacFarlane, Marlo Kravetsky for Bank of Nova Scotia in its capacity as agent for the R/T Syndicate

David R. Byers, Shane Coblin for Air Canada

James C. Tory for Board of Directors

Peter H. Griffin, Monique Jilesen for Monitor

Lyndon A.J. Barnes, Steven G. Golick for GE Capital

Aubrey Kauffman for Certain Bondholders

Richard B. Jones for Air Canada Pilots Association

Murray Gold for C.U.P.E.

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangement Act -- Miscellaneous issues

Creditors applied to amend initial order under Companies' Creditors Arrangement Act by limiting administrative charge to $10 million and limiting directors' indemnity -- Application granted in part -- Applying creditors did

not hold major amount of debt and were supported only by small bondholders -- It was inadvisable to limit administrative charge given magnitude of proceedings -- Sufficient protection was provided by requiring semi-monthly reporting of services and of any threatened lawsuits -- Charge excluded gross negligence and wilful misconduct -- Directors' trust was ordered dedicated firstly to pre-filing liabilities -- It was not appropriate to make same order respecting directors' insurance policy -- There was no significant support for removal of directors at this stage of proceedings -- Each affected director was ordered to contribute five per cent of any amount of charge used for their indemnification to general fund for benefit of creditors.

Cases considered by Farley J.:

> Pepper (Inspector of Taxes) v. Hart (1992), [1993] 1 All E.R. 42, [1993] A.C. 593, [1992] 3 W.L.R. 1032, 65 T.C. 421, [1993] I.C.R. 291, [1992] B.T.C. 591 (U.K. H.L.) -- referred to
>
> Smoky River Coal Ltd., Re, 2000 CarswellAlta 830, [2000] 10 W.W.R. 147, 83 Alta. L.R. (3d) 127, 19 C.B.R. (4th) 281, 2000 ABQB 621, 297 A.R. 1 (Alta. Q.B.) -- followed
>
> United Used Auto & Truck Parts Ltd., Re, 1999 CarswellBC 2673, 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) -- considered
>
> United Used Auto & Truck Parts Ltd., Re, 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) -- referred to

Statutes considered:

Business Corporations Act, R.S.O. 1990, c. B.16

> Generally -- referred to

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

> Generally -- considered

Canada Labour Code, R.S.C. 1985, c. L-2

> Generally -- considered

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

> Generally -- considered

APPLICATION by creditors to amend order made under Companies' Creditors Arrangement Act.

***Farley J.*:**

1 The R/T Syndicate sought the following amendments to the Initial Order:

> (a) to amend paragraphs 51 and 52 of the Initial Order to provide that the indemnity provided to the directors and officers of the Company (the "Directors' Indemnity") and the corresponding charge granted

to the directors and officers (the "Directors' Charge") be limited to claims which arise on or after the date of the Initial Order; and

(b) to amend paragraph 62 of the Initial Order to limit the amount of the Administrative Charge to $10 million without further approval by the Court.

Administrative Charge

2 Allow me to first deal with the Administrative Charge. I am of the view that the views of Tysoe, J. in *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]), affirmed (2000), 16 C.B.R. (4th) 141 (B.C. C.A.) and as commented upon by Michael B. Rotsztain, Case Comment: *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 156 should be analyzed in context. Not only was that *CCAA* application hotly contested as to appropriateness, but as well the "administrative dollar component" when viewed in relation to the values at stake was quite significant. Similarly the aspect of a super priority charge being granted only in exceptional circumstances must be taken in the context and the realization that such charges for a Monitor, its counsel and counsel for an applicant have generally been accepted as falling within this rubric of "exceptional circumstances". R/T Syndicate specifically does not object to there being an Administrative Charge of $10 million and with the priority that charge presently has. What R/T Syndicate objects to is the unlimited but subsequent ranking charge. The only support that R/T Syndicate had for its position as to the Administrative Charge and the Directors' Indemnity and Charge were some unidentified bondholders (the value of whose holdings were not specified) who were described by their counsel as being "Moms and Pops".

3 Given the magnitude and complexity of the Air Canada *CCAA* proceedings and the fact that on April 22, 2003 when this matter first returned to the Court no one present indicated that they would be advantaged by a cratering of Air Canada (and no one has come forward to advise that they have changed their mind), it does not appear that anyone seriously begrudges the Monitor, its counsel and Air Canada's counsel their fees and disbursements. The safety catch factor here as well is that these fees and disbursements are required to be reasonable in the circumstances. While these fees and disbursements are likely to be very substantial, running into the many millions, it seems to me that the only realistic concern is not as to fees and disbursements, but as to liability for negligence. I do not think that it is appropriate in these circumstances for these professionals to be attempting to deal with a myriad of problems of necessity in a quick time real time setting on a forward looking basis while having to be looking over their shoulder to see if anyone is likely to sue. It seems to me that in these circumstances it is sufficient and appropriate to require that these professionals to provide the service list of their accruing fees and disbursements as of the 1st and 15th of each month within two weeks thereof together with any information of actual or threatened lawsuits against them in their Air Canada *CCAA* professional capacity and to have limited the charge so as to exclude gross negligence and wilful misconduct.

4 While this does not track Recommendation 44 of the Reform Proposal of the Insolvency Institute of Canada and Canadian Association of Insolvency and Restructuring Professionals, Joint Task Force on Business Insolvency Law Reform dated March 15, 2002 and presented to the Senate on May 8, 2003, I would note that this recommendation is not yet law. One must have regard for the fact that the professionals are operating in a system where that recommendation has not been adopted by Parliament although it may be in the future and at that time professionals will have to govern themselves within the confines of the new amended regime. However it seems to me that what I have provided incorporates a significant amount of the spirit of the recommendation and further I am satisfied that the prevailing circumstances here warrant that treatment.

Directors' Indemnity and Charge

5 On May 16, 2003, at the hearing I asked counsel to advise whether the bylaws of Air Canada already provided for the indemnity which is incorporated in the Initial Order. That was subsequently confirmed.

6 As there is already an indemnity in place by the bylaws, then the inclusion in the Initial Order would merely be a redundancy. I think it appropriate to extend to these officers and directors the "standard" indemnity as permitted under the corporate legislation such as the *CBCA* or the *OBCA* which allows same, subject to the *proviso* of excluding indemnity for gross negligence and wilful misconduct provided that they acted honestly and in good faith with a view to the best interests of the corporation.

7 I think it fair to observe that the real and substantial concern of the R/T Syndicate and the "Moms & Pops" bondholders was not the indemnity but rather the Directors' Charge as to pre-filing obligations. In this regard I note that it has been accepted that the *CCAA* requires a large and liberal interpretation in order to be effective as a statute which favours and encourages restructuring if that is a viable option. In making that observation I am however mindful of what LoVecchio J. had to say with respect to super-priority status in *Smoky River Coal Ltd., Re*, [2000] A.J. No. 925 (Alta. Q.B.) at paras. 34-6.

8 I am of the view that in the particular circumstances prevailing in this case it is fair to observe that some of the troubles of Air Canada could not reasonably have been anticipated; this year (2003) would have brought the war in Iraq and the SARS outbreak which hit Canada in particular. It is unfortunate that the presently existing structure and operations of Air Canada are set up in such a way as to make reacting to such problems in an effective and timely way quite difficult. One could be of a divided opinion as to responsibility for such structures and operations.

9 While Parliamentary intention was cited as to the liability of directors in the *CBCA* and *Canada Labour Code*, I was given no information which would assist in substantiating that intent, such as statements of underlying government policy in *Hansard* (or otherwise) as approved as an approach in *Pepper (Inspector of Taxes) v. Hart* (1992), [1993] 1 All E.R. 42 (U.K. H.L.).

10 On the other hand, R/T Syndicate points out that there was no evidence submitted that the officers and directors were threatening to resign. However I would observe that that condition may equally be as a result of the directors and officers not shirking their responsibilities by abandoning a ship in need of a stabilizing hand to avoid having it flounder on the reefs.

11 It was suggested that the benefits of the D&O Insurance Policy and the Directors' Trust be first applied to pre-filing obligations. Without involving the D&O insurance carrier in that debate, I would not think that appropriate or possible as to the D&O Insurance Policy. However, absent any "comeback" submissions as to the Directors' Trust, I would be favourably inclined to have the Directors' Trust dedicated firstly to pre-filing liabilities as same may be pressed. This adjustment is to take effect if there are not objections received by May 31, 2003 in this respect.

12 It was advanced by counsel for the Board that the present arrangement in the Initial Order was as a result of a negotiated amendment to the draft Initial Order as negotiated with the major stakeholders. This however has to be tempered by the fact that apparently these negotiations were only with GE Capital and CIBC, both of which by virtue of other arrangements with Air Canada and particularly DIP financing have "special" arrangements and considerations which make this support look less significant as their ox is not being gored, at least to

the same extent as the other affected creditors. However on the other hand the R/T Syndicate (and the "Moms & Pops" bondholders of some indeterminate value) while representing $300 million of claims are not major players. While it would be inappropriate to call the "silent majority" as being truly supportive to a high degree of the Directors' Charge, it is truly significant that R/T Syndicate was only able to engender support from a few ("Moms & Pops") bondholders.

13 Again I would make the same observations *mutatis mutandis* with respect to the fact that no one apparently wishes Air Canada to crater, nor, it would seem, to replace the directors and officers, at least at this stage of the proceedings and restructuring process.

14 Counsel for the Board asserted that it was important for the well being of Air Canada and all affected stakeholders that the board divert its full energy and attention to solving the Air Canada problems and coming up with a successful restructuring but that it would be counter-productive to have them worried about being crushed by overwhelming liabilities. I do recognize that Air Canada presents some significant challenges for those involved in the restructuring process and that the directors and offers could be wiped out in the event that the scales of these problems were tipped only slightly given the large amounts involved. On the other hand, I do not think it appropriate even in these circumstances to in effect give them a free pass as to the $170 million in the Directors' Charge (assuming that such may be sufficient to cover all liabilities which may eventually be looking for a home to roost). As well I have taken note that while the numbers are large in absolute terms, in relative terms the R/T Syndicates $300 million and the Directors' Charge of $170 million are fairly small relative to the overall indebtedness, actual and contingent, of Air Canada. At the same time $170 million is likely in the "crushing liability" range for these people on a joint and several basis.

15 I have been referred to paragraphs 47 and 49 of the Joint Task Force Reform Proposals. Please see *supra* as to my views concerning the inappropriateness of regarding this as existing law now, but recognizing that the Proposals are dealing with valid concerns in cases generally.

16 The Directors' Charge is to respond subsequent to the D&O Insurance and the Director's Trust. Wilful misconduct and gross negligence are excluded.

17 I am of the view that there should be some reasonable exposure to liability assuming that the $170 million would cover all "excess" liability. This exposure will assist in focussing the minds of those affected to dedicate themselves to coming up with a successful restructuring plan which would tend to eliminate liability, with or without a s.5.1 exoneration provision. This exposure is to take the form of a contribution to Air Canada by any affected director or officer of 5% of any amount of the $170 million charge utilized for the protection/indemnification of that person. Such contribution is to go into the general fund for the benefit of creditors, not including the directors and officers.

18 I am of the view that the foregoing as to the Administrative Charge and the Directors' Indemnity and Charge is a fair balancing of the interests and concerns amongst the various stakeholders. Order accordingly.

19 I should also note that I am hereby memorializing my past granted extension of one week to May 28, 2003 as requested by Justice Winkler to accommodate his specific structure involved in his part of the *CCAA* negotiations.

Application granted in part.

END OF DOCUMENT

TAB 8

C.E.B. & P.G.R. 8145, 9 C.B.R. (5th) 159, 45 C.C.P.B. 151

C
2005 CarswellOnt 1078

United Air Lines Inc., Re
In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C. 36, as amended
In the Matter of United Air Lines, Inc. of the State of Delaware, in the United States of America and the other entities listed on Schedule "A"
Ontario Superior Court of Justice [Commercial List]
Farley J.
Heard: February 10, 2005
Judgment: February 26, 2005
Docket: 03-CL-5003

Counsel: Scott A. Bomhof, Marc Lavigne for United Air Lines Inc.

Hugh M.B. O'Reilly for International Association of Machinists and Aerospace Workers ("IAMAW")

Barry Wadsworth for CAW-Canada

Ian Dick for Attorney General of Canada representing the Office of the Superintendent of Financial Institutions ("OSFI")

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Miscellaneous issues

Airline filed for protection under Companies' Creditors Arrangement Act -- Airline was in intensive discussions/ negotiations in US with its American workforce unions and it was continuing to deal with its Chapter 11 proceedings filed in December 2002 -- Airline had, in all countries except for US and Canada, kept up its pension-funding commitments because, under pension and legal structures of those other countries, it had no choice but to do so -- Airline moved for order authorizing it to cease making contributions to its Canadian-funded pension plans -- Motion dismissed -- No evidence either that airline did not have sufficient funds to make pension-funding payments or that its arrangements were such that it could not make such payments -- Canadian unions had not had opportunity to negotiate cessation of pension funding with airline -- Payment of Canadian pension-funding obligations would not cause any particular stress or strain on US restructuring -- Airline was ordered to make good on its pension contribution arrears unless otherwise agreed between its unions.

Pensions --- Payment of pension -- Bankruptcy or insolvency of employer -- General

Airline filed for protection under Companies' Creditors Arrangement Act -- Airline was in intensive discussions/ negotiations in US with its American workforce unions and it was continuing to deal with its Chapter 11 pro-

ceedings filed in December 2002 -- Airline had, in all countries except for US and Canada, kept up its pension-funding commitments because, under pension and legal structures of those other countries, it had no choice but to do so -- Airline moved for order authorizing it to cease making contributions to its Canadian-funded pension plans -- Motion dismissed -- No evidence either that airline did not have sufficient funds to make pension funding payments or that its arrangements were such that it could not make such payments -- Canadian unions had not had opportunity to negotiate cessation of pension funding with airline -- Payment of Canadian pension-funding obligations would not cause any particular stress or strain on US restructuring -- Airline was ordered to make good on its pension contribution arrears unless otherwise agreed between its unions.

Statutes considered:

Pension Benefits Standards Act, 1985, R.S.C. 1985, c. 32 (2nd Supp.)

s. 8(1) -- considered

s. 8(2) -- considered

MOTION by airline under Companies' Creditors Arrangement Act protection for order authorizing it to cease making contributions to its Canadian-funded pension plans.

***Farley J.*:**

1 United Air Lines, Inc. (UAL) moved for an order authorizing it to cease making contributions to its Canadian funded pension plans. It had originally brought on its motion on September 16, 2004 as to which there had been some advance preliminary discussion as to the "necessity" for it having to obtain some relief. The somewhat chaotic circumstances surrounding UAL and its insolvency proceedings in the U.S.A. and elsewhere in all probability contributed to its haste in bringing on the September motion and most certainly with respect to its method of giving notice to its two Canadian unions, the CAW and IAMAW, as well as OSFI. Given the exigencies of the circumstances, while unfortunate that there was not an appropriate length of and "proper" notice, one cannot be too critical of UAL as to providing something better. The CAW and OSFI attended at the September hearing; IAMAW did not in the relative confusion. There was then negotiated among UAL, CAW and OSFI a form of interim order granted by Pepall J. on September 16, 2004. This consent order, as is not uncommon with courtroom-drafted orders, is a little "awkward". It provided that pending the return of the motion, UAL could cease making pension plan funding payments notwithstanding the terms of any previous order or any direction of OSFI. I am of the view that, given that this motion was not brought back on until February 10, 2005, this shows that OSFI and the unions (IAMAW being cognizant of the September 16, 2004 order shortly thereafter) are quite understanding of the financial predicament in which UAL finds itself - and continues to find itself given a number of setbacks especially in its U.S. proceedings situation.

2 UAL as an airline has fallen on hard times. In this regard it is like a number of airlines worldwide both in recent times and at various stages in the past. The unions recognize that they have both long-term and short-term objectives in dealing with an employer - essentially they want a long term stable employer who is able to employ their workers at a fair wage and for this the company must remain in business and be competitive, but also in the short run, they do not wish to see a situation where commitments related to the employment arrangement are neglected. In the latter case, if matters take a turn for the worse, in this subject case, there would be relatively significant pension deficiencies (relative to the size of the Canadian workforce) which would be unsecured claims. In this regard "cash in the bank" is always better than an IOU. At the present time, UAL is no golden

goose; indeed it is a rather bald bird (keeping in mind the taxation principle of plucking the squawking taxpayer) - but it is a bird which the unions have no interest in killing.

3 Allow me to observe a number of practical elements in this situation. UAL is in very intensive discussions/ negotiations in the U.S.A. with its American workforce unions and it is continuing to deal with the morass its insolvency proceedings have become over the time since it commenced its Chapter 11 proceedings in December 2002. It has an international workforce, including that in Canada, of significantly less magnitude. It has in all countries except for the U.S.A. and Canada kept up its pension funding commitments because under the pension and legal structures of those other countries, it had no choice but to do so. UAL has it would seem devoted most of its time and energy to attempting to solve its U.S. based problems. It seems that it has taken the approach as to Canada, both in terms of the pension arrangements - but also with respect to discussions/negotiations as to concessions with its Canadian workforce (e.g. wage cuts or productivity improvement commitments), that this will and must await the outcome of the U.S. situation. On a functional basis, I do not criticize UAL for that approach. Indeed it may be the only practical one available to it. However, the unfortunate outcome of such an approach is that in essence Canada is ignored in the interim. This is contrary to the philosophy of our insolvency proceedings approach which encompasses and balances the many elements including labour relations and balances the competing aspects of those elements - the key to which as to the labour relations element is that the company and the unions actively engage in a dialogue to see if the particular difficulty(ies) may be worked out and the aims of each side be accommodated with some give and take on a rational basis.

4 UAL has not run out of money nor of liquidity, albeit that it must husband its available funds and liquidity in a very prudent manner. However, there is no evidence before me that UAL either (i) does not have sufficient funds to make the pension funding payments or (ii) that its DIP arrangements are such that it cannot make such payments (in this latter (ii) situation, neither is there any evidence that even if it were up against the ceiling of its DIP requirements, that an application was made to the DIP lenders for consent to make such payments).

5 In other situations where a company has been in dire circumstances, it is not uncommon for a union to consent to a deferral of pension funding in order to facilitate the *bona fide* restructuring efforts of an employer (eg. the USWA in Ivaco). However, this is achieved on a consensual basis after negotiation; it is not a "given right" of the company. In the present case, the CAW and IAMAW have attempted to engage UAL in such discussions, but while UAL attended a meeting, it said it could not make any commitment. As UAL put it in its factum when speaking *generally* of its situation in Canada vis-à-vis the U.S.A.:

> 36. United has also commenced discussions with representatives of its unionized workforce in Canada and OSFI with respect to United's Canadian labour issues and pension obligations. However, United has not been in a position to determine its course of action in Canada at this time given that its Chapter 11 emergence business plan, and any further cost cutting measures required thereunder, cannot be finalized until its substantial U.S. labour and pension issues are resolved.

As discussed above, fair enough, the tail cannot be expected to wag to dog. But the dog must appreciate that it has a tail.

6 Allow me to make a further observation as to the difference between Canada and the U.S.A. In the U.S.A., the parties are dealing under an umbrella which most significantly includes the Pension Benefits Guarantee Corp. which generally protects the workforce/pensioner side in an insolvency where there is a pension deficit. In Canada, in this federally regulated situation, there is no such backstop; the workforce/pensioners are naked.

While I appreciate that as UAL points out, the pensioners in Canada continue to receive their pension cheques, that is as it should be. However, the result of that equation is that with all outflow from the fund and no inflow, it is not realistic to think that the investment income side will radically improve so that the pension deficit does not become larger with every pension cheque mailed, thereby weakening the pension fund to the detriment of future calls on it by existing pensioners and new pensioners upon retirement from the active workforce.

7 As discussed above, the relative size of the Canadian problems vis-à-vis the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring - given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would have paid premiums) but there being no such safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

8 In the end result on the basis of fairness and equity, I find no reason to excuse UAL from its obligation to fund its pension funding commitments in Canada and I therefore direct it to resume such funding.

9 I would also note that OSFI is at liberty to, if it feels it necessary, request a lift of stay so that it may issue a direction if it thinks that warranted (as opposed to the mere demand of September 3, 2004; the direction having a legal consequence).

10 I recognize that with the effluxion of time, the pension funding arrears have mounted up and therefore are greater than the interim payments at any one time which you would have in a pay as you go situation. It may therefore be desirable for UAL and its unions (with or without the assistance of OSFI) to have discussions about the mechanics of such payment regarding funding of arrears; including a schedule if necessary or desirable and the question of future obligation payments. However, recognizing the dog and its tail problem, it is conceivable that UAL would continue to conclude that it would not be practicably feasible to do so. Thus if no such arrangement is put in place by March 31, 2005, all arrears are to be paid up by April 1, 2005. I would note the definite difference between "suspend" and "cease".

11 What then of the s. 8(2) *Pension Benefits Standards Act*, R.S.C. 1985, c.32 (2nd Supp)? It provides as follows:

> 8(2) In the event of any liquidation, assignment or bankruptcy of an employer, an amount equal to the amount that by subsection (1) is deemed to be held in trust shall be deemed to be separate from and form no part of the estate in liquidation, assignment or bankruptcy, whether or not that amount has in fact been kept separate and apart from the employer's own moneys or from the assets of the estate.

I agree with the submissions of UAL as set out in its factum at para. 85:

> 85. Also, United submits that there are a number of issues which raise doubts about the application of the deemed trust set out in subsection 8(2) of the PBSA to the current situation. In particular, subsection 8(2) states that a deemed trust arises where there is a "liquidation, assignment or bankruptcy" of an employer. None of the parties to this motion have provided any evidence that United (the employer) is in liquidation, has made an assignment or is in bankruptcy.

However, UAL should also keep in mind the provisions of s.8(1):

8(1) An employer shall ensure, with respect to its pension plan, that

(a) the moneys in the pension fund,

(b) an amount equal to the aggregate of the prescribed payments that have accrued to date, and

(c) all

(i) amounts deducted by the employer from members' remuneration, and

(ii) other amounts due to the pension fund from the employer that have not been remitted to the pension fund

are kept separate and apart from the employer's own moneys, and shall be deemed to hold the amounts referred to in paragraphs (a) to (c) in trust for members of the pension plan, former members, and any other persons entitled to pension benefits or refunds under the plan.

This of course may have fall out for officers and directors as to whom no stay protection is available.

12 In the end result, I dismiss the UAL motion to cease making contributions to its pension plans involving its Canadian workforce but rather to make good on its arrears unless otherwise agreed between its unions (who will have to keep in mind that UAL at some stage will come calling for concessions if it gets its U.S.A. house in order) and OSFI.

13 OSFI itself did not request a lift of stay vis-a-vis itself and so I do not find it appropriate to deal with the unions' request that I do so. OSFI is well able to speak for itself in this regard. It made no such motion; nor did it refer to same in its factum.

14 Orders accordingly (this endorsement also deals with the motions of the CAW and IAMAW).

15 All parties to this motion - UAL, the unions and OSFI - are labouring under the difficulties of fulfilling their valid legitimate mandates at a time where functionally there are pressing financial problems, compounded by UAL's being functionally distracted from Canada (and elsewhere) by the necessity of having to deal with its U.S.A. problems on a prioritized basis. I appreciate their difficulties. I would also wish to express my appreciation for the thorough and helpful submissions I received from counsel as they attempted to deal with their own clients' difficulties in dealing effectively with this situation on both a legal and functional basis.

Motion dismissed.

END OF DOCUMENT

TAB 9

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No : 500-11-036133-094

DATE : **MAY 8, 2009**

PRESENT : THE HONOURABLE Mme JUSTICE DANIÈLE MAYRAND, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF :

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other petitioners listed in Schedules "A", "B", "C" and "D"
Petitioners
And
Ernst & Young Inc.
Intervenor

REASONS FOR JUDGEMENT PRONOUNCED ON THE BENCH ON A MOTION FOR AUTHORIZATION TO SUSPEND CERTAIN PAYMENTS TO PENSION PLANS MAINTAINED BY PETITIONERS (#37)

THE CONTEXT

[1] AbitibiBowater Inc. and its affiliated companies are asking the Court to suspend the payment of certain contributions to the pension plans of its subsidiaries Abitibi (20) and Bowater (13).

[2] At the time of the motion for issuance of an initial order, the judge responsible for supervision of the present file postponed this specific motion, contained in paragraphs 22 and subsequent of the initial application, before the undersigned and after interested parties were advised of the matter.

[3] In support of its motion, presented pursuant to s. 11(3) and (4) of the *Companies' Creditors Arrangement Act* (CCAA)[1], *Abitibi* argues that should it continue to make payments for past services and special payments (special payments for the purposes of this judgment) to the pension funds, it will be incapable of proceeding with its restructuring because it will have insufficient cash, even when taking into account the DIP financing that it has been granted.

INTERVENORS

[4] Both the Monitor and the *ad hoc* committee, which represents unsecured creditors with claims of up to $3 billion, and the DIP lender *Fairfax Financial Holdings Ltd.*, which lent $40 million to *Bowater*, support this motion submitted by *Abitibi*.

[5] The *Communications, Energy and Paperworkers Union of Canada* (CEP), the *Syndicat des employés professionnels et de bureau* (SEPB), as well as the *Fédération des travailleurs et travailleuses du papier et de la forêt* are contesting it.

[6] The regulators in charge of enforcing the laws applicable to the pension plans affected by the present motion, namely the *Régie des rentes du Québec*, the *Financial Services Commission of Ontario*, the *Superintendant of Pensions of British Columbia* and the *Superintendant of Pensions of Canada* are also intervening.

[7] They are not supporting or contesting the motion. They are considering, however, that in the event that the special payments are suspended, these cannot become an object of compromise during the restructuring. At their request, *Abitibi* agreed to the addition of the following conclusion:

> Nothing in this order shall be taken to extinguish or compromise the obligations of the Petitioners or Partnerships, if any, regarding payments under the Pension Plans.

[8] Counsel for these organizations has, furthermore, informed the Court that they are preparing to file a motion to establish the current service contributions in a manner different than that of *Abitibi*.

PROLOGUE

[9] At this time, further details must be provided in order to better understand the issues argued by the parties. Indeed, there is a distinction between the financing of a pension plan and the rights and benefits that it provides.

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[1] *Companies' Creditors Arrangement Act* (R.S.C., 1985, c. C-36)

[10] The motion for suspension involves a portion of the legal and contractual obligations of *Abitibi* with respect to the funding of the pension plans that it implemented for the benefit of its employees and for which it has the obligation to make up any actuarial difference.

[11] In other words, *Abitibi* is not asking to modify the terms of the pension plans or the collective agreements, but instead to suspend the execution of a part of its financing obligations, namely the payment of the special contributions. There is no question of suspending the current contributions, meaning for current service, that *Abitibi* will continue to make during the restructuring.

THE SPECIAL PAYMENTS

[12] The size of the amounts in question is considerable.

[13] Actuarial valuations conducted for each pension plan identify the actuarial deficits and the payments to be made. These valuations are necessary in order to take into account the performance and the fluctuations of the pension fund and the events that arise over the course of the plan.

[14] According to these actuarial valuations, at the time of the initial application, the solvency deficit (assuming the pension plans terminated today) is of the order of $1.383 billion for the aggregate of all the pension plans of *Abitibi* and *Bowater.*

[15] The special payments aim to make up the solvency deficit of the pension fund and are amortized over a period of five years.

[16] The solvency deficit of the *Abitibi* plan is $962 million. For the *Bowater* plan, it reaches $419 million. One must add to this the actuarial deficit of approximately $70 million pursuant to improvements made to the pension plans which came into effect on May 1, 2009, that Justice Gascon refused to modify in his judgment of May 4.

[17] According to the report of the monitor and the testimony of the actuary overseeing the plans, the special payments, required to amortize the solvency deficit over a period of five years, are $102.4 million per year for *Abitibi* ($8.5 million per month) and $56.9 million per year for *Bowater* ($4.7 million per month), for a total monthly payment of $13.2 million.

CURRENT SERVICE CONTRIBUTIONS

[18] These consist of payments required by *Abitibi* for the purposes of financing the current service of its active employees. They are $43.7 million per year, $28.6 million for the *Abitibi* plan and $15.1 million for the *Bowater* plan.

[19] To this must be added the payment of $400 000 for all plans in effect since May 1, 2009.

[20] Abitibi will continue to make these payments to the pension plan during the restructuring.

THE ISSUES

[21] Three issues are in dispute in the present case, namely:

1) Does the Superior Court have jurisdiction?

2) Are the special payments aimed at rectifying a deficit for services rendered prior to the application for an initial order?

3) If yes, is it thus appropriate, in the circumstances, to suspend the special payment for the period of restructuring?

ANALYSIS

1. Does the Superior Court have jurisdiction?

[22] The objectives of the CCAA were expressed by Justice Gascon[2] in the judgment he rendered on May 4 in the present case. The court fully agrees with this meaning and endorses what he set out in paragraphs 3 to 14 of his judgment.

[23] The Court adds that the CCAA was introduced in 1933, during the Great Depression, to deal with the global economic crisis. Used frequently at the outset, it thereafter entered a quiet period. Nevertheless, in the last twenty years it has enjoyed a remarkable resurgence. Many doubted the relevance of returning to this unique law in the context of a more flourishing economy. In the face of international economic and financial chaos, it can be said today without a doubt that this legislation has regained its stature.

[24] Addressing now the issue of the jurisdiction of the Court pursuant to the CCAA, the nature and the scope of the desired conclusions must be understood.

[25] The Court reiterates that the benefits and advantages that flow from the pension plans and that form part of the collective agreements cannot be unilaterally modified. This issue was already resolved by the Court of Appeal of Quebec in three different cases: *Mine Jeffrey*[3], *Uniforet*[4] and *TQS*[5]. Justice Gascon confirmed it once again on May 4, in the present case.

[26] The application concerns the financing of the pension plans. Effectively, *Abitibi* is asking to suspend its obligation to finance in part the pension plans, by suspending its special payments.

[27] The Superior Court has jurisdiction to decide if there is reason to order the suspension of the special payments to the fund of a supplemental pension plan. This is not a new issue and has been ruled upon by courts in both Quebec and Canada.

[28] In *Mine Jeffrey*[6], the debtor had obtained protection under the CCAA in order to restructure. The Court of Appeal of Quebec decided that the employer could not unilaterally modify the collective agreement, but granted the request to suspend special payments during the restructuring period.

[29] The suspension of special payments was also ordered in *Papiers Gaspesia*[7] by Justice Chaput of this Court.

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[2] May 4, 2009 judgment of Justice Clément Gascon on the motion for declaratory judgment, in the present case.
[3] *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.* [2003] R.J.Q. 420 (C.A.).
[4] *Unifôret inc. c. 9027-1875 Québec inc.* [2003] R.J.Q. 2073 (C.A.).
[5] *Syndicat des employées et employés de CFAP-TV (TQS-Québec), section locale 3946 du Syndicat canadien de la fonction publique c. TQS inc.*, J.E. 2008-1578 (C.A.) [2008] QCCA 1429.
[6] Ibid note 3.
[7] *Papiers Gaspésia inc.* [2004] Cam: 00 40296 (QC S.C.).

[30] More recently, in *Collins v. Eickman Automotive Canada Inc.*[8], Justice Spence of the Superior Court of Ontario conducted an exhaustive review of the Canadian jurisprudence on the issue (including the judgment of the Court of Appeal in *Mine Jeffrey*)[9].

[31] Justice Spence highlights the important distinction between the rights that flow from a collective agreement, particularly those set out in the pension plan, and the performance of obligations to give them effect. From a jurisdictional point of view, he adds that, despite the provincial statutory framework that obliges the employer to make special payments on an as-needed basis, such payments still remain claims that can be suspended and that will be addressed once the protection offered by the CCAA has ended.

[32] The Court shares this opinion and henceforth considers that it has jurisdiction to settle the issue that is before it.

[33] Before approaching the second issue at hand, it is necessary to respond to one of the submissions of the unions. They claim that pension plan participants have a distinct status and that they should thus be treated differently from other creditors.

[34] With all due respect, whether by virtue of the CCAA or s. 49 of the *Supplemental Pension Plans Act* (SPPA)[10], the creditors involved are ordinary creditors, that the legislator did not choose to protect in the context of the present restructuring. The wording of s. 49 of the SPPA is not sufficient in itself to imply that a genuine trust having priority over other creditors is created. Furthermore, the Court of Appeal of Ontario, in *Ivaco*[11], while deciding on the scope of s. 57(3) of the *Pension Benefit Act*[12] (the terms of which are to the same effect as those of s. 49 of the SPPA), states the following with respect to deemed trusts:

> *[...] This Legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account, it must legislate that separation. It has not done so.*

[35] While it is true that s. 81.5 of the *Bankruptcy and Insolvency Act* (BIA) sets out a super priority for employee contributions that are deducted at source by the employer and the current contributions that the employer must make to the pension plan for current service, the BIA is nevertheless not applicable in this instance.

[36] For one thing, the restructuring is conducted pursuant to another statute that does not set out such a priority and, for another, this priority does not contemplate special payments, since it is limited to deductions at source and current service contributions.

2. Are the special contributions aimed at reversing a deficit incurred for services rendered prior to the motion for an initial order?

[37] Under s. 11(3) of the CCAA, the initial order cannot suspend the rights or claims that result from obligations related to goods and services supplied after the initial order.

[38] The unions allege that the special contributions are aimed at satisfying obligations that flow from services rendered by employees after the motion for initial order.

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[8] *Collins & Aikman Automotive Canada Inc. (Re)* [2007] O.J. N° 4186 (Ont. S.C.).
[9] Ibid note 3.
[10] R.S.Q., c. R.-15.1.
[11] *Ivaco Inc. (Re)*, 2006-275 D.L.R. (4th) 132 (Ont. C.A.) paragr. 46.
[12] R.S.O. 1990 c. P.8.

[39] With all due respect, this argument has no basis.

[40] The unions base themselves on a comment by Justice Farley of the Superior Court of Ontario who, in *Ivaco*[13] in the first instance, said as follows:

> *Notwithstanding that past service contributions could be characterized as functionally a pre-filed obligation, legally, the obligation pursuant to the applicable pension legislation is a "fresh obligation".*

[41] With respect, this assertion is not determinative and furthermore was removed by Justice Spence in *Collins*[14], who wrote as follows:

> *The amount of the outstanding special payments in the present case appears to have been determined prior to the initial order based on information relating to the pre-filing period.*

[42] Further along, he adds:

> *It is not apparent that the continuation of the operation of the applicant in the post-filing period has given rise to the increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-fling experience.*
>
> *Consequently, it seems tendentious to characterize the outstanding special payments as the cost of operating in the post-filing period.*

[43] In the case at hand, the actuarial valuations, that determined the amount of the special payments and for which suspension is being requested, all originate prior to the motion for the initial order. Furthermore, the actuarial valuation of the *Régime de retraite applicable aux employés syndiqués de la compagnie Abitibi-Consolidated Company of Canada*, by far the largest, is dated December 2, 2006.

[44] As in *Papiers Gaspésia*[15] and *Mine Jeffrey*[16], the suspended special payments were identified prior to the filing of the motion for initial order and are not outstanding for services rendered after the filing of the motion.

3. <u>If yes, is it appropriate, in the circumstances, to suspend payment for the restructuring period?</u>

[45] Although the Court, which supervises and is called upon to adjudicate issues in the context of a restructuring of this scope, enjoys vast judicial discretion, this discretion still has its limits.

[46] Judicial discretion must be exercised in compliance with existing laws that the Court cannot modify.

[47] The core objective of the CCAA is to allow the company to emerge from its slump and to come to a possible agreement with its creditors. To accomplish this goal, the support, and even the sacrifice of all the stakeholders is essential.

[13] *Ivaco Inc. (Re)* [2005] O.J., No 3337 (Ont. S.C.) paragr. 4.
[14] Ibid note 8, paragr. 103.
[15] Ibid note 7.
[16] Ibid note 3.

[48] The conflict arises here between *Abitibi*, insolvent and confronted with a global economic crisis, its ordinary creditors who support it and its employees.

[49] The consequences of the measures sought and contested by the two groups are significant. If *Abitibi* cannot restructure because the special payments it is making are jeopardizing its survival, then this raises the danger of a closing of the business, the loss of jobs, the termination and the liquidation of the pension plans.

[50] The actuary testifies that as of the date of the motion for initial order, the solvency of the plans was at about 75%. This means that in the case of termination, the benefits payable would be discharged to a maximum of this percentage.

[51] Furthermore, *Abitibi*, together with all of its creditors, employees, lenders and suppliers, can meet this challenge and emerge from the deadlock by agreeing to an arrangement to put the business back on its feet, in the short or long term. Conditions for the reimbursement of the suspended payments could be agreed upon with the backing of the proper authorities. This will take place at a different stage.

[52] In the interim and in the absence of an agreement between the parties, the Court must rule on the third issue: whether the financial situation of *Abitibi* warrants suspension of the special payments.

[53] According to the monitor's representative, the restructuring is doomed to fail if the $13 million monthly payments are made. He filed, with his report, the cash flow projections between now and July 19, 2009, for both *Abitibi* and *Bowater*.

Bowater

[54] At the time the initial order was made, *Bowater* obtained bridge financing of $40 million from *Fairfax*, in order to permit the company to continue its current activities, as well as pay suppliers of goods and services, from the date of the motion for the initial order.

[55] *Fairfax* indicated to the Court that this financing was extended in order to finance current activities of *Bowater* and could not be used towards the payment of special contributions to the pension plans. The financing is also subject to the respect of certain solvency ratios.

[56] Although the filed forecasts include the $40 million financing from *Fairfax* and omit the monthly special payments of $4.7 million, they demonstrate the precarious financial position of *Bowater* in the short term.

[57] In July 2009, only $17.773 million will be left to maintain the *status quo*, continue the operation of the business and fuel its restructuring. If it had to make the special payments due since March 31, 2009, the result is evident: there would be no cash left.

Abitibi

[58] *Abitibi*'s situation is not any better. It was only yesterday that the company received "in extremis" temporary financing of $100 million. In fact, the amounts available to *Abitibi* from this financing represent at the most $87 million. The lender stipulated that the funds be utilized for

the sole purpose of maintaining current activities, and imposed solvency ratios that will not be satisfied if *Abitibi* must make the payments at issue.

[59] In the end, the name says it, the financing is temporary. It must be reimbursed in November 2009, pursuant to the sale of assets by the company.

[60] Apart from the DIP financing and the monthly contribution payments of $8.5 million, the forecasts filed for the period up to July 19, 2009 leave cash of $70 million. This does not include the additional payments for current service required for the current service contributions following the modifications that came into force May 1, 2009.

[61] As the monitor clearly explained in his report and testimony, *Abitibi* does not have enough leeway. The business needs oxygen in order to face the upcoming crucial months of restructuring. The Court refers particularly to paragraphs 42 to 51 and 57 to 60 and 63 of the third report of the monitor.

[62] It is thus necessary to suspend payment of the special contributions.

[63] Furthermore, after analysis, the Court will grant the conclusion identified as being paragraph 23, as well as that of paragraph 24, upon which the parties have agreed.

[64] Since the present judgment modifies the initial order drafted in English, the order is set forth in English.

FOR THESE REASONS, THE COURT :

1. **GRANTS** the Motion for Authorization to Suspend Certain Payments to Pension Plans Maintained by the Petitioners (N° 37).

2. **AMENDS** as follows the Initial Order issued by this Court in this matter on April 17, 2009, as amended on April 22 and May 6, 2009 by adding these paragraphs after Paragraph 21 of the Initial Order :

   [22] **ORDERS** that notwithstanding any other provision of this Order, the Petitioners and the Partnerships shall not make any past service contributions or special payments to funded pension plans maintained by the Petitioners or the Partnerships (the "Pension Plans") during the Stay Period, pending further order of this Court.

   [23] **ORDERS** that none of the Petitioners or the Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any Person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any Pension Plans maintained by a Petitioner or by a Partnership.

TAB 10

63 C.C.P.B. 125, 37 C.B.R. (5th) 282, 161 A.C.W.S. (3d) 675

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2007 CarswellOnt 7014

Collins & **Aikman Automotive Canada Inc.**, Re
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 or Arrangement of COLLINS & **AIKMAN AUTOMOTIVE CANADA INC.**
APPLICATION UNDER the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
Ontario Superior Court of Justice
Spence J.
Heard: September 20, 26, 2007
Judgment: October 31, 2007
Docket: 07-CL-7105

Counsel: M.E. Bailey for Superintendent of Financial Services (Ontario)

K.T. Rosenberg, M.C. Starnino for United Steelworkers

C.E. Sinclair for National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW -- Canada)

R.J. Chadwick for Ernst & Young Inc., as Monitor of Collins & Aikman Automotive Canada Inc.

A.J. Taylor, K.L. Mah for Collins & Aikman Automotive Canada Inc.

J.E. Dacks for JP Morgan Chase Bank NA

C.J. Hill for Chrysler LLC

Subject: Insolvency; Corporate and Commercial; Labour and Employment; Public

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Miscellaneous issues

Motions to amend initial order -- Insolvent company filed under Companies' Creditors Arrangement Act ("CCAA") -- Company's customer became debtor in possession ("DIP") lender pursuant to funding agreement between creditors -- Court issued initial order under CCAA -- Para. 4 of initial order authorized company to retain further assistants if necessary -- Para. 6 provided that company was "entitled but not required" to make special payments to employee pension plans ("special payments") -- Para. 11 authorized company to terminate employees by agreement with other parties or, failing such agreement, to deal with consequences under CCAA -- Para. 26 provided that monitor, by fulfilling obligations under initial order, would not be deemed to be employer of company's employees -- Para. 29 immunized monitor

from liability save for gross negligence or wilful misconduct -- Some months after initial order was issued, certain paragraphs were challenged by Superintendent of Financial Services and unions representing company's employees -- Superintendent and unions brought motions seeking various relief -- Motions dismissed -- Para. 4 did not provide that further hirings could breach collective agreements -- If hirings did so, aggrieved parties could apparently seek relief under CCAA -- Phrase "not required" in para. 6 did not give company carte blanche to withhold payments contemplated by initial order -- Effect of para. 6 was to exempt company from making special payments otherwise required by pension benefits regime -- If company failed to use funds available under DIP facility for purposes indicated in CCAA proceeding, that might found motion for relief -- Even if "not required" provision abrogated pension plan statutory law, court had jurisdiction to do so -- CCAA granted court jurisdiction to override express provincial statutory provision where doing so would contribute to carrying out protective function of CCAA -- It was inappropriate for court to exercise its discretion under CCAA to delete "not required" provision, or to order company to make special payments -- This would be contrary to reasonable expectations of company and DIP lender -- DIP lender had changed its position on basis of existing court orders -- Amending special payment provisions could pressure DIP lender to increase funding or risk loss of continuing operations -- There had been no objections regarding special payments at time of initial order -- Union's position, that para. 11 of initial order should be made subject to applicable collective agreements and labour laws, was rejected -- Para. 11 did not purport to abrogate collective agreement or labour laws -- No reason was advanced why union could not withhold agreement to company's proposed exercise of para. 11, or pursue matter in court under CCAA -- Para. 26 was not inconsistent with jurisdiction of board under Labour Relations Act ("LRA") to determine whether monitor was successor employer -- Initial order did not purport to determine application of LRA -- Application of para. 26 was limited to monitor's role under initial order -- Court had jurisdiction to grant limitation of liability as set out in para. 29 -- Wording in para. 29 was consistent with limitation of liability given to monitors under standard form model CCAA initial order.

Pensions --- Administration of pension plans -- Valuation and funding of plans -- Deficiency

Insolvent company filed under Companies' Creditors Arrangement Act ("CCAA") -- Company's customer became debtor in possession ("DIP") lender pursuant to funding agreement between creditors -- Court issued initial order under CCAA -- Para. 6 provided that company was "entitled but not required" to make special payments to employee pension plans ("special payments") -- Some months after initial order was issued, certain paragraphs were challenged by Superintendent of Financial Services and unions representing company's employees -- Superintendent and unions brought motions seeking various relief -- Motions dismissed -- Phrase "not required" in para. 6 did not give company carte blanche to withhold payments contemplated by initial order -- Effect of para. 6 was to exempt company from making special payments otherwise required by pension benefits regime -- If company failed to use funds available under DIP facility for purposes indicated in CCAA proceeding, that might found motion for relief -- Even if "not required" provision abrogated pension plan statutory law, court had jurisdiction to do so -- CCAA granted court jurisdiction to override express provincial statutory provision where doing so would contribute to carrying out protective function of CCAA -- It was inappropriate for court to exercise its discretion under CCAA to delete "not required" provision, or to order company to make special payments -- This would be contrary to reasonable expectations of company and DIP lender -- DIP lender had changed its position on basis of existing court orders -- Amending special payment provisions could pressure DIP lender to increase funding or risk loss of continuing operations -- There had been no objections regarding special payments at time of initial order.

Annotation

When Air Canada filed for bankruptcy protection under the *Companies' Creditors Arrangement Act* (the "CCAA") in 2003, there existed virtually no judicial guidance as to how issues surrounding its underfunded pension plans would be

treated under the CCAA. But the spate of employer insolvencies and pension plan deficits in the four years since (Slater Steel, Stelco, United Air Lines, Ivaco, General Chemical, etc.) has resulted in many of the issues at the intersection of insolvency law and pension law having been litigated and, for now at least, resolved. *Collins & Aikman* is the latest decision to answer one of the questions as to how to deal with pension issues in a CCAA restructuring.

The issue in *Collins & Aikman* was the validity of the employer decision to suspend special payments (i.e. contributions to pay down pension plan solvency deficits) on the basis of a provision in the initial CCAA court order stating that the company could, but need not, make pension plan contributions while under CCAA protection. The suspension of the special payments (but not current service contributions, which have continued to be remitted) was a condition of the interim financing designed to keep the insolvent company afloat during its restructuring, the terms of which financing were approved by the court. Neither the Ontario pension regulator nor the union opposed the financing, but they subsequently challenged the suspension of the special payment remittances to the pension plans.

The Ontario Superior Court held that the regulator and union could not have their cake and eat it too, i.e. they could not give the company the benefit of the interim financing while not allowing it to meet a key condition for that financing. Thus the validity of the "pension contribution suspension" provision in the initial CCAA order, which has become a relatively standard feature of such orders over the past few years, has been upheld, to the general relief of employers, financial institutions, and many other classes of CCAA stakeholders.

However, the decision is not necessarily a blanket endorsement of such provisions. To begin with, it is unclear whether the decision would automatically have been the same had the suspension of special payments not been a prerequisite to the court-approved financing. Second, the court held out the possibility of the regulator and/or the union being able to challenge the continued validity of the suspension at future stages in the CCAA process; whether such future challenges might be successful is, of course, another matter entirely. And finally, the union has appealed the Superior Court decision to the Ontario Court of Appeal, so this decision will not be the last judicial word on the issue.

Gary Nachshen

Cases considered by *Spence J.*:

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) -- considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, [2006] 2 S.C.R. 123, 215 O.A.C. 313, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, 2006 SCC 35, 351 N.R. 326, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193 (S.C.C.) -- considered

Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia (2007), 2007 C.L.L.C. 220-035, 363 N.R. 226, [2007] 7 W.W.R. 191, D.T.E. 2007T-507, 65 B.C.L.R. (4th) 201, 283 D.L.R. (4th) 40, 137 C.L.R.B.R. (2d) 166, 2007 SCC 27, 2007 CarswellBC 1289, 2007 CarswellBC 1290 (S.C.C.) -- considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKQB 121, 2007 CarswellSask 157, 33 C.B.R. (5th) 39 (Sask. Q.B.) -- considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 Carswell-

Sask 324, [2007] 9 W.W.R. 79, 33 C.B.R. (5th) 50 (Sask. C.A.) -- referred to

Ivaco Inc., Re (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]) -- considered

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) -- referred to

Ivaco Inc., Re (2007), 2007 CarswellOnt 2855, 2007 CarswellOnt 2856, [2006] S.C.C.A. No. 490 (S.C.C.) -- referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) -- considered

Mine Jeffrey inc., Re (2003), 35 C.C.P.B. 71, 2003 CarswellQue 90, 40 C.B.R. (4th) 95, [2003] R.J.D.T. 23, (sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.)* [2003] R.J.Q. 420 (Que. C.A.) -- considered

Richtree Inc., Re (2005), 2005 CarswellOnt 255, 13 C.B.R. (5th) 111, 10 B.L.R. (4th) 334, 7 C.B.R. (5th) 294, 74 O.R. (3d) 174 (Ont. S.C.J. [Commercial List]) -- considered

Stelco Inc., Re (2005), 253 D.L.R. (4th) 109, 75 O.R. (3d) 5, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 2005 CarswellOnt 1188, 196 O.A.C. 142 (Ont. C.A.) -- considered

Sulphur Corp. of Canada Ltd., Re (2002), 2002 CarswellAlta 896, 2002 ABQB 682, [2002] 10 W.W.R. 491, 5 Alta. L.R. (4th) 251, 319 A.R. 152, 35 C.B.R. (4th) 304 (Alta. Q.B.) -- considered

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) -- considered

United Air Lines Inc., Re (2005), (sub nom. *United Air Lines Inc. (Bankrupt), Re)* 2005 C.E.B. & P.G.R. 8145, 2005 CarswellOnt 1078, 45 C.C.P.B. 151, 9 C.B.R. (5th) 159 (Ont. S.C.J. [Commercial List]) -- considered

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Generally -- referred to

Builders Lien Act, S.B.C. 1997, c. 45

Generally -- referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 2(d) -- referred to

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

Generally -- referred to

s. 11 -- considered

s. 11(1) -- considered

s. 11(3) -- considered

s. 11(4) -- considered

s. 11(6) -- considered

s. 11.3 [en. 1997, c. 12, s. 124] -- considered

s. 11.3(a) [en. 1997, c. 12, s. 124] -- considered

s. 11.8(1) [en. 1997, c. 12, s. 124] -- considered

s. 18.6 [en. 1997, c. 12, s. 125] -- referred to

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

Generally -- referred to

s. 69 -- considered

s. 69(1) -- considered

s. 69(2) -- considered

s. 69(12) -- considered

s. 111 -- referred to

s. 116 -- considered

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally -- referred to

s. 55(2) -- considered

s. 75 -- considered

Regulations considered:

Pension Benefits Act, R.S.O. 1990, c. P.8

General, R.R.O. 1990, Reg. 909

Generally -- referred to

s. 4(2) -- considered

s. 5(1)(b) -- considered

s. 5(1)(e) -- considered

s. 31 -- considered

MOTIONS by labour unions and Superintendent of Financial Services to amend intial order made with respect to insolvent company under *Companies' Creditors Arrangement Act*.

***Spence J.*:**

1 Each of the three moving parties, the Superintendent of Financial Services, the USW and the CAW -- Canada, seeks relief relating to the Initial Order made by this Court under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") on July 19, 2007 (the "Initial Order") with respect to Collins & Aikman Automotive Canada Inc. ("Automotive" or the "Applicant").

2 On July 19, 2007, Collins & Aikman Automotive Canada Inc. ("Automotive") filed for protection from its creditors pursuant to the CCAA. The Applicant is insolvent. It was clear at the time of the CCAA filing that Automotive would not be able to reorganize and the Court was informed by counsel to Automotive and the Monitor that this proceeding is effectively a liquidation. The Court is advised that the CCAA is being utilized by the Applicant to attempt to maximize the potential recovery for the benefit of all creditors by creating the opportunity to attempt to sell some or all of its remaining operating facilities on a going concern basis.

3 Chrysler LLC (previously known as DaimlerChrysler Company LLC) ("Chrysler") is Automotive's largest remaining customer. In order to provide Automotive with the stability to pursue the sale of its facilities, Automotive, Chrysler, the U.S. Debtors and JPMorgan Chase Bank, N.A. as Agent for the U.S. Debtors' pre-petition secured creditors negotiated a comprehensive funding agreement whereby Chrysler (the "DIP Lender") will fund the costs of this CCAA filing.

4 The relief sought by the moving parties concerns, *inter alia*, the pension plans of Automotive. The Superintendent advises that Automotive maintains seven pension plans which are registered in Ontario,

The Impugned Provisions of the Initial Order

Paragraph 4

5 Paragraph 4 of the Initial Order provides as follows:

> Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

The USW is concerned that, as presently worded, paragraph 4 of the Initial Order is open to an interpretation that permits the Applicant to employ individuals in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation. In particular, paragraph 4 could be taken to authorize the unilateral contracting out of union positions. Accordingly, the USW proposes that the following text should be appended at the end of paragraph 4: ", provided that such further retainers are not in breach of any of its collective agreements."

6 The CAW supports the Superintendent and the USW with respect to their submissions in respect of the above provisions of the Order.

Paragraph 6

7 Paragraph 6 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:
>
> > (a) all outstanding and future wages, salaries, employee benefits, contributions to pension plans, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements...

8 The Superintendent objects to any provision that would be inconsistent with the Applicant being required to make any and all required employee contributions to its pension plans.

9 The USW objects to the foregoing provision of the Initial Order on the basis that Automotive appears to be interpreting that provision so as to amend the terms of their employment by staying Automotive's obligation to pay compensation accruing due to employees post filing, including, wages, benefits and special payments to the pension plan. Accordingly, the USW proposes that the words "but not required" be struck from paragraph 6.

Paragraph 11

10 Paragraph 11 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall, subject to such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:
>
> . . . . .
>
> b. Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in any plan of arrangement or compromise filed by the Applicants under the CCAA (the "Plan");...
>
> d. Repudiate such of its arrangements or agreement of any nature whatsoever, whether oral or written, as the Applicants deem appropriate on such terms as may be agreed upon between the Applicants and such counterparties, or failing such agreement, to deal with the consequences thereof in the Plan; ...

The USW is concerned that these provisions are open to an interpretation that permits Automotive to repudiate its collective agreements with the USW's members. Accordingly, the USW proposes that the following text be added at paragraph 11, following the phrase "(as hereinafter defined)":

> and any and all applicable collective agreements (including, without limitation, all employee benefit, pension and related agreements, compensation policies, and arrangements), and labour laws....

11 The Superintendent seeks an order directing the Applicant to make all required employer contributions to its Pension Plans in accordance with the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA") and an order amending the Ini-

tial Order as is necessary to reflect this relief.

12 The CAW seeks an order compelling the Applicant to make the special payments due to the pension plans operated for the benefit of the CAW's members. The special payments that are referred to include the special payments that are provided for under s. 5(1)(b) and section 5(1)(e) of the Regulation under the PBA. These payments are required to be made to liquidate any unfunded liability in the plan by reason of a going concern deficiency and any insolvency deficiency based on actuarial valuation of the plan. The other special payments referred to are those dealt with in s. 31 of the Regulation. These payments are post wind-up special payments owing under s. 75 of the PBA to address a wind-up deficit. Section 31 states that annual special payments are to commence at the "effective date of wind up" and are equal to "the amount required in the year to fund the employer's liabilities under section 75 of the [PBA] in equal payments, payable annually in advance, over not more than five years".

13 As stated in *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.) at paragraph 25, in the context of going concern special payments, special payments "may fluctuate depending upon the investment results of the pension fund and the employer's ongoing contributions, together with estimated demands on the fund by the beneficiaries" and other factors. The true position of the plan cannot, in fact, be known until the crystallization of all benefits when benefits are settled after a wind-up at which time "it will be known what are the assets in the fund and the liabilities to be set against such funds by those beneficiaries who are then established as being legally entitled to claim".

14 Accordingly, special payments are better understood as the payments which (in accordance with the PBA and Regulations and actuarial practice) have to be made to a pension plan now to meet the plan's benefit obligations which do not arise until some point in the future (either on retirement or termination for individual members or when benefits are settled in a plan wind up for the plan as a whole).

15 Likewise, post-wind-up special payments to address a wind up deficit are based on an actuarial estimate of the position of the plan as of the wind up date. Again, the actual liabilities of the pension plan are not determined until benefits are settled and the funds in the plan are used to actually purchase annuities from an insurance company (at then prevailing annuity rates) to provide the monthly pension benefit to the member.

16 The Applicant has indicated that monthly special payments for the Pension Plans are approximately $345,000 as of June 2007. The Superintendent is not in a position to confirm this amount precisely but advises that, owing to the funded position of the Plans it is clear that special payments are required for all the Pension Plans on the basis of the actuarial valuation reports last filed with the FSCO. The requirement to make special payments also applies to two of the Pension Plans which have been wound up, the Gananoque and Stratford Plans, although the special payment requirement arises on an annual rather than a monthly basis.

17 The factums of the USW and the CAW state that the most recently filed valuations for Automotive's various pension plans identify an aggregate wind-up deficiency of approximately $18.2 million.

Paragraph 26

18 Paragraph 26 provides as follows:

> THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof -- or be deemed to have been or become an employer of any of the Applicant's employees.

The USW is concerned that this provision usurps the exclusive jurisdiction of the Labour Relations Board (the "Board" or the "OLRB") to determine, on a full factual record, whether someone is a successor employer. Accordingly, the USW proposes that the following text be deleted from paragraph 26: "or be deemed to have been or become an employer of any of the Applicant's employees"; and that the following words be added: ", provided that the foregoing is without prejudice to any rights pursuant to the *Labour Relations Act, 1995*, (Ontario)."

19 The CAW seeks the same order.

Paragraph 29

20 Paragraph 29 provides as follows:

> THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions on this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

The USW is concerned that this provision provides the Monitor with a blanket immunity on a prospective basis, and that the court has no jurisdiction to provide this immunity and should not provide this immunity even if it did have such authority. Accordingly, the USW proposes that paragraph 29 be deleted and replaced with the following:

> THIS COURT ORDERS that nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any other applicable legislation.

The CRO Order

21 On September 11, 2007, Automotive returned a motion for an order approving its engagement of Axis Consulting Group Inc. ("Axis") and Allan Rutman ("Rutman") as Chief Restructuring Officer of Automotive (the "CRO Approval Motion")

22 On September 11, 2007, this court made an order approving Automotive and Axis' engagement (the "CRO Order"), subject to a reservation of rights by the USW to challenge paragraph 4 of the CRO Order.

23 Paragraph 4 of the CRO Order is similar to paragraph 29 of the Automotive Initial Order and the USW objects to it for the same reason. That paragraph provides as follows:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfillment of its duties, save and except for any liability or obligation arising from the gross negligence or willful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection herewith. This last limitation of liability will be effective up until + including Sept. 20/07 + thereafter as directed by the judge hearing the motion on Sept. 20/07.

24 The USW proposes that this paragraph be deleted and replaced with the following:

THIS COURT ORDERS that no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO.

Relevant Statutory and Regulatory Provisions

The Companies Creditors Arrangement Act

25 Section 11(1) of the CCAA provides as follows:

> Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

26 Subsections 11(3) and (4) of the CCAA provide as follows:

> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.
>
> Other than initial application court orders --
>
> (4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
>
> (a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

27 Section 11(6) of the CCAA provides as follows:

> Burden of Proof on Application --
>
> (6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

28 Section 11.3 of the CCAA provides as follows:

11.3 No order made under section 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

(b) requiring the further advance of money or credit.

The Pension Benefits Act

29 Section 55(2) of the PBA provides as follows:

An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times, ...

30 The General Regulation to the Act, R.R.O. 1990, Reg. 909, provides in part as follows:

4. (2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan...shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,

(a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;

(b) all contributions required to pay the normal cost;

(c) all special payments determined in accordance with section 5; and

(d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1.

5. (1) Except as otherwise provided in this section and in sections 4, 5.1 and 7, the special payments required to be made after the initial valuation date under clause 4 (2) (c) shall be not less than the sum of,

. . . . .

(b) with respect to any going concern unfunded liability not covered by clause (a), the special payments required to liquidate the liability, with interest at the going concern valuation interest rate, by equal monthly instalments over a period of fifteen years beginning on the valuation date of the report in which the going concern unfunded liability was determined;

. . . . .

(e) with respect to any solvency deficiency arising on or after the Regulation date, the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002, or five years, whichever is longer.

The Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A (the "LRA")

31 Section 69 of the LRA provides in part as follows:

69. (1) In this section,

"business" includes a part or parts thereof; ("enterprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

Successor employer

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

. . . . .

Power of Board to determine whether sale

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

32 Section 116 of the LRA provides as follows:

Board's orders not subject to review

116. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

Jurisdiction of the Court under the Companies' Creditors Arrangement Act

33 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, [1998] O.J. No. 3306 (Ont. Gen. Div. [Commercial List]), Blair J. adopted, at paragraph 46, the following passage from the decision of Farley J. in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an

alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)

[emphasis added]

34 In *Sulphur Corp. of Canada Ltd., Re* (2002), 35 C.B.R. (4th) 304 (Alta. Q.B.), Lovecchio J. considered the jurisdiction of the Court to make an order under s. 11 of the CCAA with provisions that conflicted with provisions of the *Builders Lien Act* of British Columbia (the "BLA"), a conflict which arose because of the grant under a CCAA order of a priority to the financing charge of a debtor in possession ("DIP financing") over all other creditors of the applicant company. Lovecchio J. decided that the Court has jurisdiction to grant a change under the CCAA to secure DIP financing which ranks in priority to a statutory lien under the BLA of British Columbia (paragraph 16).

35 After noting that, apart from the circumstances of the case, the lien under the BLA would have priority, Lovecchio J. provided the following analysis under the headings set out below in the following excerpt which addresses the jurisdiction of the Court in helpful detail and is therefore set out fully here:

The Paramountcy Argument and the Jurisdiction of the Courts

¶ 23 Sections 11(3) and 11(4) of the CCAA read as follows:

11(3) A Court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such a period as the Court deems necessary not exceeding 30 days, ...[staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, ...[staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].

¶ 24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?

¶ 25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Re Hunters Trailer & Marine Ltd.* [See Note 3 below] In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte*, 30 day stay of proceedings under the CCAA and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

Note 3: (2002), 94 Alta. L.R. (3d) 389.

¶ 26 In discussing the objective of the CCAA, Wachowich C.J.Q.B. stated the following at para. 15:

> The aim of the CCAA is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors...

At para 18:

> I agree with the statement made by Mackenzie J.A. in United Used Auto & Truck Parts Ltd., Re (2000), 16 C.B.R. (4th) 141 (BCCA), at 146 that: ...the CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.

Later, at para.32:

> Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the CCAA process. Hunters brought its initial CCAA application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases.

. . . . .

¶ 27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Luscar Ltd. v. Smoky River Coal Ltd.* [See Note 4 below] confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

> These statements about the goals and operations of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

Note 4: [1999] A.J. No. 185 (C.A.), online: (AJ).

¶ 28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s. 11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the CCAA. It is within this context that my initial Order and the June 19 Order were based.

¶ 29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re* [See Note 5 below] as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. ...

Note 5: (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div.).

¶ 30 In *Royal Oak*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* [See Note 6 below], where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

Note 6: (1975), [1976] 2 S.C.R. 475..

¶ 31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the *Court of Queen's Bench Act* [See Note 7 below], a provincial statute which, the Supreme Court of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s. 11(1) of the *Mechanics' Liens Act* [See Note 8 below], also a provincial statute.

Note 7: R.S.M. 1970, c. C280.

Note 8: R.S.M. 1970, c. M80

¶ 32 ... In *Smoky*, Hunt J.A. used the words the exercise of discretion -- a discretion she found to have been broad and one provided for in the statute.

¶ 33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the CCAA, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

¶ 34 In *Re United Used Auto & Truck Parts Ltd.* [See Note 9 below], Mackenzie J.A., of the Court of Appeal, wrote the following at p. 152, para. 29:

> When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over CCAA relief. I do not think that Parliament intended that the objects of the Act could be indirectly frustrated by secured creditors.

Note 9: (2000), 16 C.B.R. (4th) 141 (BCCA).

¶ 35 Parliament's way of ensuring that the CCAA would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a different matter and that will be discussed below.

¶ 36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.

Paramountcy

¶ 37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a

discretion granted under the CCAA, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the BLA.

¶ 38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.* [See Note 10 below] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal CCAA and the Legal Professions Act of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the CCAA, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the CCAA "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

Note 10: [1995] B.C.J. No. 1535 (C.A.)

36 More recently, the Court of Appeal, in its decision in its decision in *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), considered the jurisdiction of the Court under s. 11 of the CCAA in connection with an order given under that section removing directors from the board of the applicant company. Paragraphs 31ff of the decision dealt first with the jurisdiction of the Court and then with the exercise of its discretion. The following passages from that decision are relevant with respect to the jurisdiction of the Court:

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd. (Re)*, [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, *Chef Ready Foods Ltd. v. Hong Kong Bank of Canada*, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; *Re Lehndorff General Partners Ltd.*, [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17]Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Re Dylex Ltd.*, [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and *Westar Mining Ltd. (Re)*, [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under

the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

. . . . .

[35] ...[I]nherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p. 480 S.C.R.; *Richtree Inc.* (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[36] In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above [See Note 2 at the end of the document], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19]process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose" [See Note 3 at the end of the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

37 As to the exercise of the jurisdiction given by s. 11, the Court in *Stelco* said the following at paragraphs 43 and 44:

> [43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a)--(c) and 11(4)(a)--(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. ...
>
> [44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

38 The Court in *Stelco* went on to determine that it was not for the Court under s. 11 to usurp the role of the directors and management in conducting the restructuring efforts and found that there was no authority in s. 11 of the CCAA for the Court to interfere with the composition of a board of directors.

In the course of that analysis the Court stated as follows at paragraph 48:

> [48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See Baxter Student *Housing Ltd. v. College Housing Cooperative Ltd.*, *supra*, at p. 480 S.C.R.; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

39 It appears to me that in making the analysis set out in the above paragraphs and coming to the conclusion that it reached, the Court was addressing the need to ensure that the "terms" imposed by the Court under its s. 11 powers to do so are terms that are properly related to the jurisdiction given under s. 11 to the Court to grant stays and the purpose of that jurisdiction under the CCAA. In that regard, the Court did not consider that intervening in the composition of the internal management of the company contrary to the applicable laws in that regard was proper. This conclusion is perhaps best understood in the context of the earlier discussion in the decision of the nature of the jurisdiction of the Court under s. 11. In particular, the Court emphasized the role of the Court as a supervisory one which is exercised through its ability "to stay, restrain or prohibit proceedings against the company during the plan negotiation period" on such terms as the Court may impose (paragraph 38). It is not apparent how an order removing directors would be inherently or functionally related to the Court's role to provide a protection against legal proceedings which are potentially adverse to the facilitation of "the continuation of the corporation as a viable entity" (paragraph 36, in the quoted passage from the *Skeena* decision).

40 On this basis, the limitation expressed by the Court in *Stelco* is not to be understood as restricting the jurisdiction of the Court to make orders which carry out that protective function.

41 Similarly, but in a quite different fact situation, Lax J. of this Court, in her decision in *Richtree Inc., Re* (2005), 74 O.R. (3d) 174 (Ont. S.C.J. [Commercial List]) dismissed a motion to exempt the applicant company from certain filing requirements with regulatory authorities: see paragraphs 13 to 18 of the decision. In paragraph 18 of the decision, Lax J. said that the order that was sought had nothing to do with the restructuring process of the applicant company.

42 In view of the reasoning and the decisions in the above cases considered, the Court has a jurisdiction under the CCAA which, in the words of the decision in *Sulphur Corp. of Canada Ltd., Re, supra*, at paragraph 37, "can be used to override an express provincial statutory provision" where that would contribute to carrying out the protective function of the CCAA as reflected particularly in the provisions of s. 11 of the CCAA.

43 This analysis is developed further with regard to the special payments in the part of the text below that deals with the issue relating to paragraph 6 of the Initial Order.

The Context of the Initial Order and the CRO Order

44 On July 19, 2007, the Court issued the Initial Order authorizing, *inter alia*, Automotive to obtain and borrow under a credit facility (the "DIP Facility") from Chrysler as DIP Lender in order to finance certain expenditures contemplated by the cash flows that are approved by the DIP Lender and filed with the Court.

45 The Initial Order provided that the DIP Facility was to be on the terms and subject to the conditions set forth in the DIP Term Sheet and Commitment Letter between Automotive and the DIP Lender dated as of July 18, 2007 (the "Commitment Letter"), filed with the Court.

46 The Commitment Letter provides:

> The Borrower covenants as follows
>
> The Borrower shall not, without the Lender's prior written consent, make any material disbursement unless it is contemplated in the Initial cash flow, attached as Schedule "A" to this DIP Term Sheet and Commitment Letter (the "Initial Cash Flow") or any rolling cash flow approved by the Lender (collectively "Cash Flow Projections") and, for greater certainty, the Borrower shall not issue any cheques or make any disbursements until such point in time as the Lender has approved the same and confirmed sufficient funding of the same in accordance with the terms hereof[.]

47 The Initial Order also stated that rights of the DIP Lender under the Commitment Letter shall not be impaired in any way in Automotive's CCAA proceedings or by any provincial or federal statutes and that the DIP Lender shall not have any liability to any person whatsoever resulting from the breach by Automotive of any agreement caused by Automotive entering into the Commitment Letter.

48 The Initial Order provided that the DIP Lender was entitled to the benefit of the DIP Lender's Charge on all of the property of Automotive (except certain tax refunds).

49 The Affidavit of John Boken, dated July 19, 2007, sworn on behalf of Automotive and filed with the Court in connection with the application for the Initial Order (the "Boken Affidavit") stated the following at paragraph 46 with respect to the pension plans of Automotive:

> [Automotive] intends to continue to pay current service costs with respect to benefits accruing from the date of filing. The DIP Loan (as defined below), does not provide for the funding of any special payments.

50 In addition, the initial cash flow approved by Chrysler and filed with the Court on the application for the Initial Order clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

51 Automotive brought a motion to the Court on July 30, 2007 for, inter alia, an Order confirming the terms of the DIP Facility (the "DIP Approval Motion"). The DIP Approval Motion was made on notice to, among others, the USW and the Superintendent. The Boken Affidavit was again served in connection with the DIP Approval Motion. As noted above, the Boken Affidavit unequivocally indicated that special payments would not be made and were not permitted by the DIP Facility.

52 In addition, the Monitor filed its First Report with the Court at the return of the DIP Approval Motion and specifically noted that Automotive could not make any payments that were not in the cash flow forecast and that special pension payments were not provided for in the forecast. That point was reiterated in the notes to the cash flow forecast.

53 On July 30, 2007, the Court issued an Order confirming the terms of the DIP Facility (the "DIP Approval Order"). The DIP Approval Order provided:

> 3. THIS COURT ORDERS that the DIP Facility provided by DCC to the Applicant in the amount of Cdn.$13.6 million on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and DCC dated as of July 18, 2007, all as set forth in the Initial Order, is hereby confirmed and approved.

54 Based on the First Report of the Monitor and the submissions of all counsel Justice Stinson granted the requested relief and approved the DIP Loan "on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and the DIP Lender dated as of July 18, 2007, all as set forth in the Initial Order". As noted in Justice Stinson's endorsement in respect of the DIP Approval Order, Mr. Bailey on behalf of FSCO and Mr. Starnino on behalf of the USW requested that the Court "record their respective clients' reservation of rights in relation to the pension fund payments and other matters referenced in paragraphs 6(a), 11(b) and (d) of paragraph 26 of the [Initial] Order". Although the CAW did not attend the hearing on July 30, it did receive notice of Automotive's CCAA proceedings on July 23, 2007.

55 No party objected to the approval of the DIP Loan, or the terms and conditions set forth therein. No party appealed Justice Stinson's July 30 order approving the DIP Loan. The appeal period expired on August 20, 2007.

56 The DIP Approval Order was not opposed by the USW or the Superintendent, although they did appear at the DIP Approval Motion.

57 Automotive brought a motion to the Court on August 23, 2007 for an Order, inter alia, extending the stay of proceedings and increasing the amount of an amended DIP Facility. The motion was made on notice to the Unions and the Superintendent. The revised Cash Flow approved by Chrysler and filed with the Court (as a Schedule to the Monitor's Second Report) clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

58 On August 23, 2007, the Court issued an Order (the "August 23 Order") approving the Amended DIP Term Sheet and Commitment letter dated August 21, 2007 (the "Amended Commitment Letter"). The Amended Commitment Letter provides that Automotive shall not, without the DIP Lender's prior written consent, make any material disbursement unless it is contemplated in the cash flows approved by the DIP Lender. The Unions and the Superintendent did not oppose

the August 23 Order, and they did not seek leave to appeal it.

59 The Boken Affidavit filed in support of the Initial Application indicated that:

> (a) Automotive had no other realistic source of DIP funding to continue operations;
>
> (b) the DIP Loan was the only basis on which funding was available to keep the potential for the preservation of some of the plants as going concerns; and
>
> (c) the DIP Loan was being provided as a component of a complex multi-party agreement that represented a compromise of the rights of Chrysler, Automotive and the U.S. Debtors, which agreement was approved by the US Bankruptcy Court.

60 By Order of Justice Pepall dated September 11, 2007, Axis Consulting Group and Allan Rutman was appointed Chief Restructuring Officer ("CRO") of Automotive (the "CRO Order"). Paragraph 4 of that CRO Order states:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfilment of its duties, save and except for any liability or obligation arising from the gross negligence or wilful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection therewith. This last limitation on liability will be effective up until and including Sept. 20, 2007 and thereafter as ordered by the judge hearing the motion on Sept. 20, 2007.

61 The last sentence in paragraph 4 of the CRO Order was added by Justice Pepall in response to submissions by counsel that the issue of protections for the CRO were to be further addressed on this motion by the USW.

The Issues

Paragraph 4

62 The USW states its concern that the provision in paragraph 4 that allows the Applicant to retain further Assistants could be interpreted to allow hiring "in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation" (USW Factum, paragraph 43). How in particular that might come about is not explained. It is not suggested that the Applicant has acted or intends to act in such a manner.

63 Paragraph 4 does not provide that such hirings may be made in the manner that is the cause of concern. No basis was submitted for considering that such a result is implicit in paragraph 4.

64 Paragraph 4 is, as it is stated, consistent with the protective function of s. 11 because it effectively restrains proceedings that might otherwise be brought against the Applicant for making further hirings. It is conceivable in principle that hirings might be made in a way that would raise issues of the kind raised in *Richtree Inc., Re, supra*. In such circumstances, having regard to the approach taken by the Court in *Richtree*, the aggrieved parties would apparently be able to seeks appropriate relief from the Court as part of administrative or supervisory jurisdiction in respect of orders made by the Court under the CCAA. That would be an appropriate context in which to address the question of whether there is a conflict between the Collective Agreement and/or the LRA on the one hand and the CCAA and/or the Initial Order on the other. In the present circumstances, it is unnecessary to address the matter and there is no fact situation before the Court

to allow it to be addressed properly.

Paragraph 6

65 The objection taken to the phrase "but not required" in paragraph 6 is that Automotive regards the phrase as staying its obligations to pay various kinds of post-filing employee compensation, including in particular special payments to the pension plan.

66 Under the DIP Approval Order, the Court approved the DIP Facility on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter dated July 18, 2007. As noted, the Commitment Letter precludes Automotive from making distributions not contemplated in approved cash flows and the cash flow filed with the Court stated that special payments under the pension plans would not be made. These features link the DIP Approval Order to the paragraph 6 provision in the Initial Order that the specified kinds of payments are not required to be made. That is to say, the Initial Order and the DIP App4oroval Order are an integrated arrangement. The rationale given for this arrangement in the records is that Automotive will not be in a position to carry on business and will not have available funds without the DIP Facility and the terms on which the DIP Lender is prepared to commit to the DIP Facility are as stated.

67 Automotive states in its factum that it has continued to pay all wages and vacation pay during the course of this CCAA proceeding and intends to continue such payments and that the DIP Loan will, subject to certain conditions, provide advances to facilitate payment of statutory severance obligations.

68 The Initial Cash Flow provides for certain operating disbursements in respect of "Payroll, Payroll Taxes, Benefits, Severance, Other". The associated note states:

> The Forecast [Initial Cash Flow] assumes that payments are made for medical and health benefits and current service pension payments will be made while a plant is operating and then cease on the end of production date. The Forecast does not provide for the payment of any special pension payments as it is assumed these will be stayed in a CCAA filing.

69 The Court has approved the DIP Facility and, subject to this motion, the Initial Order. It is obvious that the DIP Facility and the Initial Order are integrally related. In consequence, if Automotive were to fail to use the funds available under the DIP Facility for the purposes that have been indicated for those funds in these CCAA proceedings, that would be a matter that might properly found a motion to the Court for relief. So the phrase "but not required" in paragraph 6 does not given Automotive a carte blanche to withhold contemplated payments, contrary to a suggestion that was made against the paragraph in the course of the hearing.

70 On the other hand, it is clear that the effect of the terms of the DIP Approval and paragraph 6 of the Initial Order is that Automotive, under the Order, is "not required" to make the special payments under its Pension Plans that would otherwise be required.

71 The requirement for the making of such special payments is a statutory requirement. The special payments are provided for in the pension benefits regime under the PBA and the related regulations, as set out in the relevant provisions excerpted above.

Jurisdiction under the CCAA re the Special Payments

72 The USW and the CAW submitted that the obligation under the pension benefits statutory regime to make special payments is an obligation under their respective collective agreements with Automotive. Those agreements require Auto-

motive to maintain pension plans for members having certain specific features, principally relating to the amount of the pension to be earned and paid for the period of employment served by the employee. It was not shown that any provisions in the collective agreements do expressly require Automotive to comply with the statutory regime as to special payments. Rather, the submission seemed to be that because Automotive has an obligation under the Collective Agreement to maintain the pension plan and also has a statutory obligation in respect of pension plans it maintains to make certain special payments, that the contractual obligation impliedly includes the statutory obligations and therefore, any relief from the statutory obligation also constitutes relief from the contractual obligation under the Collective Agreement. Whenever it is argued, as here, that a term should be implied in a contract, the necessary question is why that is so and in this case, no answer is evident from the submissions. The implication was perhaps that it is self-evident but that may be debatable. The pension plan provisions in the collective agreements are addressed to the pension benefits that the plan is required to make available to the members and not to how that is to be done. On this basis, it would seem to be a stretch to say that just because a pension plan is required to conform to the statutory regime, the company sponsoring the plan has impliedly agreed with the bargaining agent to do so. This would suggest that all that the company has agreed to do in the Collective Agreement is to maintain a plan that provides for the benefits contracted for in the collective bargain.

73 However, that analysis may be unduly technical for purposes of the issues on this motion. The commitment of Automotive in its collective agreement to maintain pension plans would given rise to a reasonable expectation that it would keep those plans in good standing in accordance with applicable regulatory requirements designed to ensure that the plans will be able to meet their payment obligations. Moreover, at least one of the pension plans contains a provision which requires the making of all payments required by the applicable statutes. So the better approach is probably to regard the maintenance of the special payments as effectively contemplated by the collective agreements.

74 Even so, this consideration would be relevant to the issue of the jurisdiction of the Court to make the impugned order only if this relationship to the collective agreements gives rise to jurisdictional considerations that are different from those that arise by reasons of the payments being required pursuant to the PBA.

75 As observed by the Supreme Court of Canada in its decision in *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia* , 2007 SCC 27 (S.C.C.) at paragraph 86, collective bargaining is a fundamental aspect of Canadian society, which has emerged as the most significant collective activity through which the freedom of association protected by s. 2(d) of the Charter is expressed in the labour context. Recognizing that workers have the right to bargain collectively reaffirms the values of dignity, personal autonomy, equality and democracy.

76 This fundamental process of collective bargaining is entrenched in the laws of Ontario by the LRA, which provides a comprehensive scheme for employment relations. Among other things, that statute directs that:

> (a) there shall only be one collective agreement in force between a trade union and an employer;
>
> (b) the trade union that is a party to the collective agreement is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein;
>
> (c) the collective agreement is binding upon the employer and the employees;
>
> (d) the collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or the statute without the consent of the Labour Board on the joint application of the parties;
>
> (e) a provision of a collective agreement may only be revised on the mutual consent of the parties;

> (f) no employer and no person acting on behalf of an employer shall interfere with the representation of employees by a trade union; and,
>
> (g) no employer shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

77 Based on these elements of the LRA, it appears that the employees cannot legally terminate their employment under their collective agreement before "it ceases to operate in accordance with its provisions or the LRA without consent of the O.L.R.B. on the joint application of the parties". The USW submits that therefore, the employees cannot legally terminate their services. However, whether this is so would depend first on whether the making of the Initial Order or its terms would allow the Collective Agreement to be terminated. No submissions were made that assist on this point.

78 Secondly, since the LRA provides that the Collective Agreement could be terminated with the consent of the Board, there is a question whether that consent could be obtained -- a matter that was not canvassed in the submissions.

79 The above considerations relating to the LRA do not suggest that the relationship of the PBA requirements for special payments to the collective agreements should be considered to give those requirements any jurisdictional status for the issues in this case that would go beyond the implications that arise from the fact of those requirements being imposed pursuant to statute.

80 This result is not altered by the Court's recognition that collective bargaining is a fundamental aspect of Canadian society involving the exercise of the freedom of association protected by s. 2(d) of the *Charter*. It was not suggested that the Initial Order constitutes a breach of the *Charter* rights of the employees.

81 The Moving Parties rely upon the decision of Farley J. in *United Air Lines, Inc., Re* (2005), 45 C.C.P.B. 151 (Ont. S.C.J. [Commercial List]) as authority for the proposition that a CCAA debtor must in all circumstances continue to make special payments post-filing. *United Air Lines* involved a motion brought by UAL for an order authorizing it to cease making contributions to its Canadian pension plans. UAL applied for protection from its creditors pursuant to section 18.6 of the CCAA, whereby it sought recognition of a Chapter 11 proceeding in the United States. UAL had filed for bankruptcy protection in the United States in December 2002 and filed under section 18.6 of the CCAA in 2003. The motion was not brought until February 2005.

82 UAL was a large U.S. corporation that was attempting to restructure. It had an international workforce, including a small Canadian workforce. In its motion, it was seeking authority to cease making all contributions to its Canadian pension plans even though it continued to meet its pension funding commitments in all countries other than the United States and Canada. UAL's U.S. employees and retirees had the benefit of the protections provided by the Pension Benefits Guarantee Corporation, while the Canadian employees, as the beneficiaries of a federally regulated scheme, did not. UAL had not presented any evidence of its inability to make the pension payments.

83 After reviewing all of the facts, Farley J. summarized as follows at paragraph 7:

> As discussed above, the relative size of the Canadian problems *vis-a-vis* the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring -- given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would

have paid premiums) but there being no such safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

84 *United Air Lines* does not appear to stand for the proposition that all pension contributions, including special payments, must in all cases be paid by a CCAA debtor absent an agreement with its unions and FSCO. On the contrary, Farley J.'s decision states in paragraph 8 that it was made "on the basis of fairness and equity" after a consideration of the facts and circumstances existing in that case.

85 Based on the decision of the Court of appeal for Quebec in *Mine Jeffrey inc., Re*, [2003] Q.J. No. 264 (Que. C.A.), there is a reason to consider that the "not required" clause does not purport to abrogate the pension plan obligations. It authorizes the company not to make payments on account of its obligations during the currency of the Initial Order. Unpaid obligations would constitute debts of the company to be dealt with at the termination of its protection under the CCAA: see *Mine Jeffrey* paragraphs 60 to 62.

86 It was submitted that the text of the *Mine Jeffrey* decision at paragraph 57 shows that in that case there was no suspension of the special payments obligation in respect of the employees who continued to work in the post-filing period. The phrase in paragraph 57 that is relied on in this regard is that the monitor was authorized to suspend pension contributions "except for employees whose services are retained by the monitor". This phrase is stated in the text to be a translation. The text of the original version of the initial order in *Mine Jeffrey* is set out at paragraph 9 of the decision. Paragraph [22] of the order authorizes the monitor to suspend "contributions to pension plans made by employees other than those kept by the monitor". At paragraphs 10 and 11 of the decision, the text makes clear that, in respect of the pension plan, the monitor advised that the payments that would continue to be paid were the current service payments, which are described as monthly remuneration to the employees to be paid to them by being paid to the plan. Nothing is said there about making any other payments to the plan. Paragraphs 68 and 70 express the Court's rejection of paragraph 16 of the Court's Order of November 29, 2006 which exempted the monitor from the collective agreements. However, paragraphs 54 and 55 of the decision deal with the suspension by the Court of payments to offset actuarial liability, which would seem to be payments in the nature of the special payments that are in issue in the present case. At paragraph 55 the Court gave its opinion that it was within the power of the Superior Court to suspend those payments. The Court of Appeal may have been making a distinction between the powers of the monitor and the Court.

87 Based on the analysis set out earlier in these reasons, even if it is correct to view the "not required" provision as abrogating provisions of pension plan statutory law, the Court has the jurisdiction under the CCAA to make an order under the CCAA which conflicts with, and overrides, provincial legislation. There is no apparent reason why this principle would not apply to an order made under the CCAA which conflicts with the PBA.

88 Reference was made to s. 11.3(a) of the CCAA, which provides that no order made under s. 11 is to have the effect of prohibiting a person from requiring payment for services provided after the order is made. The Applicant is paying the wages and the current service obligations under the pension plans of the employees who continue to be employed. The special payments do not relate exclusively to the continuing employees. It is not shown (and does not seem to be submitted) that the amounts that might be required under the special payments arise from or are in connection with the current service obligations to the plan (assuming those obligations are paid in due course). The most that can be said on the basis of the material now before the Court is that the fact that Automotive continues to operate with employment services being provided by Plan members may occasion some change in the amounts that were due and the payments that were required to be made as at the time of the CCAA filing, but what that amount might be and how, if at all, it could be attributed materially to the continuing service as opposed to other factors such as plan asset valuation is impossible to determine.

89 Accordingly, this point does not alter the conclusion that the Court has the jurisdiction to approve the "not required" clause, notwithstanding its effect in respect of the special payments.

Exercise of the Statutory Discretion under the CCAA

90 There is a separate question raised whether it is a proper exercise of the discretion of the court for it to approve the provision in question. That question must be addressed in the context discussed above.

91 The evidence before this Court is that Automotive is incapable of making the special payments. Automotive does not have the funds necessary to make the special payments. As at July 19, 2007, Automotive had no cash of its own. In the five-week period from July 19, 2007 to August 25, 2007, Automotive had negative cash flow from operations of approximately $5 million. It is forecast that in the four-week period from August 26, 2007 until September 22, 2007 Automotive will have negative cash flow of approximately an additional $12 million. Since filing, Automotive has been wholly dependent on the DIP Loan to fund all disbursements.

92 Two other important considerations are evident in the present case. First, for the reasons given above, the effective suspension of special payments is a feature of the integrated arrangement which was made available by Chrysler as the DIP Lender and which was the arrangement which enabled the company to continue in operation. So there was and is a very good reason for the Court to approve that arrangement.

93 Secondly, the moving parties each had a full opportunity to object to the approval of the DIP Facility and none of them did so, even though it was clear from the terms of the DIP Facility and the terms of the Initial Order that they are an integrated arrangement. Instead of objecting to the DIP Facility, they have allowed it to be approved and have objected only to the related provisions of the Initial Order. In proceeding this way, it appears they have avoided facing the question whether if they opposed the DIP Approval Order for the reasons they now advance in respect of the special payments, the DIP Lender might have resisted their demands at the first moment, to the detriment of the continuing employment of members, and they now seek to raise the issue now that the DIP lender is in place and has been advancing funds, in circumstances where the only practical consequence could be to raise the question which would have appropriately been raised at the earlier stage.

94 Chrysler submitted that this conduct is a collateral attack on the DIP Approval Order and should not be countenanced by the Court.

95 The Initial Order was approved on July 19, 2007 with a provision in paragraph 3 providing for a further hearing on July 30, 2007 (the "Comeback Date") at which time the Initial Order could be supplemented or otherwise varied. On July 30, 2007 the Court ordered the approval of the DIP Facility. It ordered an extension of the Stay Period to August 24, 2007.

96 The Court did not make any order to supplement or vary the Initial Order in any other respects. Neither did it make any order to the contrary. Nor does it appear from the recitals in the DIP Approval Order that the Court was asked on that motion to deal with the Initial Order in other respects. Stinson J., in his endorsement of July 30, 2007 approving the issuance of the DIP Approval Order, recorded the requests on behalf of the Superintendent and the USW that he record their respective clients' reservation of rights in relation to the pension fund payment and other matters referenced in paragraphs 6(a), 11(b) and (d) and paragraph 26 of the Initial Order. Since this reservation was recorded at the same time as the DIP Approval Order was granted and without any order being granted at that time to deal with any variations to the Initial Order, this raises a question of whether it is fair to regard the motion now before the Court as a collateral attack on the DIP Approval Order.

97 It is important that, in the Initial Order at paragraph 34, the DIP Facility was ordered to be on the terms and conditions in the DIP Term Sheet and Commitment Letter dated as of July 18, 2007 which was approved in that paragraph subject to a further hearing on the Comeback Date. Covenant No. 1 in the DIP Term Sheet and Commitment Letter provides that the Borrower shall not without the Lender's prior written consent make any material disbursement unless it is contemplated in the initial cash flow or any subsequent cash flow approved by the Lender.

98 As noted earlier, on the motion to approve the Initial Order the Court had affidavit information from Automotive that the DIP Loan does not provide for the funding of any special payments, along with a copy of the cash flow which states that no provision is made for the payment of any special pension payments.

99 So, based on the above analysis, the Court, in the Initial Order, by reason of paragraph 34 (as to which no reservation of a right to object has been made or is now asserted), has ordered that the DIP Loan is not to be applied to special payments except with the consent of the DIP Lender.

100 The Superintendent seeks an order requiring the Applicant to pay the Special Payments. For the reasons given above, such an order would constitute a collateral attack on DIP Approval because the evidence is that the Applicant has no funds available to it other than the DIP Loan. Consequently, the order the Superintendent requests would effectively order the Applicant to use the DIP Loan for a purpose which, pursuant to paragraph 34 of the Initial Order, is not permitted.

101 Chrysler's agreement to act as DIP lender is based on the fact that the Applicant's supply is required to maintain Chrysler's own just-in-time vehicle manufacturing operations. The Superintendent submits that if Chrysler has concluded that it requires the output derived from the labour of the employees, then it is only fair and equitable that Chrysler bears the cost, in terms of remuneration to the employees including special payments to the Pension Plans, of that labour.

102 In the decision in *Ivaco Inc., Re* (2005), 47 C.C.P.B. 62 (Ont. S.C.J. [Commercial List]) at paragraph 4 (affirmed (2006), 275 D.L.R. (4th) 132 (Ont. C.A.), leave to appeal granted [2006] S.C.C.A. No. 490 (S.C.C.)) at the first instance, Farley J. characterized the nature of special payments, stating that "notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a 'fresh' obligation".

103 The amount of the outstanding special payments in the present case appears to have been determined prior to the Initial Order based on information relating to the pre-filing period. It is not apparent that the continuation of the operations of the Applicant in the post-filing period has given rise to an increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience. Consequently, it seems tendentious to characterize the outstanding special payments as the costs of operating in the post-filing period.

104 The Superintendent objects that the approach that has been taken by the Applicant in the present case has been done without the requisite negotiation with the Superintendent and the pension plan stakeholders. In the decision in *United Airlines Inc., supra*, Farley J. cited the example of a case where the company obtained specific relief from the requirement to make special payments although current service costs were made. The Court, however, concluded that such an arrangement "is not a 'given right' of the company" and is to be achieved "on a consensual basis after negotiation" with the pension plan stakeholders.

105 If there had been an objection to paragraph 34 of the Initial Order, that might well have occasioned negotiations of this kind, but there was no such objection. As noted, if there had been, each side could have assessed its own interests *vis-à-vis* the position of the other and the extent to which it would take the risk of insisting on its position or instead seek

a compromise. Instead, what has happened is that the DIP Facility has proceeded without objection and the DIP Lender has changed its position on the basis of the Court orders given to date and now, after it has done so, an effort is made to put it in a position where it has no choice but to increase its funding or risk the loss of the continuing operations. This might yield a negotiation but it would be a lopsided one by reason of the DIP Lender already having provided funding in accordance with the Court orders.

106 The USW contends that its submissions in respect of paragraph 6 of the Initial Order are not in conflict with paragraph 34 because they do not seek an order that the DIP Lender provide the funds that Automotive would require to make the special payments or that Automotive make the payments, but only that it not be ordered that Automotive is not required to make those payments.

107 Since the material before the Court is to the effect that Automotive had and has no funds and has no expectation of having funds available which could be used to make the special payments, other than the monies available under the DIP Facility, if the Court were now to countenance and make the amendment to paragraph 6 which the moving party seeks, the necessary practical consequence of that amendment would be to allow pressure to be put on the DIP Lender to increase its funding commitment to Automotive and consent to Automotive making the special payments, because Automotive would otherwise be potentially vulnerable to proceedings to force it to meet its payment obligations and there would inevitably be concerns about the consequences that could flow from default on its part. That situation would be contrary to the expectations which both Automotive and the DIP Lender would reasonably have been entitled to hold in respect of the Initial Order. It might well be different if the moving party had instead sought an order that the "not required" clause in paragraph 6 should be subject to a proviso that it would not apply to the extent that payment of such amounts could be funded out of monies other than from the DIP Facility. There is no alternative request for such a proviso, perhaps because no one expects it would be of any use.

108 So what remains is a request that the Court, in the exercise of its discretion under s. 11, should make an order that would be contrary to the reasonable expectations of the Applicant and the DIP Lender based on the steps already taken and the orders already granted under the CCAA in this proceeding. That would be unfair and it would not contribute to the fair application of the CCAA in this case or as a precedent for others.

109 Moreover, the failure of the moving parties to reserve in respect of and then dispute paragraph 34 of the Initial Order has the following unsatisfactory effect. If the moving parties had duly disputed paragraph 34 there would have been an opportunity for the Court to consider what would have been the two opposing positions on whether the DIP terms proposed by the DIP Lender should be accepted. If that question had properly been put in issue, then there would also have been an opportunity for each side to consider whether it would seek to press its position or would compromise for the sake of the respective potential benefits to each side. No such opportunity would exists with the request that is now before the Court. So the request should not be granted.

110 For the reasons given above, there is no fair way at the present time to put the parties on a level playing field for negotiation about the special payments. For the reasons mentioned at other points above, it is desirable to ensure that there is an opportunity for such negotiation in CCAA circumstances, as an important means of achieving the most satisfactory arrangements for all concerned to the extent possible. With these considerations in mind, it is appropriate to take into account that the period of the application of the Initial Order was extended by Court order and will expire on the date set by the last such Order unless further extended. If a motion is made for a further extension of the Initial Order beyond its present expiry date, there would seem to be no basis in the above reasons to object to the legitimacy of interested parties raising an objection to paragraph 6 at that time, provided they are also prepared to object to paragraph 34.

Paragraph 11

111 The objection taken by the USW is that the provisions of s. 11 are open to an interpretation that would permit Automotive to repudiate its collective agreements with the USW's members.

112 Paragraph 11 is stated to be subject to covenants in the Definitive Documents as defined in the Initial Order. (They appear to be certain security documents.) The provision does not state that the right to terminate is subject only to such covenants. No mention is made in paragraph 11 of other obligations to which the Applicant may or may not be subject.

113 The USW seeks to have the rights provided for in clauses (b) and (d) of paragraph 11 made subject to all applicable collective agreements and labour laws. Those rights can only be exercised by agreement with the affected employees or other counterparty or under a plan filed under the CCAA, failing which the matters are to be left to be dealt with in any plan of arrangement filed by the Applicant under the CCAA. Nothing in the provision purports to abrogate any applicable collective agreement or labour laws. No reason was advanced why the authorized bargaining agent could not withhold agreement to any proposed exercise of clause (b) or (d) and if Automotive then sought to deal further with the matter pursuant to the CCAA there is no apparent reason why the matter could not be pursued against Automotive in court under the CCAA.

114 Reference is made to the discussion set out earlier with respect to the provision in paragraph 4 relating to further hirings. The comments made there are, with appropriate changes, applicable with respect to the issue relating to paragraph 11.

Paragraph 26

115 The USW and the CAW object to the part of paragraph 26 which provides that the monitor, by fulfilling its obligations under the Initial Order, shall not be deemed to have taken control of the business or be deemed to have "been or become an employer of any of the Applicant's employees." [The word "employees" does not appear in the text of the Order in certain of the materials, but it is obviously intended.]

116 The USW objects to the provision on the basis that the determination of whether the monitor is an employer is within the exclusive jurisdiction of the O.L.R.B. by reason of s. 69, s. 111 and s. 116 of the LRA. Section 69(2) of that Act provides that a person to whom an employer sells its business becomes the employer (the "successor employer") for the purposes specified in that section until the Board declares otherwise.

117 The Initial Order does not expressly purport to determine the application of s. 69(2) of the LRA, since it does not refer to that Act. The application of paragraph 26 is stated to be limited to the monitor in its limited role under the Initial Order, which leaves the Applicant in possession and control of the business and, therefore, as the employer . This consideration has been regarded as determinative in finding such a provision to be acceptable: see the *Mine Jeffrey* decision at paragraph [76].

118 The discussion in *Mine Jeffrey ic., Re* about a provision of this kind did not address statutory provisions such as s. 69(2) of the LRA.

119 As worded, it is not apparent that paragraph 26 warrants the concern expressed by the USW. It seems reasonable to assume that if the monitor were to take action of a kind that would suggest that the monitor has started to act *de facto* as the employer, in breach of paragraph 26, a motion might be brought before the Court under the CCAA and/or to the

Ontario Labour Relations Board and the matter would then be considered in the context of an actual fact situation rather than in the present abstract and ill-defined circumstances. No order to give effect to the objection of the USW and the CAW in respect of this feature of paragraph 26 is appropriate at the present time.

Paragraph 29

120 The USW objects that the immunity, or limitation of liability, provided to the monitor in the first sentence of paragraph 29 is not within the jurisdiction of the Court under the CCAA, or if it is, the granting of this immunity is not a proper exercise of the discretion of the Court. The impugned provision limits liability to gross negligence and willful misconduct.

121 There was no reservation of rights in the endorsement of Stinson J. of July 30, 2007 with respect to this paragraph.

122 The USW cites no authority that has been decided with respect to the CCAA in support of its contention that the limitation of liability is beyond the jurisdiction of the Court under the CCAA. In view of the stay jurisdiction of s. 11 of the CCAA and taking into account the "on such terms" jurisdiction under that section, it might seem that the better view is that the Court does have the jurisdiction to make such an order and that the only issue is whether the grant of limited liability of the kind specified is a proper exercise of the discretion of the Court.

123 The USW submits that other court decisions show that the Court does not have the jurisdiction to grant a limitation of liability to the monitor of the kind set out in paragraph 29.

124 In *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* , [2006] 2 S.C.R. 123 (S.C.C.) ("*T.C.T. Logistics*"), the Supreme Court of Canada held that the "boiler plate" immunization of the receiver, though not uncommon in receivership orders, was invalid in the absence of "explicit statutory language" to authorize such an extreme measure:

> Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the Bankruptcy and Insolvency Act.
>
> . . . . .
>
> As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, 2004 SCC 3:
>
> > ...explicit statutory language is required to divest persons of rights they otherwise enjoy at law... [S]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

125 The USW also relies on s. 11.8(1) of the CCAA. Indeed, subsection 11.8(1) explicitly exempts a monitor from liability in respect of claims against the company which arise "before or upon the monitor's appointment":

> Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

126 The decision in *TCT Logistics Inc.* did not deal with the CCAA. The monitor in that case had been appointed by the Court with a mandate to hire employees and carry on the business, but in the present case the monitor is restricted

from hiring any employees and Automotive remains the employer of all of the unionized employees. The statements quoted from the *TCT Logistics Inc.* decision are made in the context of a consideration of the issue whether a bankruptcy court judge can determine successor rights issues relating to the LRA. The immunity given in that case was that no action could be taken against the interim receiver without the leave of the Court.

127 Section 11.8(1) deals with the situation where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees and it provides a blanket immunity against claims which arose before or upon the monitor's appointment. It is understandable that in the situation addressed in the section that the immunity would be limited to such claims and that it would be a blanket immunity in respect of such claims. The existence of s. 11.8(1) does not given rise to any implication as to what kind of limitation of liability would be reasonable in respect of a monitor with the limited powers given in the present case.

128 The specific wording in paragraph 29 of the Initial Order is consistent with the standard limitation of liability protections granted to monitors under the standard-form model CCAA Initial Order, which was authorized and approved by the Commercial List Users' Committee on September 12, 2006.

129 That is, of course, not determinative but it suggest that the clause has received serious favourable consideration from members of the bar in a context unrelated to particular party interests.

130 The monitor submitted in its factum a list of twelve recent CCAA proceedings in which orders have been granted with similar provisions to the limitation of liability in this case. This would seem to suggest that in those cases the clause limiting liability was not disputed or, if it was, the Court found the clause to be acceptable.

131 For these reasons, paragraph 29 is acceptable.

Paragraph 4 of the CRO Order

132 The USW advances the submissions made with respect to jurisdiction as regards the monitor based on *TCT Logistics Inc.* against the clause limiting the liability of the CRO.

133 Automotive does not have D&O insurance in place. The protection set out in paragraph 4 of the CRO Order can reasonably be regarded as a fundamental condition of Axis Consulting Group Inc. and Mr. Rutman's agreement to accept and continue as CRO. Automotive would probably be severely restricted in its ability to appoint a capable and experienced Chief Restructuring Officer without the ability to offer a limitation on potential liability.

134 The USW's claim that the Court does not have authority to grant this protection to the CRO is contrary to established practice. These protections are consistent with limitations of liability granted to Chief Restructuring Officers in other CCAA proceedings, and are consistent with the protections granted to Monitors under the standard-form CCAA Initial Order. The same or similar language was used in paragraph 19 of the Order of July 29, 2004 in the Stelco Inc. CCAA proceedings and in paragraph 3 of the Order of November 28, 2003 in the Ivaco Inc. CCAA proceeding, both granted by Farley J.

135 In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* , [2007] S.J. No. 154 (Sask. Q.B.) the Saskatchewan Court of Queen's Bench upheld a similar limitation of liability for the Chief Restructuring Officer of Bricore. In dismissing a motion to lift the stay against the Chief Restructuring Officer, Koch J. stated:

> The [CCAA] is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in

> the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.

136 The Saskatchewan Court of Appeal upheld the decision [2007 CarswellSask 324 (Sask. C.A.)].

137 The terms of the limitation of liability given to the CRO are similar to the limitation in the indemnity ordered in paragraph 21 of the Initial Order to be given by the Applicant to the directors and officers of the Applicant. The moving parties have not requested any amendment of that paragraph.

138 It is hard to imagine how a prospective CRO would be prepared to take on the responsibilities of that position in the context of a situation like the present one, fraught as it is with obvious conflicting interests on the part of the different parties involved and a background of action in the work place and litigation in court, without significant protection against liability.

139 Paragraph 4 of the CRO Order appears satisfactory for the above reasons.

Conclusion

140 For the reasons given above, the motions are dismissed.

141 Counsel may make written submissions as to costs if necessary.

Motions dismissed.

END OF DOCUMENT

TAB 11

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **MAY 26, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Debtors (Respondents)

And
COMMUNICATIONS, ENERGY & PAPEWORKERS UNION OF CANADA (CEP) AND ITS LOCAL 60-N AND 161
And
GEORGE RANDELL
And
WILSON PIKE
And
EVERETT LAMBERT
And
LEO ATWOOD
And
RAYMOND TAYLOR
And
WILLIS BLAKE
And

JG1793

WILLIAM BUTT
And
GERALD PEARCE
And
LEONARD HIGGINS
And
LLOYD PINSENT
And
HARRIS ROWSELL
And
SANDY LOVELESS
Petitioners

And
ERNST & YOUNG INC.
Monitor (mis en cause)

REASONS FOR JUDGMENT RENDERED ORALLY ON MOTION TO LIFT STAY OF PROCEEDINGS (# 96)

INTRODUCTION

[1] The Petitioners, the Communications, Energy and Paperworkers Union of Canada (**CEP**), its locals 60N and 161, as well as some of its members, present a Motion to lift the stay of proceedings[1] imposed by the Initial Order of this Court dated April 17, 2009.

[2] This Initial Order was issued under the terms of the *CCAA*[2]. One of its purposes is to notably allow the Debtors to file a plan of arrangement for the benefit of all their creditors and, potentially, the communities in which they operate as well.

[3] The CEP and its members are amongst those creditors. Here, 122 of these members, all former employees of the Debtors, seek the Court's exercise of its statutory discretion to lift the stay of proceedings, so as to order the Debtors to fulfil their obligations under two Early Retirement Incentive Programs (**ERIPs**) established for the benefit of Petitioners[3].

THE FACTS

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1 Motion to Lift Stay of Proceedings dated May 13, 2009.
2 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.
3 Exhibits P-1 and P-2.

[4] In a nutshell, the purpose of the ERIPs signed respectively in 1999 and 2004 was to help diminish the impact of the reorganization of the Debtors' workforce through the advancement of mechanization of harvesting on their operations, as well as the automation and technical changes that continued to impact their employees.

[5] As a result, under the ERIPs, employees who had reached age 58 and over and who met the criteria of eligibility received $1,600 or $1,400 per month under age 60 and $1,400 or $1,200 per month until age 65.

[6] As well, employees participating in the ERIPs were covered by benefits (such as life insurance and prescription drugs) paid either 100% by the employer or 65% by the employer and 35% by the employee, depending upon the applicable program.

[7] Prior to entering the ERIPs, employees were required to cash in all their accumulated vacations, exhaust their long-term disability benefits, and exhaust as well all employment insurance benefits.

[8] Presently, a total of 122 employees remain covered under the two (2) ERIPs.

[9] Yet, further to the stay of proceedings that forms part of the Initial Order, the Debtors ceased all payments under the ERIPs as they no longer had the funds necessary to make such. According to the Debtors, the sums owed pursuant to the ERIPs form part of pre-filing collective bargaining agreements in respect of what are now permanently closed facilities.

[10] It is the Court's understanding that the Petitioners' situation is by no means unique. Unfortunately, a similar decision has been applied by the Debtors with respect to all its severance obligations or other early retirement incentive programs, in all cases for the same reasons.

THE POSITIONS OF THE PARTIES

[11] The CEP contends that the stay of proceedings should be lifted for the 122 former employees involved because they all show necessity for the ERIPs payments, they suffer undue hardship and they are severely prejudiced.

[12] The CEP argues that they do not receive sufficient income to cover their basic essentials. Numerous detailed affidavits support these assertions.

[13] The Petitioners claim that their situation is special, their circumstances uncommon, and their sacrifices greater than that of other creditors of the Debtors.

[14] AbitibiBowater replies that it does not have the means to pay. Furthermore, it could not treat the Petitioners any different than the other stakeholders. AbitibiBowater believes that maintaining the equilibrium between everyone is the best manner to achieve a

successful restructuring that would benefit everyone better than a bankruptcy, including the Petitioners.

ANALYSIS AND DISCUSSION

[15] This is not an easy situation. No Court, including this one, is insensitive to the real difficulties, socially, economically or personally, in which a matter like this one places many individuals, first and foremost the Petitioners in this case.

[16] Yet, the sympathy a Court may feel towards the sad situation of many should not and could not distract it from its supervisory role, and particularly, from its key objective of maintaining, during this restructuring process, a fair but delicate balance between the positions of everyone, no matter how painful it could sometimes be.

[17] In the Court's opinion, and notably with respect to the individual Petitioners involved here, no doubt a successful restructuring is most likely a better end result than a bankruptcy of the Debtors.

[18] That being so, the Court believes that, at the stay of proceedings stage, the stakeholders are better served by an equal treatment of their respective positions than by the granting of an undue advantage or preference to some.

[19] In this process, to deal with everyone in a rather similar way enhances the chances of success of the restructuring, limits the potential conflicts between stakeholders and prevents some to withdraw from or fight the process because they feel they are unfairly treated.

[20] In essence, here, Petitioners are seeking a preference over other similarly situated unsecured creditors. This should always be looked at with caution.

[21] Certainly, CEP's Counsel is right in saying that there is no statutory test under the *CCAA* to guide the Court in deciding whether or not to lift the stay of proceedings in a given circumstance.

[22] However, it remains that lifting the stay is an exception to the general rule and that convincing reasons must exist to grant it. This is even more true when, like here, the process undertaken progresses well and enjoys so far a large support from the stakeholders.

[23] As Paperny J. stated in *Canadian Airlines Corp. (Re)*[4], before granting a stay, a Court should consider the particular facts involved and remember that it is required to balance a variety of interests and problems. One should never lose sight of the global picture.

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[4] (2000) 19 C.B.R. (4th) 1 (Alta Q.B.).

[24] In that regard, a Court should try to keep at its minimum the manoeuvres for positioning amongst creditors during the restructuring process. Rather, it should play its supervisory role by trying to preserve a delicate *status quo* while moving along the process swiftly towards a successful compromise or arrangement.

[25] Of course, preservation of a *status quo* does not necessarily mean inflexible rigidity. For instance, in some situations, if undue hardship caused by the stay itself is showed and strong necessity for immediate payment is established, a Court may consider it appropriate to lift the stay.

[26] However, in this Court's opinion, the situations where only these two criteria of undue hardship and immediate necessity for payment would justify the lifting of the stay will be rare.

[27] Seldom, if ever, will a restructuring process not cause definite hardship on most stakeholders. As well, rarely will stakeholders not be able to establish some level of necessity for the payment of what is owed to them.

[28] If the sole criteria of undue hardship and necessity for payment would suffice to lift the stay of proceedings in a *CCAA* restructuring, Courts, debtors and monitors would likely end up devoting indefinite time and energy trying to assess the levels of prejudice caused to one or the other, instead of focusing upon the end result, that is, to develop and submit a plan and gather consensus around a fair and reasonable compromise for all.

[29] This would undoubtedly have an adverse impact upon many restructuring efforts.

[30] From that perspective, trying to please everyone on the basis of undue hardship or utmost necessity may end up resulting in displeasing all. This is why this should be approached with caution and, in this Court's view, with great reservation.

[31] Turning to the present case, the Court is not convinced that its statutory discretion should be exercised along the lines suggested.

[32] Yes, hardship exists for many here. Yet, in many of the situations described, hardship arises, if only partially, from pre-existing conditions or independent conditions of Petitioners that the stay of the Initial Order itself did not necessarily cause.

[33] Yes, necessity for payment exists. Yet, it remains far from obvious that it is of such a magnitude as to render untenable the delay of a few months before the likely filing of a plan.

[34] In the meantime, certainly times will be difficult. Nobody denies it. But times would be worse if the Debtors were to collapse and go bankrupt.

[35] From that standpoint, the idea of saying yes to some and no to others is not the best way to deal with the situation. In fact, it would only open the door to many similar requests and destabilize the restructuring process. This should be avoided.

[36] The Court prefers to say to all: wait and be patient. The process is under way. The Court, with the help of the Monitor, closely watches and supervises the process. The Debtors realize that time is of the essence. This is the better approach.

[37] It is no consolation to Petitioners, but the situation at stake is not unheard of. Notwithstanding that, and without surprise, CEP's Counsel cannot submit any precedent in the case law that would support his position. Certainly, this is therefore not the preferred way to deal with a situation like this one.

[38] In all due respect to the contrary view, the Court believes that this matter should not be treated any differently.

FOR THESE REASONS GIVEN VERBALLY AND REGISTERED, THE COURT:

[39] **DISMISSES** the Motion;

[40] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C. J.S.C.

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Dates of hearing May 25 and 26, 2009
Reasons transcribed and revised on June 1st, 2009

SCHEDULE "A"

ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY,
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.

SCHEDULE "B"
BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

SCHEDULE "D"
PARTNERSHIPS

1. **BOWATER CANADA FINANCE LIMITED PARTNERSHIP**
2. **BOWATER PULP AND PAPER CANADA HOLDINGS LIMITED PARTNERSHIP**
3. **ABITIBI-CONSOLIDATED FINANCE LP**

TAB 12

35 C.C.P.B. 71, 40 C.B.R. (4th) 95, [2003] R.J.Q. 420, [2003] R.J.D.T. 23, REJB 2003-37078, J.E. 2003-346

2003 CarswellQue 90

Mine Jeffrey inc., Re
Syndicat national de l'amiante d'Asbestos inc., L'Association des policiers-pompiers de JM Asbestos inc., Syndicat démocratique des techniciens en fibre et employés du bureau de JMAI et Rodrigue Chartier, Appelants c. Mine Jeffrey inc., Intimée-débitrice et Raymond Chabot inc., contrôleur, Intimée
Cour d'appel du Québec
Dalphond, J.C.A., Robert, J.C.Q., Rothman, J.C.A.
Heard: 24 janvier 2003
Judgment: 31 janvier 2003
Docket: C.A. Montréal 500-09-012972-022

Counsel: Me Denis Lavoie, Me Annick Desjardins, pour les appelants

Me Pierre M. Lepage, Me Jean Legault, pour la débitrice-intimée

Me Louis Leclerc (avocat conseil)

Subject: Corporate and Commercial; Labour and Employment; Insolvency

Compagnies --- Arrangements et compromis -- En vertu de la Loi sur les arrangements avec les créanciers des compagnies -- Questions diverses

Vu la situation financière intenable de la compagnie minière, ses administrateurs se sont prévalus de la Loi sur les arrangements avec les créanciers des compagnies et ont ensuite tous démissionné -- Contrôleur a été nommé en vertu de la Loi -- Contrôleur a obtenu une ordonnance indiquant notamment qu'il ne pouvait être considéré comme l'employeur ou le successeur de la compagnie -- Contrôleur a licencié tous les employés, puis en a rappelé 90, dont 60 syndiqués -- Contrôleur a fait signer aux employés rappelés un contrat individuel de travail -- Ordonnance a été reconduite -- Devant la possibilité d'obtenir un contrat, le contrôleur a obtenu une troisième ordonnance reconduisant la première et déclarant qu'il n'était pas lié par les conventions collectives -- Syndicats ont interjeté appel -- Pourvoi accueilli en partie -- Contrôleur nommé en vertu de la Loi est un officier de la cour -- Rôle du contrôleur, soit surveiller les affaires et les finances de la compagnie débitrice et préparer les rapports d'information pour le tribunal et les créanciers, n'a pas pour effet de dépouiller la compagnie de ses biens ou de lui en enlever le contrôle -- Loi permettait au tribunal d'autoriser le contrôleur à administrer les affaires de la compagnie, ce qu'ont fait les ordonnances -- Biens de la compagnie sont restés sa propriété et n'ont pas été transférés au contrôleur, tout comme dans le cas du liquidateur d'une compagnie -- Loi ne prévoit pas la dévolution des biens et des droits de la compagnie insolvable au contrôleur, et les ordonnances rendues ne pouvaient être lues comme emportant une telle dévolution -- Contrôleur n'était pas un tiers vis-à-vis de la compagnie -- Contrôleur n'était pas un nouvel employeur; il continuait, au nom de la compagnie, l'emploi des employés gardés ou rappelés -- Ordonnances précisaient à bon droit que le contrôleur n'était pas l'employeur puisque la compagnie minière

demeurait l'employeur -- Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36.

Droit du travail collectif --- Droits de négociation -- Succession d'entreprise -- Employeur qui succède -- En général

Vu la situation financière intenable de la compagnie minière, ses administrateurs se sont prévalus de la Loi sur les arrangements avec les créanciers des compagnies et ont ensuite tous démissionné -- Contrôleur a été nommé en vertu de la Loi -- Contrôleur a obtenu une ordonnance indiquant notamment qu'il ne pouvait être considéré comme l'employeur ou le successeur de la compagnie -- Contrôleur a licencié tous les employés, puis en a rappelé 90, dont 60 syndiqués -- Contrôleur a fait signer aux employés rappelés un contrat individuel de travail -- Ordonnance a été reconduite -- Devant la possibilité d'obtenir un contrat, le contrôleur a obtenu une troisième ordonnance reconduisant la première et déclarant qu'il n'était pas lié par les conventions collectives -- Syndicats ont interjeté appel -- Pourvoi accueilli en partie -- Contrôleur nommé en vertu de la Loi est un officier de la cour -- Rôle du contrôleur, soit surveiller les affaires et les finances de la compagnie débitrice et préparer les rapports d'information pour le tribunal et les créanciers, n'a pas pour effet de dépouiller la compagnie de ses biens ou de lui en enlever le contrôle -- Loi permettait au tribunal d'autoriser le contrôleur à administrer les affaires de la compagnie, ce qu'ont fait les ordonnances -- Biens de la compagnie sont restés sa propriété et n'ont pas été transférés au contrôleur, tout comme dans le cas du liquidateur d'une compagnie -- Loi ne prévoit pas la dévolution des biens et des droits de la compagnie insolvable au contrôleur, et les ordonnances rendues ne pouvaient être lues comme emportant une telle dévolution -- Contrôleur n'était pas un tiers vis-à-vis de la compagnie -- Contrôleur n'était pas un nouvel employeur; il continuait, au nom de la compagnie, l'emploi des employés gardés ou rappelés -- Ordonnances précisaient à bon droit que le contrôleur n'était pas l'employeur puisque la compagnie minière demeurait l'employeur -- Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36.

Droit du travail collectif --- Droits de négociation -- Annulation -- Motifs -- Motifs divers

Vu la situation financière intenable de la compagnie minière, ses administrateurs se sont prévalus de la Loi sur les arrangements avec les créanciers des compagnies et ont ensuite tous démissionné -- Contrôleur a été nommé en vertu de la Loi -- Contrôleur a obtenu de la Cour supérieure une ordonnance lui accordant plusieurs pouvoirs -- Contrôleur a licencié tous les employés, puis en a rappelé 90, dont 60 syndiqués -- Contrôleur a fait signer aux employés rappelés un contrat individuel de travail -- Ordonnance a été reconduite -- Devant la possibilité d'obtenir un contrat, le contrôleur a obtenu une troisième ordonnance reconduisant la première et déclarant qu'il n'était pas lié par les conventions collectives -- Syndicats ont interjeté appel -- Pourvoi accueilli en partie -- Puisque rien dans les ordonnances rendues n'abolissait ou modifiait les certificats d'accréditation des syndicats, ils étaient encore valides et opérants -- Il était par ailleurs douteux que la Cour supérieure ait un tel pouvoir, à tout le moins en l'absence d'une disposition de Loi le permettant et étant valide constitutionnellement -- Monopole de représentation des syndicats se continuait, ce que la première ordonnance reconnaissait en précisant qu'un avis au syndicat constituait un avis aux salariés -- Accréditations étant toujours valides, leurs effets devaient être reconnus -- Contrôleur ne pouvait faire fi du monopole de représentation des syndicats à l'égard des postes couverts par les unités d'accréditation en négociant individuellement avec les employés -- Contrats individuels signés par des personnes appelées à occuper des postes visés par les accréditations violaient le monopole de représentation des syndicats et étaient illégaux -- Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36.

Droit du travail collectif --- La convention collective -- Salaire -- En général

Vu la situation financière intenable de la compagnie minière, ses administrateurs se sont prévalus de la Loi sur les arrangements avec les créanciers des compagnies et ont ensuite tous démissionné -- Contrôleur a été nommé en vertu de la Loi -- Contrôleur a obtenu une ordonnance lui accordant plusieurs pouvoirs -- Contrôleur a licencié tous les employés,

puis en a rappelé 90, dont 60 syndiqués -- Contrôleur a fait signer aux employés rappelés un contrat individuel de travail -- Ordonnance a été reconduite -- Devant la possibilité d'obtenir un contrat, le contrôleur a obtenu une troisième ordonnance reconduisant la première et déclarant qu'il n'était pas lié par les conventions collectives -- Syndicats ont interjeté appel -- Pourvoi accueilli en partie -- Article 11.3 de la Loi ne permet pas au tribunal d'ordonner à des fournisseurs de biens ou de services, dont les employés, de fournir leur prestation sans être payés immédiatement par le contrôleur -- Loi n'autorise pas le tribunal ou le contrôleur à imposer unilatéralement la contrepartie payable au fournisseur; celle-ci doit être convenue avec le fournisseur avant la prestation ou l'ordonnance initiale -- Vu que les accréditations n'étaient pas visées par les ordonnances, que le licenciement des employés syndiqués ne mettait pas fin aux accréditations et que des employés avaient été rappelées pour occuper des postes visés par les accréditations, la contrepartie à verser à ces employés-là devait être celle prévue par les conventions collectives -- Contrepartie comprenait le salaire et les autres avantages sociaux depuis l'ordonnance initiale -- Employés étaient des créanciers au sens de la Loi pour les sommes dues au moment de l'ordonnance initiale -- Suspension des conventions collectives par le tribunal était illégale, puisqu'elle écartait unilatéralement les dispositions des conventions collectives en matière de contrepartie payable aux employés rappelés -- Modification unilatérale des conditions de travail des employés syndiqués par le contrôleur violait leurs droits résultant des accréditations -- Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36.

Droit du travail collectif --- La convention collective -- Avantages sociaux -- Fonds de pension

Vu la situation financière intenable de la compagnie minière, ses administrateurs se sont prévalus de la Loi sur les arrangements avec les créanciers des compagnies et ont ensuite tous démissionné -- Contrôleur a été nommé en vertu de la Loi -- Régime de retraite de la compagnie avait un déficit actuariel situé entre 30 et 35 millions de dollars que la compagnie devait combler par versements mensuels en vertu des conventions collectives -- Contrôleur a obtenu une ordonnance lui permettant notamment de suspendre les versements mensuels au régime de retraite -- Contrôleur a licencié tous les employés et a rappelé 90 employés, dont 60 syndiqués -- Contrôleur a fait signer aux employés rappelés un contrat individuel de travail -- Ordonnance a été reconduite -- Devant la possibilité d'obtenir un contrat, le contrôleur a obtenu une troisième ordonnance reconduisant la première et déclarant qu'il n'était pas lié par les conventions collectives -- Syndicats ont interjeté appel -- Pourvoi accueilli en partie -- Cour supérieure avait le pouvoir de permettre la suspension des versements mensuels au régime de retraite et sa décision ne pouvait être modifiée en appel -- Compagnie a recherché la protection de la Loi justement parce qu'elle ne pouvait rencontrer ses obligations financières, dont faire ces versements -- En autorisant le contrôleur à suspendre le versement de la cotisation sauf pour les employés qu'il avait rappelés, la Cour supérieure n'a pas modifié les conventions collectives -- Obligations de la compagnie à l'égard des sommes payables à la caisse de retraite en vertu des conventions collectives continuaient d'exister, mais n'étaient pas honorées en raison de l'insuffisance de fonds -- Arrangements pouvaient être convenus quant au paiement de ces sommes -- Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36.

Droit du travail collectif --- La convention collective -- Avantages sociaux -- Avantages divers

Vu la situation financière intenable de la compagnie minière, ses administrateurs se sont prévalus de la Loi sur les arrangements avec les créanciers des compagnies et ont ensuite tous démissionné -- Contrôleur a été nommé en vertu de la Loi -- Contrôleur a obtenu de la Cour supérieure une ordonnance lui accordant plusieurs pouvoirs -- Contrôleur a licencié tous les employés, puis en a rappelé 90, dont 60 syndiqués -- Contrôleur a fait signer aux employés rappelés un contrat individuel de travail -- Ordonnance a été reconduite -- Devant la possibilité d'obtenir un contrat, le contrôleur a obtenu une troisième ordonnance reconduisant la première et déclarant qu'il n'était pas lié par les conventions collectives -- Syndicats ont interjeté appel -- Pourvoi accueilli en partie -- Cour supérieure n'a pas modifié les conventions collectives en autorisant le contrôleur à arrêter de verser les primes pour certains bénéfices sociaux pour les personnes qui n'ont pas rendu de services à la compagnie depuis l'ordonnance initiale -- Personnes sont devenues des créanciers de la compagnie

pour la valeur monétaire des avantages perdus en raison de l'arrêt du versement des primes par la compagnie et le fait que ces avantages étaient prévus dans les conventions collectives n'y changeait rien -- Arrangements pouvaient être convenus quant au paiement de ces sommes -- Loi sur les arrangements avec les créanciers des compagnies, L.R.C. 1985, c. C-36.

Corporations --- Arrangements and compromises -- Under Companies' Creditors Arrangement Act -- Miscellaneous issues

Given mining company's untenable financial situation, company's directors first took advantage of Companies' Creditors Arrangement Act and then all resigned -- Monitor was appointed under Act -- Monitor obtained order saying, among others, that monitor could not be considered employer or successor of company -- After laying off all employees, monitor called back 90 employees, including 60 unionized ones -- Monitor had called-back employees sign individual employment contract -- Order renewed -- Given possibility of obtaining contract, monitor obtained third order renewing first one and declaring monitor was not bound by collective agreements -- Unions appealed -- Appeal allowed in part -- Monitor appointed under Act is officer of court -- Monitor's role is supervising debtor company's business and finances and preparing information reports for court and creditors; monitor's role does not divest company of property or control over property -- Act allowed court to authorize monitor to administrate company's business, which is what orders did -- Company's assets remained company's property and were not transferred to monitor as is case for liquidator of company -- Act does not provide for vesting of insolvent company's assets and rights to monitor and orders could not be read as causing such vesting -- Monitor was not third party with regards to company -- Monitor was not new employer; monitor continued, in company's name, employment of employees kept or called back -- Order properly indicated monitor was not employer as mining company remained employer -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Labour law --- Bargaining rights -- Successor rights -- Successor employer -- General

Given mining company's untenable financial situation, company's directors first took advantage of Companies' Creditors Arrangement Act and then all resigned -- Monitor was appointed under Act -- Monitor obtained order saying, among others, that monitor could not be considered employer or successor of company -- After laying off all employees, monitor called back 90 employees, including 60 unionized ones -- Monitor had called-back employees sign individual employment contract -- Order renewed -- Given possibility of obtaining contract, monitor obtained third order renewing first one and declaring monitor was not bound by collective agreements -- Unions appealed -- Appeal allowed in part -- Monitor appointed under Act is officer of court -- Monitor's role is supervising debtor company's business and finances and preparing information reports for court and creditors; monitor's role does not divest company of property or control over property -- Act allowed court to authorize monitor to administrate company's business, which is what orders did -- Company's assets remained company's property and were not transferred to monitor as is case for liquidator of company -- Act does not provide for vesting of insolvent company's assets and rights to monitor and orders could not be read as causing such vesting -- Monitor was not third party with regards to company -- Monitor was not new employer; monitor continued, in company's name, employment of employees kept or called back -- Order properly indicated monitor was not employer as mining company remained employer -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Labour law --- Bargaining rights -- Termination -- Grounds -- Miscellaneous grounds

Given mining company's untenable financial situation, company's directors first took advantage of Companies' Creditors Arrangement Act and then all resigned -- Monitor appointed under Act -- Monitor obtained order granting him many powers -- After laying off all employees, monitor called back 90 employees, including 60 unionized ones -- Monitor had called-back employees sign individual employment contract -- Order renewed -- Given possibility of obtaining contract, monitor obtained third order renewing first one and declaring monitor was not bound by collective agreements -- Unions

appealed -- Appeal allowed in part -- Unions' certifications were still valid and effective as nothing in orders abolished or modified certifications -- Doubtful that Superior Court could have such authority, mostly absent provision in Act allowing it which is constitutionally valid -- Unions' representation monopoly continued, which was recognized by first order by specifying that notice to union constituted notice to employees -- As certifications were still valid, certifications' effects had to be recognized -- Monitor could not ignore unions' representation monopoly with respect to positions covered by certification by individually negotiating with employees -- Individual contracts signed by persons who were to fill positions covered by certifications violated unions' representation monopoly and were illegal -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Labour law --- The collective agreement -- Wages -- General

Given mining company's untenable financial situation, company's directors first took advantage of Companies' Creditors Arrangement Act and then all resigned -- Monitor appointed under Act -- Monitor obtained order granting monitor many powers -- After laying off all employees, monitor called back 90 employees, including 60 unionized ones -- Monitor had called-back employees sign individual employment contract -- Order renewed -- Given possibility of obtaining contract, monitor obtained third order renewing first one and declaring monitor was not bound by collective agreements -- Unions appealed -- Appeal allowed in part -- Section 11.3 of Act does not allow court to order suppliers of goods or services to perform without immediate payment from monitor -- Act does not authorize court or monitor to unilaterally impose payable consideration to supplier; consideration must be decided with supplier prior to performance or original order -- In view of fact that orders were not directed at certifications, that lay-off of unionized employees did not terminate certifications and that persons were called back to fill positions covered by certifications, consideration paid to persons had to be consideration provided for in collective agreements -- Consideration included salary and other social benefits since initial order -- Employees were creditors within meaning of Act for amounts owed at time of initial order -- Suspension of collective agreements by court was illegal as suspension unilaterally set aside provisions of collective agreements concerning consideration payable to called back employees -- Monitor's unilateral modification of unionized employees' working conditions violated employees rights resulting from certifications -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.3.

Labour law --- The collective agreement -- Employee benefits -- Pensions

Given mining company's untenable financial situation, company's directors first took advantage of Companies' Creditors Arrangement Act and then all resigned -- Monitor appointed under Act -- Actuarial deficit of company's pension plan was between 30 and 35 million dollars, which company had to make up by monthly payments under collective agreement -- Monitor obtained order allowing him, among others, to suspend monthly payments to pension plan -- After laying off all employees, monitor called back 90 employees, including 60 unionized ones -- Monitor had called-back employees sign individual employment contract -- Order renewed -- Given possibility of obtaining contract, monitor obtained third order renewing first one and declaring monitor was not bound by collective agreements -- Unions appealed -- Appeal allowed in part -- Superior Court had power to authorize suspension of monthly payments to pension plan and Court's decision could not be modified in appeal -- Company asked for Act's protection precisely because company could not meet financial obligations, including those payments -- By authorizing monitor to suspend payment of contributions except for employees called back, Superior Court did not alter collective agreements -- While company's obligations regarding amounts payable to pension fund under collective agreements did not cease to exist, obligations were not honoured because of lack of funds -- Arrangements could be made regarding payment of amounts -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Labour law --- The collective agreement -- Employee benefits -- Miscellaneous benefits

Given mining company's untenable financial situation, company's directors first took advantage of Companies' Creditors Arrangement Act and then all resigned -- Monitor appointed under Act -- Monitor obtained order granting him many powers -- After laying off all employees, monitor called back 90 employees, including 60 unionized ones -- Monitor had called-back employees sign individual employment contract -- Order renewed -- Given possibility of obtaining contract, monitor obtained third order renewing first one and declaring monitor was not bound by collective agreements -- Unions appealed -- Appeal allowed in part -- Superior Court did not alter collective agreements by authorizing monitor to stop paying premiums of some employee benefits for persons who had not worked for company since initial order -- Persons became creditors of company for monetary value of benefits lost because company stopped paying premiums and fact that benefits were provided for in collective agreements changed nothing -- Arrangements could be made regarding payment of amounts -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

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Canadian Airlines Corp., Re, 2000 CarswellAlta 622, 19 C.B.R. (4th) 1 (Alta. Q.B.) -- referred to

Canadian Airlines Corp., Re, 2000 ABCA 238, 2000 CarswellAlta 919, [2000] 10 W.W.R. 314, 20 C.B.R. (4th) 46, 84 Alta. L.R. (3d) 52, 9 B.L.R. (3d) 86, 266 A.R. 131, 228 W.A.C. 131 (Alta. C.A. [In Chambers]) -- referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re , 1999 CarswellOnt 3234, 12 C.B.R. (4th) 194, 39 C.P.C. (4th) 362 (Ont. S.C.J. [Commercial List]) -- referred to

Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc., 39 C.B.R. (3d) 253, (sub nom. Dubois v. Coopérants (Les), Société mutuelle d'assurance-vie (Liquidation)) 196 N.R. 81, (sub nom. Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois) 133 D.L.R. (4th) 643, (sub nom. Coopérants, Mutual Life Insurance Society (Liquidator of) v. Dubois) [1996] 1 S.C.R. 900, 1996 CarswellQue 369, 1996 CarswellQue 369F (S.C.C.) -- followed

Coopérants, société mutuelle d'assurance-vie/Coopérants, Mutual Life Insurance Society, Re, [1997] R.J.Q. 776, 1997 CarswellQue 475 (Que. C.A.) -- considered

N.L.R.B. v. Bildisco (1984), 104 S.Ct. 1188, 465 U.S. 513, 79 L. Ed. 2d 482, 115 L.R.R.M. 2805, 100 Lab. Cas. P. 10,771, 11 Bankr. Ct. Dec. 564, Bankr. L. Rep. 69,580, 5 Employee Benefits Cas. 1015 (U.S.S.C.) -- considered

PCI Chemicals Canada Inc., Re, 2002 CarswellQue 831, [2002] R.J.Q. 1093 (Que. S.C.) -- considered

PCI Chemicals Canada Inc., Re (April 9, 2002), Doc. C.A. Québec 500-09- 012056-024 (Que. C.A.) -- referred to

Pointe-Claire (Ville) c. S.E.P.B., Local 57 (1997), 1997 CarswellQue 86, (sub nom. Pointe-Claire (Ville) v. Syndicat des employées & employés professionnels-les & de bureau, section locale 57 (S.E.P.B. - U.I.E.P.B. - C.T.C. - F.T.Q.)) 211 N.R. 1, (sub nom. Pointe-Claire (City) v. Quebec (Labour Court)) 146 D.L.R. (4th) 1, (sub nom. Pointe-Claire (City) v. Quebec (Labour Court)) [1997] 1 S.C.R. 1015, (sub nom. Pointe-Claire (City) v. Quebec (Labour Court)) 97 C.L.L.C. 220-039, 28 C.C.E.L. (2d) 177, 46 Admin. L.R. (2d) 1, [1997] L.V.I. 2841-1, 1997 CarswellQue 87 (S.C.C.) -- considered

Quinsam Coal Corp., Re, 2000 CarswellBC 852, 2000 BCSC 653 (B.C. S.C.) -- referred to

Quintette Coal Ltd. v. Nippon Steel Corp., 47 B.C.L.R. (2d) 193, 2 C.B.R. (3d) 291, 1990 CarswellBC 382 (B.C. S.C.) -- referred to

Reference re Companies' Creditors Arrangement Act (Canada), 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75, 1934 CarswellNat 1 (S.C.C.) -- considered

Royal Oak Mines Inc., Re, 1999 CarswellOnt 792, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) -- referred to

Royal Oak Mines Inc., Re, 2001 CarswellOnt 433, 143 O.A.C. 75, 27 C.C.P.B. 163 (Ont. C.A.) -- followed

Société d'énergie de la Baie James c. Noël, 2001 SCC 39, 2001 CarswellQue 1270, 2001 CarswellQue 1271, (sub nom. Noël v. Société d'énergie de la Baie James) 202 D.L.R. (4th) 1, (sub nom. Noël v. Société d'énergie de la Baie James) 271 N.R. 304, (sub nom. Noël v. Société d'énergie de la Baie James) [2001] 2 S.C.R. 207, (sub nom. Noël v. Société d'énergie de la Baie James) 2002 C.L.L.C. 220-012 (S.C.C.) -- considered

T. Eaton Co., Re, 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) -- referred to

United Used Auto & Truck Parts Ltd., Re, 2000 BCCA 146, 2000 CarswellBC 414, 73 B.C.L.R. (3d) 236, [2000] 5 W.W.R. 178, 16 C.B.R. (4th) 141, 135 B.C.A.C. 96, 221 W.A.C. 96 (B.C. C.A.) -- considered

Westar Mining Ltd., Re, 14 C.B.R. (3d) 95, 1992 CarswellBC 509 (B.C. S.C.) -- referred to

Woodward's Ltd., Re, 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) -- referred to

Statutes considered:

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Pt. III -- referred to

s. 47 -- referred to

s. 47.1 [en. 1992, c. 27, s. 16(1)] -- referred to

Bankruptcy Code, 11 U.S.C. 1982

s. 1113 -- considered

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art. 39 -- referred to

art. 45 -- referred to

art. 46 -- referred to

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

Generally -- considered

s. 5.1 [en. 1997, c. 12, s. 122] -- referred to

s. 11(6) [en. 1997, c. 12, s. 124] -- referred to

s. 11.1 [en. 1997, c. 12, s. 124] -- referred to

s. 11.3 [en. 1997, c. 12, s. 124] -- considered

s. 11.3(a) [en. 1997, c. 12, s. 124] -- considered

s. 11.4 [en. 1997, c. 12, s. 124] -- referred to

s. 11.7 [en. 1997, c. 12, s. 124] -- considered

s. 11.7(1)(a) [en. 1997, c. 12, s. 124] -- considered

s. 11.7(3) [en. 1997, c. 12, s. 124] -- considered

s. 11.7(3)(a) [en. 1997, c. 12, s. 124] -- considered

s. 11.7(3)(b) [en. 1997, c. 12, s. 124] -- considered

s. 11.7(3)(c) [en. 1997, c. 12, s. 124] -- considered

s. 11.7(3)(d) [en. 1997, c. 12, s. 124] -- considered

s. 11.8 [en. 1997, c. 12, s. 124] -- considered

s. 11.8(1) [en. 1997, c. 12, s. 124] -- considered

s. 11.8(2) [en. 1997, c. 12, s. 124] -- considered

s. 18.1 [en. 1997, c. 12, s. 125] -- referred to

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Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally -- considered

s. 33 -- considered

s. 35 -- considered

POURVOI des syndicats à l'encontre de l'ordonnance accordant plusieurs pouvoirs au contrôleur de la compagnie débitrice, lequel avait été nommé en vertu de la Loi sur les arrangements avec les créanciers des compagnies, et déclarant qu'il n'était pas lié par les conventions collectives.

***La Cour*:**

1 LA COUR, statuant sur le pourvoi des appelants contre un jugement de la Cour supérieure, district de St-François, prononcé le 29 novembre 2002, corrigé le 2 décembre 2002, par l'honorable Pierre C. Fournier, qui reconduisait l'ordonnance initiale et rendait diverses ordonnances, dont l'une à l'effet que le contrôleur n'était pas lié par les conventions collectives et, par conséquent, non tenu d'en respecter les dispositions;

2 Après avoir étudié le dossier, entendu les parties et délibéré;

3 Pour les motifs ci-joints du juge Pierre J. Dalphond, auxquels souscrivent le juge en chef J.J.Michel Robert et le juge Melvin L. Rothman :

4 ACCUEILLE le pourvoi en partie comme suit :

> • Biffe de l'ordonnance initiale, telle que reconduite le 27 novembre 2002 et à compter de cette date, au par. 22, les mots ", dans ce dernier cas,";
>
> • Ajoute au par. 20 h) de l'ordonnance initiale, telle que reconduite le 27 novembre 2002 et à compter de cette date, et au par. 7 a) du jugement, après les mots "selon des termes et conditions qu'il jugera appropriés", les mots "lesquels sont, pour les postes couverts par des accréditations, ceux prévus dans la convention collective appropriée, telle qu'amendée s'il y a lieu";
>
> • Casse le par. 16 du jugement et le déclare sans effet;

5 LE TOUT, sans frais.

***Dalphond, J.C.A.*:**

6 La Cour supérieure pouvait-elle en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (L.R.C. (1985) ch. C.-36) (ci-après, LACC), autoriser le contrôleur nommé par elle avec pouvoir de continuer l'exploitation de l'entreprise de la débitrice à ne pas respecter les dispositions des conventions collectives intervenues entre la débitrice et les syndicats appelants?

7 La Cour supérieure pouvait-elle autoriser le contrôleur à ne plus effectuer les paiements requis pour renflouer le déficit actuariel du régime de retraite?

LES FAITS

8 Mine Jeffrey inc. est une compagnie spécialisée dans l'exploitation et la transformation de l'amiante. Elle exploite à Asbestos la plus importante mine à ciel ouvert au monde. En début d'octobre 2002, devant une situation financière intenable, son conseil d'administration décide de se prévaloir de la LACC. Ses administrateurs démissionnent ensuite en bloc.

9 Le 7 octobre 2002, à la suite d'une requête non signifiée aux appelants, elle obtient de la Cour supérieure une ordonnance initiale désignant la société intimée, Raymond Chabot inc., contrôleur. L'esquisse du plan d'arrangement envisagé par Mine Jeffrey Inc. est la sauvegarde du site et la conclusion d'ententes avec les créanciers garantis et les gouvernements en vue de favoriser une reprise éventuelle des opérations ou la vente du complexe. Les passages suivants de l'ordonnance initiale sont pertinents au pourvoi :

> [6] Ordonne au contrôleur de transmettre par courrier ordinaire à tous les créanciers non garantis de Mine

Jeffrey inc., et, pour les employés de Mine Jeffrey inc., à leur syndicat, une copie de la présente ordonnance et ce, dans les dix jours des présentes;

(...)

[8] Autorise Mine Jeffrey inc. à déposer un plan d'arrangement avec ses créanciers, le tout conformément à la LACC;

(...)

[16] Autorise le contrôleur à prendre possession de tous les biens corporels et incorporels, mobiliers et immobiliers appartenant à Mine Jeffrey inc. ou servant à l'exploitation de son entreprise;

(...)

[18] Autorise le contrôleur à faire tous les actes nécessaires à la conservation et à l'entretien des biens et des locaux de Mine Jeffrey inc. selon les standards commerciaux en la matière;

(...)

[20] Autorise le contrôleur à exercer les pouvoirs suivants :

(...)

h) engager et retenir les services de certains des anciens dirigeants de Mine Jeffrey inc. de même que tout autre personne, ex-employés ou non de Mine Jeffrey inc., selon des termes et conditions qu'il jugera appropriés, en vue de compléter la perception des comptes à recevoir, la vente des produits finis, la mise en place de mesures de protection des actifs immobilisés, l'élaboration d'un plan de sauvetage des actifs et de mise en veilleuse du complexe minier et la finalisation d'un plan d'arrangement avec les créanciers de Mine Jeffrey inc.;

(...)

i) procéder à l'arrêt des opérations de production de Mine Jeffrey inc. et à la mise en place de mesures de protection des actifs immobilisés de la compagnie;

(...)

l) effectuer les mises à pied et mettre fin au contrat d'emploi des employés de Mine Jeffrey inc., selon ce qu'il jugera approprié;

m) conserver au service de Mine Jeffrey inc. tout employé, selon ce qu'il jugera approprié, pour procéder à l'exécution du plan d'arrangement;

n) encourir et payer, à même les recettes de Mine Jeffrey inc., les frais et dépenses liés au plan d'arrangement, dont notamment le salaire des employés conservés et des consultants engagés, les dépenses liées à la sauvegarde des biens de Mine Jeffrey inc.;

(...)

> [22] Autorise le contrôleur à suspendre, selon ce qu'il jugera approprié, toute convention comportant pour Mine Jeffrey inc. l'obligation de verser des sommes d'argent pour le bénéfice des employés de Mine Jeffrey inc., actuels ou anciens, et qui sont relatives à des avantages sociaux consentis par Mine Jeffrey inc. à ses employés actuels et anciens, telles que les assurances médicaments et dentaires, les assurances-vie et invalidité, le versement de cotisation au régime de retraite des employés sauf, dans ce dernier cas, pour les employés dont les services sont retenus par le contrôleur, le tout sous réserve du droit, s'il en est, de tels créanciers de produire une preuve de réclamation;
>
> (...)
>
> [26] Déclare que le contrôleur n'est pas et ne pourra être considéré comme un employeur ou successeur de Mine Jeffrey inc., et ce, pour quel que objet que ce soit relativement à Mine Jeffrey inc., ses employés ou anciens employés;
>
> [27] Déclare que le contrôleur et toute personne dont il retient les services dans le cadre de la présente ordonnance et toute personne dont il aura retenu les services dans le cadre de l'arrangement ne peuvent encourir de responsabilité statutaire ou civile pour tout acte, décision ou omission fait dans l'exercice des pouvoirs autorisés aux termes de la présente ordonnance ou de tout renouvellement ou modification et que toutes actions, poursuites et autres procédures ne pourront être portées contre le contrôleur ou toute personne dont il aura retenu les services, sans autorisation préalable de cette Cour;
>
> (...)
>
> (je souligne)

10 Le jour même, le contrôleur procède à un licenciement collectif des employés de Mine Jeffrey inc. À ce moment, elle comptait 258 employés syndiqués actifs, membres de l'un ou l'autre des trois syndicats appelants. À compter du lendemain, il retient progressivement les services d'environ 90 personnes, dont 60 membres des syndicats appelants. À chacun d'eux, indépendamment de son statut (cadre, salarié syndiqué ou non), il fait signer un contrat individuel d'emploi où il se décrit comme agissant ès qualité de contrôleur de l'arrangement et des affaires de Mine Jeffrey inc., qui comprend les dispositions suivantes :

> **2. RÉMUNÉRATION**
>
> L'Employé sera rémunéré hebdomadairement selon le taux horaire habituel de l'Employé pour l'emploi occupé chez Mine Jeffrey inc.
>
> **3. VACANCES ET AVANTAGES SOCIAUX**
>
> Pour les vacances et tous les avantages sociaux, sous quelque forme qu'ils soient, une somme forfaitaire imposable équivalent à vingt-deux pour-cent (22%) de la rémunération brute sera versée à l'Employé à la fin de chaque semaine.
>
> **4. RÉGIME DE PENSION**
>
> Une somme forfaitaire équivalent à huit pour-cent (8%) de la rémunération brute gagnée entre le 7 octobre et le 30 novembre 2002 sera versée au régime de pension de l'Employé auquel il participe.

5. COTISATIONS SYNDICALES

L'Employé demande spécifiquement au Contrôleur de retenir, à même sa rémunération, sa cotisation syndicale habituelle afin qu'elle soit remise au syndicat dont il est membre.

(. . .)

L'Employé reconnaît que le Contrôleur n'agit pas et ne pourra être considéré comme Employeur successeur de Mine Jeffrey inc. et qu'il n'assumera d'aucune façon les dettes et obligations passées ou présentes que Mine Jeffrey inc. pourrait avoir à l'égard de l'Employé.

11 Dans une lettre du 23 octobre 2002, adressée au président du comité des retraités du régime de retraite des employés horaire de Mine Jeffrey inc., le contrôleur conformément à l'autorisation donnée au par. 22 de l'ordonnance initiale écrit :

(. . .)

Mine Jeffrey inc., à titre d'employeur, est partie au régime de retraite mentionné en titre et verse à la caisse de retraite des cotisations patronales pour le bénéfice des participants et bénéficiaires du régime.

En date du 7 octobre dernier, le contrôleur procédait à un licenciement collectif des employés de Mine Jeffrey inc. et n'a conservé au service de Mine Jeffrey inc. qu'un nombre limité d'employés participant au régime de retraite.

En ce qui concerne les cotisations postérieures au 1er octobre 2002, le contrôleur versera, pour les employés participants dont les services auront été retenus par le contrôleur, une somme forfaitaire équivalente à huit pourcent (8%) de la rémunération brute gagnée entre le 7 octobre et le 30 novembre 2002 de chaque employé. Les cotisations seront remises à la caisse de retraite à la fin de chaque mois.

Finalement, considérant la situation financière précaire de Mine Jeffrey inc., le contrôleur vous avise que les contributions de l'employeur à la caisse de retraite du régime en vue de redresser son déficit actuariel ne seront plus effectuées et ce, pour la période débutant le 1er octobre 2002 et se terminant à une date indéterminée.

(. . .)

(je souligne)

12 La preuve indique qu'à ce moment, le déficit actuariel se situerait entre 30 000 000 $ et 35 000 000 $ et qu'il y a 1200 employés retraités. Celui-ci avait été évalué en décembre 1999 à environ 12 000 000 $ et la débitrice a versé jusqu'en septembre 1999, 170 500 $ par mois pour le renflouer. Comme l'indique la lettre du 23 octobre, le contrôleur a suspendu le paiement de ce montant en octobre 2002.

13 Le contrôleur termine aussi les régimes d'assurance soins dentaires, d'assurance invalidité, d'assurance médicaments et d'assurance voyage, des programmes prévus par les conventions collectives et qu'il a remplacé pour les employés toujours actifs par une majoration de 22% de leur salaire.

14 Le 7 novembre 2002, à la suite d'une requête du contrôleur, la Cour supérieure émet une seconde ordonnance qui reconduit l'ordonnance initiale jusqu'au 10 janvier 2003, ordonne le report de la convocation de l'assemblée des

créanciers à une date indéterminée et autorise le contrôleur à emprunter et donner des garanties afin de financer les frais et déboursés liés à la préservation des actifs.

15 Le contrôleur mentionne alors la possibilité d'obtenir un contrat d'une société américaine fournisseur de la NASA, ATK Thiokol Propulsion Corp., pour 600 tonnes d'amiante. Celui-ci requerrait une reprise momentanée des opérations d'environ quatre mois. À la sortie de la salle d'audience, le contrôleur déclare au président du principal syndicat que ce contrat n'a d'intérêt que si les conventions collectives sont mises de côté et lui demande sa position. Ce dernier ne répond pas.

16 Dans les semaines qui suivent, le contrôleur négocie avec les banquiers, les créanciers garantis ayant des droits sur les équipements et certains fournisseurs dont Hydro-Québec afin de pouvoir être en mesure d'exécuter le contrat avec Thiokol. Cependant, il n'y a eu aucune tentative de négociation avec les appelants visant à modifier les conventions collectives ou en suspendre temporairement l'application. Le 22 novembre, le contrôleur accepte la commande de Thiokol, puis s'adresse à la Cour supérieure pour obtenir diverses ordonnances considérées nécessaires à sa réalisation, dont une déclaration à l'effet qu'il n'est pas lié par les conventions collectives. Dans sa requête, il allègue que "les représentants des ex-employés syndiqués de la Débitrice ont avisé le Contrôleur qu'ils réclameraient que ce dernier applique intégralement les conditions de travail prévues aux Conventions collectives".

17 Le 27 novembre 2002, vers 19h20, les avocats des appelants reçoivent par télécopieur la requête du contrôleur avec avis de présentation le lendemain matin à Sherbrooke.

18 Cette requête donne lieu à un débat devant le premier juge les 28 et 29 novembre 2002. Le contrôleur fait valoir qu'il a obtenu un contrat important susceptible de générer des recettes nettes de plus de 2 000 000 $ et qui permettrait le rappel au travail d'environ 275 employés pendant quatre mois. Il ajoute que s'il devait respecter les dispositions des conventions collectives, le projet Thiokol serait sans intérêt car il ne générera pas suffisamment de profits. Son principal problème est l'obligation de l'employeur en vertu de la *Loi sur les régimes complémentaires de retraite* (L.R.Q. c. R-15.1) d'amortir sur une période de cinq ans le déficit actuariel des régimes de retraite prévus aux conventions collectives, ce qui requerrait des contributions mensuelles d'au moins 500 000 $, même de 600 000 $. Il y a aussi les vacances accumulées en 2002, avant le 7 octobre, payables selon les conventions le 1er janvier 2003 et représentant environ 1 334 000 $, puis le maintien de l'assurance-vie des retraités prévue dans les conventions collectives et dont les primes sont à la seule charge de la débitrice. Finalement, il déclare qu'il est impossible de remettre en place les régimes d'assurance médicaments, dentaire et invalidité dans un si court délai. Il conclut que s'il devait respecter toutes les exigences des conventions collectives pendant les quatre mois d'opération, il en coûterait environ 4 000 000 $, somme qu'il n'a pas et qui excède de beaucoup le bénéfice escompté du projet Thiokol.

19 Le 29 novembre 2002, le premier juge accueille la requête et prononce séance tenante une troisième ordonnance, laquelle autorise le contrôleur à reprendre certaines opérations de la Mine Jeffrey inc. pour réaliser le projet Thiokol, incluant le pouvoir d'engager toute personne requise et ce, sans avoir à respecter les conventions collectives.

20 Depuis lors, le contrôleur a retenu les services d'environ 220 salariés membres de l'un ou l'autre des syndicats appelants. Même si les engagements se font dans le respect des règles d'ancienneté prévues dans les conventions collectives, les syndicats appelants n'ont été impliqués d'aucune façon. À chaque occasion, le contrôleur a exigé des salariés qu'ils signent un contrat individuel de travail semblable à celui décrit plus haut.

21 Il appert que les salaires versés correspondent à ceux prévus aux conventions collectives et que les montants accordés pour les avantages sociaux et le régime de retraite (30%) correspondent aux coûts que ceux-ci représentaient pour la débitrice avant le 7 octobre, hormis le financement du déficit actuariel.

LE JUGEMENT D'INSTANCE

22 L'ordonnance émise le 29 novembre 2002 contient les dispositions suivantes :

> [6] **RECONDUIT** jusqu'au 31 mai 2003 la seconde ordonnance rendue par l'Honorable Pierre C. Fournier, j.c.s., le 7 novembre 2002, telle qu'amendée par la présente ordonnance;
>
> [7] **AUTORISE le contrôleur ès-qualité à reprendre pour et au nom de Mine Jeffrey inc. certaines des opérations de celle-ci et pour ce faire, AUTORISE le Contrôleur à exercer les pouvoirs suivants :**
>
> a) engager et retenir les services de toute personne, ex-employé ou non de Mine Jeffrey inc. selon des termes et conditions qu'il jugera appropriés;
>
> b) extraire et transformer le minerai brut d'amiante en produit fini;
>
> (. . .)
>
> c) encourir et payer à même les recettes de Mine Jeffrey inc. les frais et dépenses liés à la reprise des opérations en rapport avec le projet Thiokol;
>
> (. . .)
>
> f) exercer tout autre pouvoir nécessaire ou utile en vue de gérer les opérations de Mine Jeffrey inc.;
>
> (. . .)
>
> [12] **DÉCLARE** que le Contrôleur et toute personne dont il retient les services dans le cadre de la présente ordonnance et toute personne dont il aura retenu les services dans le cadre de l'arrangement ne peuvent encourir de responsabilité statutaire ou civile pour tout acte, décision, omission ou dommage fait dans l'exercice des pouvoirs autorisés aux termes de la présente ordonnance y compris, mais sans limitation, tout dommage lié à la qualité et aux effets et conséquences découlant de la vente des produits de fibre d'amiante qui seront vendus suite à la reprise des opérations de Mine Jeffrey inc. et tout dommage lié à l'environnement et survenu dans le cadre de la reprise des opérations de la Débitrice, sauf si un tel fait ou dommage est causé par sa négligence grave ou son inconduite délibérée;
>
> [16] **DÉCLARE que le Contrôleur n'est pas lié par les Conventions collectives convenues** entre Mine Jeffrey inc. et ses ex-employés syndiqués et qu'il n'est conséquemment pas tenu d'en respecter les dispositions dans le cadre de l'exécution du projet Thiokol;
>
> [20] **DÉCLARE** la présente ordonnance exécutoire nonobstant tout appel;
>
> (je souligne)

LES PRÉTENTIONS DES PARTIES

23 Les appelants font valoir que l'ordonnance attaquée permet au contrôleur d'opérer la mine, gérer ses activités, licencier, embaucher, congédier et déterminer les conditions de travail des salariés, sans respecter leurs droits découlant de l'accréditation et les obligations découlant des conventions collectives, le tout en bénéficiant d'une immunité civile et statutaire. Or, selon eux, le contrôleur est en vertu de l'art. 18.1 de la LACC le successeur de Mine Jeffrey inc., ce qui en

fait un nouvel employeur visé par l'art. 45 du *Code du travail du Québec.* Il est, par conséquent, lié par les accréditations et les conventions collectives. Il s'ensuit, selon eux, que les dispositions attaquées des ordonnances (par. 20 h), 20 l), 20 m), 22, 26 et 27 de l'ordonnance initiale et par. 7 a), 12 et 16 de la troisième ordonnance) sont contraires à des dispositions d'ordre public en matière d'aliénation d'entreprise (art. 39, 45 et 46 du *Code du travail du Québec*) et doivent être déclarées invalides. De plus, les questions soulevées ne relèveraient pas de la Cour supérieure, mais de tribunaux administratifs spécialisés.

24 L'intimé rétorque que le par. 26 de l'ordonnance initiale a déclaré qu'il n'est pas et ne peut être considéré comme un employeur ou successeur de Mine Jeffrey inc. et qu'il est désormais trop tard pour les appelants pour demander à cette cour de réviser cette partie de l'ordonnance initiale. Il s'ensuit selon lui qu'il ne peut être lié par les conventions collectives.

25 Quant aux parties de la troisième ordonnance relatives aux conventions collectives, elles ne feraient que les suspendre pendant le projet Thiokol, ce qui ne violerait en rien la liberté d'association des salariés et serait valide considérant les pouvoirs très étendus du tribunal en vertu de la LACC, dont celui de modifier les droits de parties autres que la débitrice sans leur consentement, si les circonstances le justifient.

LES DISPOSITIONS LÉGISLATIVES PERTINENTES

26 Les dispositions législatives de la LACC pertinentes en l'espèce sont :

11.3	
No order made under section 11 shall have the effect of	L'ordonnance prévue à l'article 11 ne peut avoir pour effet :
(a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or	a) d'empêcher une personne d'exiger que soient effectués immédiatement les paiements relatifs à la fourniture de marchandises ou de services, à l'utilisation de biens loués ou faisant l'objet d'une licence ou à la fourniture de toute autre contrepartie valable qui ont lieu après l'ordonnance prévue à

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cet article;

(b) requiring the further advance of money or credit.

b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits.

11.7

(1) When an order is made in respect of a company by the court under section 11, the court shall at the same time appoint a person, in this section and in section 11.8 referred to as « the monitor », to monitor the business and financial affaires of the company while the order remains in effect.

(1) Le tribunal qui accorde l'ordonnance visée à l'article 11 nomme une personne pour agir à titre de contrôleur des affaires et des finances de la compagnie pour la période pendant laquelle l'ordonnance est en vigueur.

(2) Except as may be otherwise directed by the court, the auditor of the company may be appointed as the monitor.

(2) Sauf décision contraire du tribunal, le vérificateur de la compagnie peut être nommé pour agir à titre de contrôleur.

(3) The monitor shall

(3) Le contrôleur :

a) for the purposes of monitoring the company's business and financial affairs, have access to

a) dans le cadre de la surveillance des affaires et des finances de la compagnie et dans la mesure où cela

and examine the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company to the extent necessary to adequately assess the company's business and financial affairs;

b) file a report with the court on the state of the company's business and financial affairs, containing prescribed information,

(i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,

(ii) at least seven days before any meeting of creditors under section 4 or 5,

or

(iii) at such other times as the

s'avère nécessaire pour lui permettre de les évaluer adéquatement, a accès aux biens de celle-ci - notamment locaux, livres, données sur support électronique ou autre, registres et autres documents financiers -, biens qu'il est d'ailleurs tenu d'examiner;

b) est tenu de déposer auprès du tribunal un rapport portant sur l'état des affaires et des finances de la compagnie et contenant les renseignements prescrits :

(i) dès qu'il note un changement négatif important au chapitre des projections relatives à l'encaisse ou au chapitre de la situation financière de la compagnie,

(ii) au moins sept jours avant la tenue de l'assemblée des créanciers au titre des articles 4 ou 5,

iii) aux autres moments déter-minés

court may order;

c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and

d) carry out such other functions in relation to the company as the court may direct.

(4) Where the monitor acts in good faith and takes reasonable care in preparing the report referred to in paragraph (3)(b), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

(5) The debtor company shall

a) provide such assistance to the monitor as is necessary to enable the monitor to adequately carry out the monitor's functions; and

b) perform such duties set out in

par ordonnance de celui-ci;

c) est tenu de mentionner dans l'avis à envoyer aux créanciers au titre des articles 4 ou 5 que le rapport visé à l'alinéa b) a été déposé;

d) est tenu d'accomplir tout ce que le tribunal lui ordonne de faire.

(4) S'il agit de bonne foi et prend toutes les précautions voulues pour bien préparer le rapport visé à l'alinéa (3)b), le contrôleur ne peut être tenu responsable des dommages ou pertes subis par la personne qui s'y fie.

(5) La compagnie débitrice doit

aider le contrôleur à remplir adéquatement ses fonctions et

satisfaire aux obligations visées à

section 158 of the Bankruptcy and Insolvency Act as are appropriate and applicable in the circumstances.

l'article 158 de la Loi sur la faillite et l'insolvabilité selon ce qui est indiqué et applicable dans les circonstances.

11.8

(1) Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

(1) Par dérogation au droit fédéral et provincial, le contrôleur qui, ès qualités, continue l'exploitation de l'entreprise de la compagnie débitrice ou succède à celle-ci comme employeur est dégagé de toute responsabilité personnelle découlant de toute réclamation contre le débiteur ou liée à l'obligation de celui-ci de payer une somme si la réclamation est antérieure à sa nomination ou découle de celle-ci.

(2) A claim referred to in subsection (1) shall not rank as costs of administration.

(2) Une telle réclamation ne fait pas partie de frais d'administration.

(je souligne)

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L'ANALYSE

I. Bref rappel historique :

27 La LACC a été adoptée par le Parlement en 1933, lors de la Grande Dépression. Sa validité à titre de loi relative à l'insolvabilité et la faillite a été reconnue dès 1934 par la Cour suprême dans *Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.).

28 La LACC a été utilisée en ses débuts, mais peu par la suite. Elle a connu cependant une renaissance remarquable en Ontario, en Colombie-Britanique et en Alberta depuis une quinzaine d'années. Pour ne citer que quelques exemples, je mentionne la société aérienne Canadien[FN1], les magasins Eaton[FN2] et Woodward's[FN3], les mines Westar[FN4], Quintette [FN5] et Royal Oak[FN6] et la Société canadienne de la Croix-Rouge [FN7]. Au Québec, le phénomène est plus récent et cette cour n'a pas eu à interpréter cette loi depuis fort longtemps.

29 En 1992, lors de l'adoption par le Parlement d'une série importante de modifications à la *Loi sur la faillite et l'insolvabilité*(L.R.C. c. (1985) ch. B-3) (ci-après, LFI), plusieurs ont proposé d'abroger la LACC à la suite de l'entrée en vigueur de la nouvelle Partie III relative aux propositions concordataires. Le Parlement a plutôt choisi de la conserver, puis de la modifier substantiellement en 1997 (L.C. 1997, ch. 12). Il a alors codifié les pouvoirs du tribunal en matière de transaction concernant des réclamations contre les administrateurs (art. 5.1), précisé la preuve requise pour l'émission de l'ordonnance initiale ou toute autre ordonnance subséquente (art. 11(6)), ajouté des dispositions relatives à la nomination et aux attributions du contrôleur (art. 11.7 et 11.8) et limité les pouvoirs du tribunal quant à la fourniture des biens et services à crédit (art. 11.3), les contrats financiers admissibles (art. 11.1) et les pouvoirs des gouvernements en vertu de certaines lois (art. 11.11 et 11.4).

II. Objectif de la LACC :

30 Contrairement à une liquidation en vertu de la *Loi sur les liquidations et les réorganisations* (L.R.C. (1985) c. W-11) (ci-après, Loi sur les liquidations) ou à une cession de biens en vertu de la LFI,l'objectif n'est pas la fin des opérations de la débitrice et la distribution de ses actifs aux créanciers, mais comme l'indique le titre même de la LACC, d'en arriver à des arrangements entre la compagnie insolvable et ses créanciers qui permettront sa survie, le tout sous la supervision du tribunal. Le juge en chef Duff écrit dans *Attorney General of Canada, supra*, à la p. 661 :

> Furthermore, the aim of the Act is to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy.
>
> (je souligne)

31 Afin d'atteindre cet objectif, la LACC permet au tribunal de rendre toutes les ordonnances nécessaires pour maintenir le *statu quo* pendant la période requise pour qu'une proposition soit faite aux créanciers. La Cour d'appel de la Colombie-Britannique écrit dans *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146 (B.C. C.A.) :

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the *status quo* for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

32 Dans un jugement où elle fait une remarquable synthèse de la jurisprudence, *PCI Chemicals Canada Inc., Re*,

[2002] R.J.Q. 1093 (Que. S.C.) [FN8], la juge Danièle Mayrand fait les commentaires suivants que je partage :

> [52] La vitalité de la LACC est due en partie à l'interprétation que lui ont donnée les tribunaux, principalement en Ontario, en Colombie Britannique et en Alberta. Ces tribunaux recourent à une interprétation large et libérale de la LACC et à la notion de « juridiction inhérente » et « d'équité » pour donner effet aux objectifs de la LACC qui sont de permettre à des entreprises de demeurer en affaires pour régler leur insolvabilité et redresser leur situation financière. Les tribunaux ont conclu que la LACC doit être interprétée et appliquée de cette façon afin de constituer un outil flexible pour la réorganisation des entreprises insolvables.
>
> [53] S'appuyant sur ces concepts, les tribunaux n'ont pas hésité au cours des dernières années, à rendre des ordonnances qui sont devenues presque routinières en vertu de la LACC, dont le droit pour la débitrice de résilier ses contrats.
>
> [54] Plusieurs de ces jugements s'inspirent de l'arrêt de la Cour supreme, Baxter Student Housing Ltd. c. College Housing Co-operative Limited[FN9], pour exercer leur juridiction inhérente et assurer la finalité de la LACC. La Cour suprême avait énoncé que la juridiction inhérente d'un tribunal ne lui permettait pas de rendre une ordonnance qui va à l'encontre de la volonté clairement exprimée par le législateur. Dans *Re Westar Mining Ltd.[FN10]*, le juge Macdonald réfère à l'arrêt *Baxter* et énonce le principe qui sera suivi par plusieurs jugements:
>
> Proceedings under the C.C.A.A. are a prime example of the kind of situation where the Court must draw such powers to « flesh out » the bare bones of an inadequate incomplete statutory provision in order to give effect to its objectives.[FN11]

(. . .)

> [58] Il se dégage de certains arrêts de la Cour d'appel alors qu'elle se prononçait sur d'autres question impliquant la LACC, qu'elle partage la même vision que celle des autres tribunaux canadiens quant à l'interprétation large et libérale que doit recevoir de la LACC pour assurer sa finalité.
>
> [59] Dans l'affaire *Michaud c. Steinberg Inc.[FN12]*, une ordonnance de la Cour supérieure permettait à Steinberg de désavouer ses baux et Steinberg a désavoué certains baux dont celui conclu avec Jalbec Inc.
>
> [60] Ce jugement a été porté en appel[FN13] mais la Cour d'appel n'est pas intervenue quant à cet aspect du dossier. Par contre, la juge Deschamps se prononçant sur une autre question énonce, que les propos du juge Forsyth dans l'affaire *Norcen[FN14]* « peuvent être adoptés sans réserve »:
>
> These comments may be reduced to two cogent points. First, it is clear that the C.C.A.A. grants a court the authority to alter the legal rights of parties other than the debtor company without their consent. Second, the primary purpose of the Act is to facilitate reorganizations and this factor must be given due consideration at every stage of the process, including the classification of creditors made under a proposed plan.[FN15]
>
> (Nos soulignés)

(. . .)

> [62] Dans l'arrêt *Les Immeubles Wilfrid Poulin Ltée c. Les Ordinateurs Hypocrat Inc.[FN16]*, la Cour

d'appel doit décider si elle peut homologuer un plan d'arrangement qui prévoit le droit de la débitrice de résilier certains contrats dont ses baux immobiliers et d'autres contrats à exécution successive.

[63] La Cour d'appel se réfère aux jugements rendus dans d'autres provinces canadiennes et confirme que la Cour supérieure avait judicieusement exercé sa discrétion en approuvant l'arrangement qui impliquait la résiliation des contrats de location :

(. . .) Aucune disposition de cette loi n'interdit à un tribunal d'homologuer un arrangement qui prévoit la résiliation de contrats à exécution successive si cette mesure peut sauvegarder les intérêts de l'entreprise en difficultés. (. . .)[FN17]

(. . .)

[65] Plus récemment, ce sont les jugements et les arrêts rendus dans les causes *Re Blue Range Resources Corp.[FN18] et Re Eaton Co.[FN19]*qui ont sonné le glas aux arguments des créanciers qui proposaient que le pouvoir de permettre la résiliation de contrat n'existait pas en vertu de l'article 11.

(. . .)

[74] La revue de la jurisprudence démontre que l'ordonnance de suspension des procédures rendue en vertu de l'article 11 peut prévoir le droit pour la débitrice de résilier les contrats qui lui sont préjudiciables.

(. . .)

[81] Par contre, même si l'ordonnance initiale prévoit ce droit pour la débitrice, le créancier qui s'estime lésé a le droit de demander au Tribunal de réviser cette ordonnance. Le Tribunal peut alors décider s'il est opportun pour la débitrice de résilier le contrat en question.

(je souligne)

III. Rôle du contrôleur :

33 Je suis d'avis que, comme le liquidateur nommé en vertu de la Loi sur les liquidationsoopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc., [1996] 1 S.C.R. 900 (S.C.C.)), le contrôleur est un officier de la cour[FN20].

34 Comme l'indique l'art. 11.7(3) de la LACC, son rôle en est d'abord un de surveillance des affaires et des finances de la débitrice et de préparation de rapports d'information à l'attention des créanciers et du tribunal. Son rôle s'apparente ainsi à celui du syndic nommé dans le cadre d'une proposition concordataire en vertu de la partie III de la LFI. En aucun temps un tel rôle n'a pour effet de dépouiller la débitrice de ses biens ou de lui en enlever le contrôle.

35 L'art. 11.7(3)d) de la LACC, cité plus haut, reconnaît que le tribunal peut aussi lui confier d'autres fonctions. Parmi celles-ci on peut penser, par exemple, à la prise de contrôle des biens, ce qui a été fait en l'instance par l'ordonnance initiale. De même, le tribunal peut autoriser le contrôleur à continuer l'exploitation de l'entreprise de la débitrice comme cela est reconnu explicitement par l'art. 11.8 de la LACC ("le contrôleur qui, ès qualités, continue l'exploitation de l'entreprise de la compagnie débitrice"). C'est ce qu'a fait l'ordonnance attaquée en son par. 7. En l'instance, les affaires de la débitrice sont donc, à la suite d'ordonnances de la cour, administrées par un contrôleur. Cela était bien sûr rendu nécessaire par la démission de ses administrateurs et la nécessité de reprendre les opérations pour exécuter le projet

Thiokol et ainsi générer un profit substantiel tout en préservant les relations d'affaires avec un très important client de la débitrice, ce qui est critique à toute relance de l'entreprise.

36 Le contrôleur se retrouve alors dans une situation comparable à celle d'un liquidateur en vertu de la Loi sur les liquidations qui est désigné par le tribunal pour agir à la place des administrateurs de la compagnie en liquidation et, à cette fin, "prend en sa garde ou son contrôle tous les biens, effets et droits incorporels" de la compagnie[FN21] et, si nécessaire pour une liquidation avantageuse, "continue les opérations de la compagnie" avec l'autorisation du tribunal[FN22]. Dans l'arrêt *Coopérants, Société mutuelle d'assurance-vie* , *supra*, p. 915, commentant les effets des ordonnances rendues en vertu de la Loi sur les liquidations, la Cour suprême a statué que contrairement à ce qui prévaut en cas de faillite, les biens de la compagnie en liquidation restent sa propriété et ne sont pas transférés dans les mains du liquidateur.

37 À mon avis, il n'en va pas autrement en l'instance car il n'y a pas en vertu de la LACC dévolution des biens et des droits de la compagnie insolvable au contrôleur. Les ordonnances rendues ne peuvent d'ailleurs être lues comme emportant dévolution des biens et des droits de la débitrice au contrôleur.

38 J'ajoute que ma conclusion est en harmonie avec les conséquences d'un avis d'intention d'une proposition concordataire en vertu de la Partie III de la LFI, où il est bien établi qu'il n'en résulte pas une cession des biens et droits de l'insolvable au syndic ni même en faveur d'un séquestre intérimaire nommé en vertu des art. 47 ou 47.1 de la LFI et autorisé par le tribunal à "prendre possession de tout ou partie des biens du débiteur" et à "exercer sur ces biens ainsi que les affaires du débiteur" un contrôle total[FN23].

39 En somme, le contrôleur devient la personne désignée par le tribunal pour agir à la place des administrateurs de la débitrice pour la période de négociation des arrangements. Comme pour un liquidateur, cet officier du tribunal n'est pas un tiers vis-à-vis de la compagnie insolvable (*Coopérants, Société mutuelle d'assurance-vie*, *supra*, p. 915).

40 C'est donc à bon droit que les ordonnances rendues précisent que le contrôleur ne saurait être considéré comme l'employeur des employés retenus ou rappelés, car Mine Jeffrey inc. demeure cet employeur. Dans l'arrêt *Royal Oak Mines Inc., Re*, [2001] O.J. No. 562 (Ont. C.A.), la Cour d'appel d'Ontario précise au par. 14 que le contrôleur nommé en vertu de la LACC, auquel le tribunal avait aussi conféré des pouvoirs de séquestre intérimaire en vertu de l'art. 47 de la LFI, ne devient pas l'employeur *même s'il opère*, car la débitrice le demeure :

> [14] The obligation to pay pension benefits was an obligation of Royal Oak under the collective agreement. That obligation was not altered by the order of April 16, 1999 because Royal Oak remained the employer. That obligation, however, was not honoured by Royal Oak for the simple reason that Royal Oak had no funds. PwC was under no obligation to pay the pension benefits; it was not the employer of the employees, nor was it the agent of Royal Oak. PwC's obligation and liabilities, positive and negative were spelled out in the order of April 16, 1999. In our view, s. 47(2) of the BIA gave the Court jurisdiction to make the order, including paragraph 33.
>
> (je souligne)

41 Il s'ensuit qu'il ne peut être qualifié de nouvel employeur en lieu et place de la débitrice quant aux employés gardés ou rappelés. On ne peut non plus parler d'une relation tripartite[FN24], car tel que mentionné plus haut il n'est pas un tiers vis-à-vis Mine Jeffrey inc. En réalité, lorsque le contrôleur met à pied ou engage à nouveau des employés, il le fait au nom de la débitrice comme l'indique d'ailleurs les par. 20 i), l) et m) de l'ordonnance initiale et le par. 7 de l'ordonnance attaquée.

42 Quant à l'art. 11.8, je n'y retrouve rien qui contredise cette conclusion. Il est vrai que dans le premier alinéa de l'art. 11.8 de la LACC, version française, on lit "le contrôleur qui, ès qualité, . . . succède à la compagnie débitrice comme employeur". Ces mots, pris hors contexte, peuvent, peut-être, être lus comme signifiant qu'il s'agit d'un nouvel employeur. Ceci dit avec égards, une telle interprétation m'apparaît cependant contraire à l'esprit même de la LACC, notamment parce que la débitrice continue d'exister et d'être propriétaire de ses biens et le fait que le contrôleur n'est pas un tiers vis-à-vis la débitrice. De plus, l'art. 11.8 dans sa version anglaise est plus clair puisqu'il énonce "*where a monitor* carries on in that position the business of a debtor company or *continues the employment of the company's employees*". Continuer l'emploi des employés de la compagnie est descriptif de la décision prise par le contrôleur, tout en reflétant bien l'idée que ceux-ci sont toujours des employés de la compagnie puisque le contrôleur *continue* leur emploi.

43 D'ailleurs n'est-il pas intéressant de noter que dans l'ordonnance initiale, le contrôleur a été autorisé, d'une part, à effectuer les mises à pied et mettre fin au contrat d'emploi des employés *de Mine Jeffrey inc.* et, d'autre part, à conserver *au service de Mine Jeffrey inc.* tout employé requis pour l'exécution du plan d'arrangement.

IV. La LACC et le monopole de représentation des appelants :

44 Rien dans les ordonnances rendues n'est à l'effet que les accréditations sont abolies ou modifiées. Les certificats d'accréditation émis en faveur des appelants sont donc encore valides et opérants. D'ailleurs, il est douteux que la Cour supérieure ait compétence pour statuer sur de telles questions comme il en a été décidé par la majorité dans le cadre de la liquidation des Coopérants (*Coopérants, société mutuelle d'assurance-vie/Coopérants, Mutual Life Insurance Society, Re*, [1997] R.J.Q. 776 (Que. C.A.)), à tout le moins en l'absence d'une disposition dans la LACC le permettant et valide constitutionnellement. Il s'ensuit que le monopole de représentation des appelants se continue, ce qu'incidemment l'ordonnance initiale reconnaît en précisant en son par. 6 qu'un avis à leur syndicat constitue un avis aux salariés.

45 Puisque les accréditations sont toujours valides, il faut en reconnaître les effets, ainsi décrits par la Cour suprême dans *Société d'énergie de la Baie James c. Noël*, [2001] 2 S.C.R. 207 (S.C.C.), aux par. 41 et 42 :

> [41] (. . .) L'octroi de cette accréditation impose des obligations importantes à l'employeur. Elle le contraint à reconnaître le syndicat accrédité et à négocier de bonne foi avec lui dans le but de conclure une convention collective. Une fois conclue, la convention collective lie aussi bien les salariés que l'employeur (. . .)
>
> [42] (. . .) L'existence de l'accréditation, et ensuite de la convention collective, prive l'employeur de négocier directement avec ses employés. En raison de sa fonction de représentation exclusive, la présence du syndicat forme écran entre l'employeur et les salariés. L'employeur est privé de la possibilité de négocier des conditions de travail différentes avec les salariés individuels. (. . .)
>
> (je souligne)

46 Par voie de conséquence, le contrôleur ne peut à l'égard de postes couverts par les unités d'accréditation faire fi du monopole de représentation des appelants. Or, la signature de contrats individuels avec des personnes appelées à occuper l'un ou l'autre des postes visés par les accréditations viole le monopole de représentation des appelants et est donc illégale.

V. Les conditions de travail des salariés continués ou rappelés :

47 L'art. 11.3 de la LACC ne permet pas à un tribunal d'ordonner à des fournisseurs de biens ou de services, incluant

les employés, de fournir leur prestation sans être payés immédiatement par le contrôleur. Quant à la contrepartie payable, celle-ci ne peut, selon moi, être imposée unilatéralement par le contrôleur ou le tribunal.

48 Ainsi prenons le cas d'un fournisseur de mazout. En vertu de ses pouvoirs étendus conférés par la LACC en matière de protection du statu quo et de sursis, le tribunal peut ordonner au fournisseur de continuer d'approvisionner la débitrice malgré la présence dans son contrat d'une clause en permettant la terminaison en cas d'insolvabilité du client. Les livraisons subséquentes de mazout se feront alors au prix prévu au contrat; si le contrôleur n'est pas satisfait de ce prix, il doit négocier une réduction avec le fournisseur ou terminer le contrat (en anglais, "to disclaim the contract"). Je ne vois cependant pas en vertu de quel pouvoir le tribunal pourrait ordonner que ce prix soit réduit à celui que le contrôleur estime approprié considérant la situation financière de la débitrice.

49 De même, je ne vois aucune assise juridique qui justifierait un tribunal d'ordonner au locateur d'accepter une réduction du loyer payable au locateur par une débitrice placée sous la LACC. Si le contrôleur ne peut obtenir par négociation une réduction du loyer, sa seule option sera de quitter les lieux et de résilier le bail.

50 En somme, rien dans la LACC[FN25] n'autorise le contrôleur ou le tribunal à arrêter unilatéralement la contrepartie payable à celui qui fournit un bien ou un service à la débitrice. De plus, cette contrepartie doit être convenue avec le fournisseur avant la prestation ou avoir été convenue avant l'ordonnance initiale, comme par exemple dans un contrat à exécution successive, ou encore être celle applicable en vertu de la loi, d'un règlement, d'un tarif ou des règles du marché. La situation est encore une fois semblable à celle d'une débitrice régie par la LFI.

51 En l'instance, puisque les accréditations ne sont pas visées par les ordonnances rendues, que le licenciement de tous les salariés syndiqués ne met pas fin aux accréditations et que des personnes sont rappelées le lendemain ou plus tard pour occuper des postes visés par les accréditations, il s'ensuit que la contrepartie à verser à ces personnes doit être celle prévue aux conventions collectives ou à tout amendement à celles-ci négocié avec le syndicat approprié. Cette contrepartie comprend le salaire et les autres avantages associés à leur prestation de services depuis l'ordonnance initiale. De plus, comme tout autre fournisseur, ils ne peuvent exiger en plus le paiement de toute somme due au moment de l'ordonnance initiale (art. 11.3, alinéa a) *in fine*); pour ces montants, ils seront au sens de la LACC des créanciers auxquels la débitrice proposera éventuellement un arrangement.

52 L'intimé souligne que l'ordonnance attaquée ne fait que suspendre, temporairement, les conventions collectives et que cela est possible en vertu des pouvoirs de sursis du tribunal. Je suis d'avis qu'une telle suspension est illégale lorsqu'elle revient à écarter unilatéralement les dispositions des conventions collectives en matière de contrepartie payable aux employés rappelés visés par les accréditations. En effet, outre le fait que l'art. 11.3 de la LACC interdise toute suspension de leur droit immédiat à la contrepartie, il est évident que la débitrice ne s'est pas engagée à leur payer plus tard la différence entre ce qu'ils auront reçu et ce qu'ils ont droit de recevoir en vertu des conventions collectives. Il ne s'agit pas d'une suspension, mais d'une modification des conditions de travail décrétée unilatéralement par le contrôleur, ce qui viole les droits des appelants résultant des accréditations.

53 J'ajoute que le pouvoir du contrôleur, avec ou sans autorisation du tribunal, de terminer un contrat m'apparaît difficilement applicable à une convention collective en raison de l'encadrement législatif, fédéral ou provincial, selon le cas, s'y appliquant et qui en fait plus qu'un simple contrat bilatéral, mais un instrument véritablement original[FN26]. De toute façon, à quoi servirait-il de résilier les conventions collectives si les accréditations demeurent et qu'il en résulte l'obligation pour l'employeur de négocier avec le syndicat approprié les conditions applicables en cas de nouvelle prestation de services par des salariés visés par lesdites accréditations? Négocier une nouvelle convention ou convenir de modifications à celle existante s'équivaut.

VI. La suspension des versements requis pour remédier au déficit du fonds de retraite et pour maintenir des assurances au profit des retraités :

54 En vertu des conventions collectives, Mine Jeffrey Inc. doit combler par des versements mensuels appropriés tout déficit actuariel. Celui-ci s'établissait en novembre 2002 entre 30 000 000 $ et 35 000 000 $ et requerrait des versements mensuels de 400 000 $ à 500 000 $ pour les cinq prochaines années.

55 Dans son témoignage devant le premier juge, le contrôleur a expliqué que la situation financière actuelle de la débitrice rendait impossible de tels versements, les profits tirés du contrat avec l'acheteur américain devant servir à des fins plus immédiates pour la survie de la débitrice. Je suis d'avis que la Cour supérieure avait le pouvoir de permettre la suspension de ces versements mensuels et que, dans les circonstances, sa décision ne peut être modifiée en appel.

56 Dans l'arrêt *Royal Oak Mines Inc., Re*, précité, la Cour d'appel d'Ontario était saisie de l'appel du syndicat qui contestait la validité de la partie de l'ordonnance initiale prescrivant que le contrôleur, autorisé à continuer l'exploitation de l'entreprise, ne pouvait faire aucune contribution au régime de retraite sans l'autorisation du tribunal. La Cour d'appel ontarienne rejette le pourvoi en ces termes :

> [11] The appellants submitted that paragraph 33 was beyond the power of the Court to order and, in effect, that paragraph 33 was illegal. They argued that the power of the interim receiver[FN27] could not exceed the power of Royal Oak and that as Royal Oak could not legally refuse to pay the pension benefits owing under its collective agreements, the Court could not authorize the interim receiver to refrain from paying them.
>
> [12] This submission misconstrues or mischaracterizes the situation. Royal Oak sought the protection of the CCAA, because it was incapable of dealing with the claims against it. The appointment of an interim receiver was sought in April 1999 by Royal Oak, its banker and other creditors because, as one counsel put it, Royal Oak's management had disappeared. It was hoped that with careful management the operations could be salvaged and the mines sold to others.
>
> [13] The interim receiver, however, had no funds with which to pay debts or with which to continue Royal Oak's operations. Nor did Royal Oak. Work could only begin or continue, and debts could only be paid with the infusion of financial support from Trilon Financial Corporation (« Trilon »), Northgate Exploration Limited (« Northgate ») and other prospective lenders. What operations were to be continued and what debts were to be paid were decided upon in advance by PwC and then authorized by Court order.
>
> [14] The obligation to pay pension benefits was an obligation of Royal Oak under the collective agreement. That obligation was not altered by the order of April 16, 1999 because Royal Oak remained the employer. That obligation, however, was not honoured by Royal Oak for the simple reason that Royal Oak had no funds. PwC was under no obligation to pay the pension benefits; it was not the employer of the employees, nor was it the agent of Royal Oak. PwC's obligation and liabilities, positive and negative were spelled out in the order of April 16, 1999. In our view, s. 47(2) of the BIA gave the Court jurisdiction to make the order, including paragraph 33[FN28].
>
> [15] Indeed, all that paragraph 33 of the order of April 16, 1999 did was to make it clear to the interim receiver and to others that the money being advanced by Trilon, Northgate and others was not to be applied to pension benefits without the express direction and authority of the Court. Between April 16 and August 29, 1999, approximately $37,174,400. was advanced pursuant to the terms of the order of April 16, 1999 in or-

> der to keep Royal Oak in operation.
>
> [16] It was argued that the inclusion of paragraph 33 in the order served to undermine the collective agreement which provided for the payment of pension benefits. We do not accept that submission. The benefits were not paid because Royal Oak had no funds with which to pay them and the financial support available to the receiver did not provide for such payments.

(je souligne)

57 En l'instance, la Cour supérieure en autorisant le contrôleur à suspendre le versement de cotisation au régime de retraite, "sauf, . . . , pour les employés dont les services sont retenus par le contrôleur" ne modifie pas les conventions collectives. En effet, les obligations de Mine Jeffrey inc. à l'égard des sommes payables à la caisse de retraite en vertu des conventions collectives continuent d'exister, mais ne sont pas honorées en raison de l'insuffisance de fonds. Dans le cadre du plan de réorganisation, des arrangements pourront être convenus quant au paiement des sommes alors dues.

58 Il en va de même à l'égard de la perte de certains bénéfices sociaux pour les personnes qui n'ont pas rendu de services à la débitrice depuis l'ordonnance initiale. Ces personnes deviennent des créanciers de la débitrice à hauteur de la valeur monétaire des avantages perdus en raison de l'arrêt du versement des primes par Mine Jeffrey inc.; le fait que ces avantages soient prévus dans les conventions collectives n'y change rien.

59 Finalement, quant aux jours de congé accumulés au moment de l'ordonnance initiale et toute rémunération non alors acquittée par Mine Jeffrey inc., ils demeurent des créances de la débitrice que le contrôleur n'est pas tenu d'acquitter (art. 11.8 LACC) et qui peuvent constituer des créances admissibles dans le cadre du plan de réorganisation.

VI. Récapitulation :

60 Les conventions collectives continuent de s'appliquer comme tout contrat à exécution successive non modifié d'un commun accord après l'ordonnance initiale ou non terminé (à supposer que cela puisse être possible pour des conventions collectives). Le contrôleur ou le tribunal ne peut les amender par décision unilatérale. Ceci dit, il y a lieu de faire des distinctions quant au paiement des créances qui en résultent.

61 Ainsi, les employés syndiqués gardés ou rappelés ont le droit d'être payés immédiatement par le contrôleur pour tout service rendu après la date de l'ordonnance (art. 11.3) et ce, selon les termes de la convention collective applicable dans sa version originale ou modifiée de consentement avec le syndicat concerné. Par contre, pour les services antérieurs, les obligations non exécutées par Mine Jeffrey inc. résultent en des créances contre Mine Jeffrey inc. pour lesquelles le contrôleur ne peut être tenu responsable (art. 11.8 LACC) et dont les employés ne peuvent exiger le paiement immédiat (art. 11.3 LACC).

62 Pour les employés licenciés définitivement le 7 octobre 2002 et les personnes qui étaient à ce jour des ex-employés de Mine Jeffrey inc., les obligations non honorées résultant des conventions collectives ou d'autres engagements constituent des créances de la débitrice, Mine Jeffrey inc., dont il sera disposé dans le cadre du plan de réorganisation ou à défaut, de la faillite de Mine Jeffrey inc.

VII. Les conclusions recherchées par les appelants :

63 Les appelants demandent d'annuler les par. 20h), 20l), 20m), 22, 26 et 27 de l'ordonnance initiale reconduite par le jugement attaqué et les par. 7a), 12 et 16 de la troisième ordonnance ou de rendre toute ordonnance qu'il plaira à la Cour.

64 À mon avis, le pouvoir conféré au contrôleur d'effectuer des mises à pied et de mettre fin à des contrats d'emploi, selon ce qu'il juge approprié, par. 20 l), est parfaitement valide. Il s'agit d'un pouvoir de gestion. Bien entendu les personnes visées ont droit de recevoir de Mine Jeffrey inc. les indemnités prévues à leur contrat individuel de travail si elles ne sont pas syndiquées et, dans le cas contraire, celles prévues à la convention collective applicable. Il en va de même du pouvoir de conserver une personne au service de la débitrice, par. 20 m).

65 Quant au pouvoir d'engager des employés selon des termes et conditions que le contrôleur juge appropriés, par. 20 h) de l'ordonnance initiale et par 7 a) de la troisième ordonnance, il y a lieu de préciser quant aux personnes occupant des postes visés par les accréditations, que ces termes et conditions sont ceux prévus dans la convention collective appropriée, telle qu'amendée s'il y a lieu.

66 Le par. 22, suspension des paiements, est valide pour les employés retraités ou non retenus par le contrôleur, mais non pour ceux rappelés. Il faut donc biffer après le mot "sauf", les mots ",dans ce dernier cas,".

67 La déclaration contenue au par. 26 de l'ordonnance initiale, pour les motifs énoncés plus haut sur le rôle du liquidateur, est bien fondée et apparaît utile, voire nécessaire pour éviter tout débat, notamment avec les appelants.

68 Il en va autrement du par. 16 de la troisième ordonnance déclarant que le contrôleur n'est pas tenu de respecter les conventions collectives, lequel est sans fondement et nul. Le juge aurait plutôt dû déclarer que le contrôleur devait négocier avec les appelants les modifications considérés nécessaires. J'invite d'ailleurs les parties dans le cadre de négociations urgentes et de bonne foi à convenir des amendements requis, s'il en est, pour compléter la réalisation du projet Thiokol.

69 Quant au par. 27 de l'ordonnance initiale et sa version élargie dans la troisième ordonnance, le par. 12, ils apparaissent d'abord comme des déclarations quant à l'immunité relative du contrôleur et des employés conformes à la LACC et utiles de réitérer considérant la nature particulière de l'entreprise de la débitrice et, ensuite, un exercice valide par le tribunal de son pouvoir de sursis de toute procédure (2^{eme} partie du par. 27 de l'ordonnance initiale et par. 13 de la troisième).

VIII. Conclusion et dispositif :

70 Pour ces motifs, je propose d'accueillir en partie le pourvoi, sans frais, vu la nouveauté des questions et le statut des parties, comme suit :

> • Biffer de l'ordonnance initiale, telle que reconduite le 27 novembre 2002 et à compter de cette date, au par. 22, les mots ", dans ce dernier cas";
>
> • Ajouter au par. 20 h) de l'ordonnance initiale, telle que reconduite le 27 novembre 2002 et à compter de cette date, et au par. 7 a) de la troisième ordonnance, après les mots "selon des termes et conditions qu'il jugera appropriés", les mots "lesquels sont, pour les postes couverts par des accréditations, ceux prévus dans la convention collective appropriée, telle qu'amendée s'il y a lieu";
>
> • Casser le par. 16 du jugement et le déclarer sans effet.

Pourvoi accueilli en partie.

FN1. *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 1 (Alta. Q.B.), confirmé en appel (2001), 20 C.B.R. (4th) 46 (Alta. C.A. [In Chambers]).

FN2. *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.)

FN3. *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.).

FN4. *Westar Mining Ltd., Re* (1992), 14 C.B.R. (3d) 95 (B.C. S.C.).

FN5. *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 47 B.C.L.R. (2d) 193 (B.C. S.C.).

FN6. *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]).

FN7. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1999), 12 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]).

FN8. Permission d'en appeler refusée, (April 9, 2002), Doc. C.A. Québec 500-09-012056-024 (Que. C.A.)

FN9. [1996] 2 R.C.S. 475.

FN10. (1992) 14 C.B.R. (3d) 88 (B.C.S.C.).

FN11. Id. p. 93

FN12. J.E. 93-743 (C.S.).

FN13. *Michaud c. Steinberg*, [1993] R.J.Q. 1684 (C.A.).

FN14. (1989) 72 C.B.R. 20.

FN15. *Michaud c. Steinberg, supra*, p. 1690.

FN16. [1998] R.D.I. 189 (C.A.).

FN17. Id. p. 191.

FN18. (1999) 245 A.R. 154 (Alb. Q.B.).

FN19. (2000) 14 C.B.R. (4th) 288 (Ont. S.C.).

FN20. Voir aussi *Quinsam Coal Corp., Re*, 2000 BCSC 653 (B.C. S.C.).

FN21. Art. 33 de la *Loi sur les liquidations.*

FN22. Art. 35 de la *Loi sur les liquidations.*

FN23. Albert Bohémier, *Faillite et insolvabilité*, 1992, écrit à la p. 197 : "En principe, le séquestre intérimaire n'agit que comme gardien des biens dont il acquiert la possession : le débiteur en demeure propriétaire. Par exception, le séquestre intérimaire peut acquérir en outre des pouvoirs d'aliénation". Houlden & Morawetz, *Bankruptcy and Insolvency*, 2003, écrivent à la p. 156 "The order appointing an interim receiver does not divest the debtor of his or her assets".

FN24. *Pointe-Claire (Ville) c. S.E.P.B., Local 57*, [1997] 1 S.C.R. 1015 (S.C.C.).

FN25. Contrairement au chapitre 11 du *U.S. Bankcruptcy Code* (art. 1113), la LACC ne contient pas une disposition ex-

presse permettant au tribunal de faillite de modifier les conventions collectives (voir à titre d'exemple, dans le dossier United Airlines, le jugement modifiant sans écarter la convention collective des employés au sol : *In re:UAL Corporation et al.*, US Bankruptcy Court, Northern District of Illinois, Eastern Division, dossier n° 02 B 48191, le 10 janvier 2003, juge Wedoff). Cet art. 1113 codifie la jurisprudence telle que résumée par la Cour suprême des États-Unis dans l'arrêt *N.L.R.B. v. Bildisco*, 465 U.S. 513 (U.S.S.C. 1984). La Cour suprême a alors unanimement conclu que la convention collective était un contrat au sens du code, lequel prévoit que le *trustee* peut, avec l'autorisation de la cour, continuer ou terminer tout contrat, mais que sa nature particulière obligeait la *debtor-in-possession* ou le *trustee* à tenter de le renégocier avec le syndicat, en toute bonne foi, avant de s'adresser à la cour pour la faire mettre de côté. De plus, la cour devait se satisfaire que cela était approprié dans le cadre de la réorganisation.

FN26. Robert P. Gagnon, *Le droit du travail du Québec*, 4^{e} éd., p. 442.

FN27. Price Waterhouse Coopers (PwC) avait été nommé contrôleur en vertu de la LACC et, en plus, séquestre intérimaire, avec pouvoirs de continuer l'exploitation de l'entreprise de Royal Oak.

FN28. Les pouvoirs du tribunal en vertu de la LACC ne sont certes pas moindres.

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TAB 13

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Air Canada, Re
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended
IN THE MATTER OF SECTION 191 OF THE CANADA BUSINESS CORPORATIONS ACT, R.S.C. 1985, C-44, as amended
IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF AIR CANADA AND VARIOUS APPLICANTS APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, as amended
RE: BANKRUPTCY OF AIR CANADA
Ontario Court of Appeal
O'Connor A.C.J.O., Sharpe, Blair JJ.A.
Heard: December 17, 2003
Judgment: December 17, 2003
Docket: CA M30712

Proceedings: refusing leave to appeal (2003), 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]); additional reasons to (2003), 2003 CarswellOnt 4966 (Ont. S.C.J. [Commercial List])

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Peter Griffin for Ernst & Young Inc., the monitor

James C. Tory for Board of Directors of Air Canada

Mark A. Gelowitz, Edward A. Sellers for Trinity Time Investments Limited

Richard B. Jones, Kevin A. Taylor for Air Canada Pilots Association

Ian Dick, J. Dais-Visca for Attorney General of Canada

Chris Besant for Lessor/Lenders Group

Matthew Gottleib for Deutsche Bank

Howard A. Gorman for Ad Hoc Committee of Unsecured Creditors

John R. Varley for Non-Union, ACPA Retirees

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Miscellaneous issues

Insolvent company embarked upon equity solicitation process that was narrowed down to two potential investors, T and C -- Company ultimately selected T as equity investor and entered into agreement with T to that effect -- Agreement contained "fiduciary out" clause which allowed board of directors of company to consider superior proposal -- Entire process was agreed to by monitor and various stakeholders -- C made series of unsolicited proposals to board of directors of company in effort to beat T proposal -- C advised that it would be putting forward its final proposal -- Stakeholder M brought motion requesting adjournment of approval hearing pending final proposal from C and disclosure of forthcoming C proposal -- Motion was dismissed -- T agreement was approved -- Stakeholder M brought motion for leave to appeal -- Motion dismissed -- Motion judge did not err in refusing adjournment and approving T agreement -- All parties had accepted process -- It was well within appropriate exercise of motion judge's discretion to hold parties to process to which they had agreed -- Motion judge concluded in effect that equity solicitation process and resulting T agreement were fair and reasonable in circumstances and advanced interests of stakeholders and company in restructuring -- "Fiduciary out" clause called for other investor proposals to be put forward within framework of T agreement -- If board of directors of company considered any such proposal to be superior it was required to bring it to court for consideration -- Approval of equity investor was but one of many steps towards ultimate plan of compromise and arrangement which would require approval of creditors and court -- In context of Companies' Creditors Arrangement Act proceeding court will grant leave to appeal only sparingly.

Cases considered:

Country Style Food Services Inc., Re (2002), 2002 CarswellOnt 1038, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) -- referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) -- referred to

Statutes considered:

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

Generally -- referred to

MOTION by stakeholder in insolvent company for leave to appeal from judgment reported at 2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List]) approving proposal from equity investor T and refusing request for adjournment of approval hearing pending proposal from equity investor C.

***The Court*:**

1 Mizuho International plc ("Mizuho") seeks leave to appeal from the order of Farley J. dated December 8, 2003. In that order, Farley J. (a) declined Mizuho's request for an adjournment of the hearing pending what is said to be a final proposal from Cerberus; and (b) approved what is know as the "Trinity Agreement" concerning Trinity's proposed equity

investment in the insolvent Air Canada. If leave be granted, Mizuho will argue the appeal as well.

2 We are all of the view that the motion for leave to appeal should be dismissed. It is well-settled that this court will only sparingly grant leave to appeal in the context of a *Companies' Creditors Arrangement Act* ("CCAA") proceeding. The court must be satisfied there are "serious and arguable grounds that are of real and significant interest to the parties": see *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377 (Ont. C.A. [In Chambers]). In our view, the test has not been met in the circumstances of this case.

3 In this particularly complex restructuring involving Air Canada, the company some time ago embarked upon an equity solicitation process that was ultimately narrowed down to two potential investors, namely Trinity and Cerberus.

4 On November 8, 2003, Air Canada selected Trinity as the equity investor and entered into an agreement with Trinity to that effect. The agreement contains confidentiality provisions and a "fiduciary out" clause that allows the Air Canada Board to consider a "superior proposal" as therein defined. This process has been supervised by the Monitor and all the stakeholders, including Mizuho, have bought into it as the most effective way of moving the restructuring along.

5 Indeed, until a few days before the approval hearing before Farley J., Mizuho was urging all concerned to accept the Trinity Agreement. In late November, however, Cerberus made a series of unsolicited proposals to the Air Canada Board seeking to best the Trinity proposal. During a chambers meeting with Farley J. on December 4th, Cerberus indicated that it would be putting forward its final proposal the following week and that it was content to do so under the rubric of the fiduciary out clause in the Trinity Agreement.

6 On December 8th, Farley J. refused Mizuho's request for an adjournment and for an order requiring that the forth-coming Cerberus proposal be disclosed to the court and to the creditors. On the urging of virtually all of the parties, and on the recommendation of the Monitor and in the interests of facilitating the urgent need for the Air Canada restructuring to proceed, Farley J. approved the Trinity Agreement.

7 Mr. Sasso argues that he erred in doing so and that the court had a duty to consider and review competing offers before deciding whether to approve the Trinity Agreement as the one in the best interests of the creditors. He relies on the decision of this court in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.).

8 What Farley J. did, however, was to conclude in effect that the equity solicitation process and the Trinity agreement which resulted from it were fair and reasonable in the circumstances and advanced the interests of the stakeholders and Air Canada in the restructuring. All parties had accepted this process, which has, as a significant feature, the fiduciary out clause. This clause calls for other investor proposals to be put forward in the framework of the Trinity Agreement. It also places in the Air Canada Board, in the exercise of its business acumen as a board, the duty to determine whether such a proposal is a "superior proposal". The Board is, of course, bound to consider any such proposal in good faith and in the context of its fiduciary duties as directors. If it considers the proposal to be a "superior" one, it must bring it to the court for consideration. We note as well that the court-appointed Monitor remains inextricably involved in this exercise.

9 Given these circumstances, accepted by all, it was well within the appropriate exercise of Farley J.'s discretion to refuse the adjournment, approve the Trinity Agreement and hold the parties to the process to which they had agreed. We see no error in principle on his part in doing so.

10 We observe that the approval of the equity investor is but one of many steps along the route towards an ultimate plan of compromise and arrangement which will require the approval of creditors and the sanction of the court.

11 Accordingly, the motion for leave to appeal is dismissed. The costs of this motion, and of the chambers motion before Blair J.A. on December 5, 2003, are fixed as follows, and payable by Mizuho:

To Air Canada	$30,000
To Trinity Time Investments	$20,000
To Air Canada Pilots Association	$10,000
To GECAS	$10,000
To Lessors/Lenders Group	$ 5,000

Motion dismissed.

END OF DOCUMENT

TAB 14

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **MAY 6, 2009**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Petitioners

And
ERNST & YOUNG INC.
Monitor

SECOND AMENDED INITIAL ORDER

---

[1] **CONSIDERING** Petitioners' Motion for the Approval of a DIP Financing in Respect of the Abitibi Petitioners;

[2] **CONSIDERING** the representations of the parties;

[3] **GIVEN** the provisions of the CCAA;

FOR THE REASONS GIVEN ORALLY AND REGISTERED, THE COURT:

JG1793

[1] **GRANTS** the Petition.

[2] **ISSUES** an order pursuant to Sections 4, 5, 11 and 18.6 of the CCAA (the "**Order**"), divided under the following headings:

a) Service

b) Application of the CCAA

c) Effective Time

d) Plan of Arrangement

e) Recognition of U.S. Proceedings

f) Procedural Consolidation

g) Stay of Proceedings against the Petitioners, the Partnerships, the Property, the Directors or others

h) Possession of Property and Carrying on Business

i) Securitization Program

j) Restructuring

k) Directors Indemnification and Charge

l) BCFPI DIP Financing

m) ACI DIP Financing

n) Subrogation to ACI DIP Charge

o) Inter-Company Advances

p) Bowater Adequate Protection Charge

q) Powers of the Monitor

r) Appointment of Information Officer in Respect of U.S. Proceedings

s) Approval and Appointment of Financial Advisor

t) Priorities and General Provisions Relating to CCAA Charges

u) General

v) Effect, Recognition and Assistance

Service

[3] **EXEMPTS** AbitibiBowater Inc. (**"ABH"**), Abitibi-Consolidated Inc. (**"ACI"**), the Petitioners listed on Schedule "A" hereto (collectively with ACI, the **"Abitibi Petitioners"**), Bowater Canadian Holdings Inc. (**"BCHI"**) and the Petitioners listed on Schedule "B" hereto (collectively with BCHI, the **"Bowater Petitioners"**) from having to serve the Petition and from any notice of presentation.

Application of the CCAA

[4] **DECLARES** that the Abitibi Petitioners and the Bowater Petitioners (collectively the **"Petitioners"**) are debtor companies to which the CCAA applies.

Effective time

[5] **DECLARES** that from immediately after midnight (Montréal time) on the day prior to this Order i.e. from the beginning of the day on April 17, 2009 (the **"Effective Time"**) to the time of the granting of this Order, any act or action taken or notice given by any Person in respect of the Petitioners, the 18.6 Petitioners, the Directors or the Property (as those terms are defined hereinafter), are deemed not to have been taken or given, as the case may be, to the extent such act, action or notice would otherwise be stayed after the granting of this Order.

Plan of Arrangement

[6] **ORDERS** that the Petitioners shall file with this Court and submit to their creditors one or more plans of compromise or arrangement under the CCAA (collectively, the **"Plan"**) between, among others, the Petitioners and one or more classes of their creditors as the Petitioners may deem appropriate, on or before the Stay Termination Date (as defined hereinafter) or such other time or times as may be allowed by this Court.

Recognition of U.S. Proceedings

[7] **ORDERS AND DECLARE** that the proceedings (the **"U.S. Proceedings"**) commenced by ABH and the Petitioners listed on Schedule "C" hereto (collectively, the **"18.6 Petitioners"**) under Chapter 11 of the United States Code in the United States Bankruptcy Court for the District of Delaware (the **"U.S. Court"**) be and are hereby recognized as foreign proceedings for purposes of Section 18.6 of the CCAA.

[8] **DECLARES** that the 18.6 Petitioners are debtor companies within the meaning of the CCAA and, as such, are entitled to relief under Section 18.6 of the CCAA.

Procedural Consolidation

[9] **ORDERS** that the consolidation of these CCAA proceedings in respect of the Abitibi Petitioners, the Bowater Petitioners and the 18.6 Petitioners shall be for administrative purposes only and shall not effect a consolidation of the assets and property of the Petitioners including, without limitation, for the purposes of any Plan or Plans that may be hereafter proposed.

Stay of Proceedings against the Petitioners, the Partnerships, the Property, the Directors or others

[10] **ORDERS** that, until and including May 14, 2009, or such later date as the Court may order (the **"Stay Termination Date"**, the period from the date of this Order to the Stay Termination Date being referred to as the **"Stay Period"**), no right, legal or conventional, may be exercised and no proceeding, at law or under a contract, by reason of this Order or otherwise, however and wherever taken (collectively the **"Proceedings"**) may be commenced or proceeded with by anyone, whether a person, firm, partnership, corporation, stock exchange, government, administration or entity exercising executive, legislative, judicial, regulatory or administrative functions (collectively, **"Persons"** and, individually, a **"Person"**) against or in respect of the Petitioners, the 18.6 Petitioners and the entities listed on Schedule "D" hereto (the **"Partnerships"**), or any of the present or future property, assets, rights and undertakings of the Petitioners, the 18.6 Petitioners or the Partnerships, of any nature and in any location, whether held directly or indirectly by the Petitioners, the 18.6 Petitioners or the Partnerships, in any capacity whatsoever, or held by others for the Petitioners, the 18.6 Petitioners or the Partnerships (collectively, the **"Property"**), and all Proceedings already commenced against the Petitioners, the 18.6 Petitioners, the Partnerships or any of the Property, are stayed and suspended until the Court authorizes the continuation thereof, the whole subject to the provisions of the CCAA.

[11] **ORDERS** that, without limiting the generality of the foregoing, during the Stay Period, all Persons having agreements, contracts or arrangements with the Petitioners, the 18.6 Petitioners, the Partnerships or in connection with any of the Property, whether written or oral, for any subject or purpose:

a) are restrained from accelerating, terminating, cancelling, suspending, refusing to modify or extend on reasonable terms such agreements, contracts or arrangements or the rights of the Petitioners, the 18.6 Petitioners, the Partnerships or any other Person thereunder;

b) are restrained from modifying, suspending or otherwise interfering with the supply of any goods, services, or other benefits by or to such Person thereunder (including, without limitation, any directors' and officers' insurance, any telephone numbers, any form of telecommunications service, any oil, gas, electricity or other utility supply); and

c) shall continue to perform and observe the terms and conditions contained in such agreements, contracts or arrangements, so long as the Petitioners, the 18.6 Petitioners or the Partnerships pay the prices or charges for such goods and services received after the date of this Order as such prices or charges become due in accordance with the law or as may be hereafter negotiated (other than deposits whether by way of cash, letter of credit or guarantee, stand-by fees or similar items which the Petitioners, the 18.6 Petitioners or the Partnerships shall not be required to pay or grant);

Unless the prior written consent of the Petitioners, the 18.6 Petitioners or the Partnerships, as well as that of the Monitor, is obtained or leave is granted by this Court.

[12] **ORDERS** that, without limiting the generality of the foregoing and subject to Section 18.1 of the CCAA, if applicable, cash or cash equivalents placed on deposit by the Petitioners, the 18.6 Petitioners or the Partnerships with any Person during the Stay Period, whether in an operating account or otherwise for itself or for another entity, shall not be applied by such Person in reduction or repayment of amounts owing to such Person as of the date of this Order or due on or before the expiry of the Stay Period or in satisfaction of any interest or charges accruing in respect thereof; however, this provision shall not prevent any financial institution from: (i) reimbursing itself for the amount of any cheques drawn by the Petitioners, the 18.6 Petitioners or the Partnerships and properly honoured by such institution, or (ii) holding the amount of any cheques or other instruments deposited into the Petitioners', the 18.6 Petitioners' or the Partnerships' account until those cheques or other instruments have been honoured by the financial institution on which they have been drawn.

[13] **ORDERS** that, notwithstanding the foregoing, any Person who provided any kind of letter of credit, bond or guarantee (the **"Issuing Party"**) at the request of the Petitioners, the 18.6 Petitioners or the Partnerships shall be required to continue honouring any and all such letters, bonds and guarantees, issued on or before the date of this Order; however, the Issuing Party shall be entitled, where applicable, to retain the bills of lading or shipping or other documents relating thereto until paid therefore.

[14] **DECLARES** that, to the extent any rights, obligations, or time or limitation periods, including, without limitation, to file grievances, relating to the Petitioners, the 18.6 Petitioners or Partnerships or any of the Property may expire, other than the term of any lease of real property, the term of such rights or obligations, or time or limitation periods shall hereby be deemed to be extended by a period equal to the Stay Period. Without limitation to the foregoing, in the event that the Petitioners, the 18.6 Petitioners or the Partnerships become bankrupt or a receiver within the meaning of paragraph 243(2) of the *Bankruptcy and Insolvency Act* (Canada) (the **"BIA"**) is appointed in respect of the Petitioners, the 18.6 Petitioners or the Partnerships, the period between the date of this Order and the day on which the Stay Period ends shall not be calculated

in respect of the Petitioners, the 18.6 Petitioners or the Partnerships in determining the 30-day periods referred to in Sections 81.1 and 81.2 of the BIA.

[15] **ORDERS** that no Person may commence, proceed with or enforce any Proceedings against any former, present or future director or officer of the Petitioners, the 18.6 Petitioners, the Partnerships or any person that, by applicable legislation, is treated as a director of the Petitioners, the 18.6 Petitioners or the Partnerships, or that will manage in the future the business and affairs of the Petitioners, the 18.6 Petitioners or the Partnerships (each, a "**Director**", and collectively the "**Directors**") in respect of any claim against such Director that arose before this Order was issued and that relates to obligations of the Petitioners, the 18.6 Petitioners or the Partnerships for which such Director is or is alleged to be liable (as provided under Section 5.1 of the CCAA) until further order of this Court or until the Plan, if one is filed, is refused by the creditors or is not sanctioned by the Court.

[16] **ORDERS** that no Person shall commence, proceed with or enforce any Proceedings against any of the Directors, officers, employees, legal counsel or financial advisers of the Petitioners, the 18.6 Petitioners, the Partnerships, the Monitor, the BI DIP Lenders (as defined hereinafter) or the legal counsel or financial advisers to the Monitor or to the BI DIP Lenders, for or in respect of the Restructuring (as defined hereinafter) or the formulation and implementation of the Plan without first obtaining leave of this Court, upon seven days written notice to the Petitioners' and the Partnerships' *ad litem* counsel and to all those referred to in this paragraph whom it is proposed be named in such Proceedings.

Possession of Property and Carrying on Business

[17] **ORDERS** that, subject to the terms of this Order, the Petitioners shall remain in possession of their Property until further order in these proceedings.

[18] **ORDERS** that the Petitioners and the Partnerships shall continue to carry on their business and financial affairs, including the business and affairs of any person, firm, joint venture or corporation owned by a Petitioner or in which a Petitioner owns an interest, in a manner consistent with the commercially reasonable preservation thereof.

[19] **ORDERS** that the Petitioners and Partnerships shall be authorized and empowered to continue to retain and employ the employees, consultants, individual self-employed contractors, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

[20] **ORDERS** that the Petitioners and the Partnerships shall be entitled to continue to utilize the existing centralized cash management systems currently in place as described in this Petition or, subject to the terms of the BI DIP Documents (as defined hereinafter), replace them with other substantially similar central cash management

system(s) (together, the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Petitioners or the Partnerships of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person other than the Petitioners and the Partnerships, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System. The Monitor shall review and monitor the Cash Management System and report to this Court from time to time.

[21] **ORDERS** that the Petitioners and the Partnerships shall be entitled to pay the following expenses whether incurred prior to or after this Order:

a) all outstanding and future wages, salaries, commissions, vacation pay, current pension contributions and other benefits, reimbursement of expenses (including, without limitation, amounts charged by employees to credit cards) and other amounts payable to former, current or future employees, officers or directors on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements;

b) all outstanding and future amounts owing to or in respect of individuals working as independent contractors in connection with the Petitioners' business;

c) all outstanding amounts payable to third party customer brokers or agents on or after the date of this Order;

d) all outstanding amounts payable on or after the date of this Order in respect of (i) customer programs including, *inter alia*, rebates, adjustments, performance and volume discounts and (ii) billing errors, including duplicative invoicing, improper invoicing, duplicative payment, mispricing and various other billing and payment errors;

e) the fees and disbursements of any Assistants retained or employed by the Petitioners or the Partnerships in respect of these proceedings, at their standard rates and charges; and

f) the interest, fees and expenses payable under the Canadian Credit Agreement (as defined hereinafter).

[22] **[Intentionally omitted]**

[23] **[Intentionally omitted]**

[24] **[Intentionally omitted]**

[25] **ORDERS** that, except as otherwise provided to the contrary herein, the Petitioners and the Partnerships shall be entitled but not required to pay all reasonable expenses incurred by them in carrying on the business in the ordinary course from and after the date of this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

a) all expenses and capital expenditures reasonably necessary for the preservation of their Property or the business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

b) payment for goods or services actually supplied to the Petitioners or the Partnerships following the date of this Order.

[26] **ORDERS** that, except as otherwise provided to the contrary herein, the Petitioners and the Partnerships shall remit, in accordance with legal requirements, or pay:

a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Québec Pension Plan, and (iv) income taxes;

b) amounts accruing and payable by a Petitioner or a Partnership in respect of employment insurance, Canada Pension Plan, workers compensation, employer health taxes and similar obligations of any jurisdiction with respect to employees;

c) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Petitioners or the Partnerships in connection with the sale of goods and services by the Petitioners or the Partnerships, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

d) any amount payable to the Crown in right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the business by the Petitioners or the Partnerships.

[27] **ORDERS** that, except as specifically permitted herein, the Petitioners and the Partnerships are hereby directed, until further Order of this Court: (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Petitioners or Partnerships to any of their creditors as of this date unless such amounts have been approved by the Monitor; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the business.

[28] **ORDERS** that the Petitioners and the Partnerships are authorized to pay any pre-filing amounts outstanding and to complete any outstanding transactions and engage in new transactions with each other and with any of their respective affiliates and other entities, partnerships and joint ventures within and among the ABH Group (as defined hereinafter) in which they have a direct or indirect ownership interest (the Petitioners collectively with Abitibi-Bowater US Holding LLC, Bowater Newsprint South LLC and Bowater Incorporated and their respective subsidiaries are referred to herein as the "**ABH Group**") and the Petitioners and the Partnerships may, *inter alia*, continue on and after the date hereof to buy and sell goods and services and allocate, collect and pay costs, including without limitation head office expenses and shared goods and services, from and to each other and from and to the other members of the ABH Group in the ordinary course of business on terms consistent with existing arrangements or past practice (including without limitation, pursuant to the Securitization Program Agreements (as defined hereinafter) and sales of inventory by ACI to ACSC (as defined hereinafter).

Securitization Program

[29] **ORDERS** that the execution and delivery by ACI of the "Omnibus Amendment No. 5 to Amended and Restated Receivables Purchase Agreement and Amendment No. 3 to Amended and Restated Purchase and Contribution Agreement and Waiver Agreement", **Exhibit R-19** in support of the Petition, (the "**Waiver Agreement**") to:

a) a certain Amended and Restated Receivables Purchase Agreement, dated as of January 31, 2008 (as heretofore amended, the "**RPA**"), **Exhibit R-17** in support of the Petition, among Abitibi-Consolidated U.S. Funding Corp. ("**ACUSFC**" - a wholly-owned subsidiary of ACSC that is not a debtor in the U.S. Proceedings), Eureka Securitisation, plc ("**Eureka**"), Citibank, N.A. ("**Citibank**"), Citibank, N.A. London Branch (the "**Securitization Agent**"), ACI, in its capacity as Subservicer and an Originator, and Abitibi-Consolidated Sales Corporation ("**ACSC**", a debtor in the U.S. Proceedings), in its capacity as Servicer and an Originator; and

b) a certain Amended and Restated Purchase and Contribution Agreement, dated as of January 31, 2008 (as heretofore amended, the "**PCA**"), **Exhibit R-16** in support of the Petition, among ACI and ACSC as Sellers and ACUSFC as Purchaser (the terms "**Receivables**" and "**Related Security**" shall have the meanings attributed thereto in the PCA),

as well as all related documents and instruments executed or to be executed and delivered in connection therewith (as amended by the Waiver Agreement, collectively referred to as the "**Receivables Agreements**") are hereby ratified and approved.

[30] **ORDERS** that ACI is hereby authorized and empowered to perform or continue to perform its obligations, including the sale and servicing of Receivables and all Related Security, under the Receivables Agreements and under the following agreements to which it is a party, **Exhibit R-18** in support of the Petition:

a) the Undertaking Agreement (Servicer) dated as of October 27, 2005 by ACI in favour of Eureka, Citibank and the other Banks (as defined in the RPA) that are party to the RPA, as amended;

b) the Undertaking Agreement (Originator) dated as of October 27, 2005 by ACI in favour of ACI Funding, as amended;

c) the Deposit Account Control Agreement dated as of January 31, 2008 among ACUSFC, ACI, ACSC, Citibank and the Securitization Agent;

d) the Blocked Accounts Agreement dated as of October 27, 2005 among ACI, ACSC, the Securitization Agent, Royal Bank of Canada and ACUSFC;

e) the Agreement Re: Pledged Deposit Accounts dated as of October 27, 2005 among ACSC, ACI, ACUSFC, the Securitization Agent and LaSalle Bank National Association;

f) the Second Amended and Restated Four Party Agreement for Sold Accounts (General) dated as of January 31, 2008 among Export Development Canada and Compagnie Française d'Assurance pour le Commerce Extérieur - Canada Branch, ACI, ACUSFC, the Securitization Agent and Citibank;

g) the Intercompany Agreement dated as of December 20, 2007 between ACI and ACSC; and

h) the Accounts Receivable Policy (Shipments) General Terms and Conditions, plus the Coverage Certificate effective September 1, 2008 (together with all schedules and endorsements thereto) issued by Export Development Canada and Compagnie Française d'Assurance pour le Commerce Extérieur - Canada Branch to ACI;

(collectively with the Receivables Agreements, and such non-material amendments and modifications thereto as may be agreed upon, from time to time, the "**Securitization Program Agreements**").

[31] **ORDERS** that ACI is hereby authorized and empowered to sell the relevant Receivables and Related Security to ACUSFC pursuant to and in accordance with the Securitization Program Agreements, and such sale shall be free and clear of any lien, claims, charges or encumbrances and other interests of any of ACI, ACSC, the Petitioners or their respective creditors, including any charges created pursuant to this Order.

[32] **DECLARES** that the transfers by ACI of its Receivables and Related Security to ACUSFC under the PCA shall constitute true sales under applicable non-bankruptcy law and are hereby deemed true sales and were or will be for fair consideration. Upon the transfer of the Receivables to ACUSFC, the Receivables and Related Security did (with respect to transfers occurring prior to the Effective Time as defined in the RPA) and will (with respect to transfers occurring on or after the date hereof) become the sole property of ACUSFC, and none of the Petitioners, nor any creditors of the Petitioners, shall retain any ownership rights, claims, liens or interests in or to the Receivables and Related Security, or any proceeds therefrom including, without limitation, pursuant to any theory of substantive consolidation or otherwise.

[33] **DECLARES** that each Securitization Program Agreement constitutes a valid and binding obligation of ACI, enforceable against ACI in accordance with its terms and that the terms and conditions of the Securitization Program Agreements have been negotiated in good faith and at arm's length and the transfers made or to be made and the obligations incurred or to be incurred shall be deemed to have been made for fair or reasonably equivalent value and in good faith.

[34] **DECLARES** that upon the transfer by ACI pursuant to the Securitization Program Agreements neither the Receivables nor the Related Security, nor the proceeds thereof, shall constitute property of the patrimonies of any of the Petitioners or their affiliates, including notwithstanding any intentional or inadvertent deposit of any proceeds of the Receivables in bank accounts owned or controlled by any of the Petitioners or their affiliates.

[35] **DECLARES** that notwithstanding: (i) these proceedings and any declaration of insolvency made herein; (ii) any bankruptcy application or bankruptcy motion filed pursuant to the BIA in respect of the Petitioners and any bankruptcy order or any assignment in bankruptcy made or deemed to be made in respect of the Petitioners; (iii) proceedings taken by ACI under Chapter 15 of Title 11 of The United States Code (**"ACI's Chapter 15 Proceedings"**); or (iv) the provisions of any federal or provincial statute, the transfers of Receivables and Related Security made by ACI pursuant to the Securitization Program Agreements and this Order do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

[36] **DECLARES** that the performance by ACI, ACSC and ACUSFC of their respective obligations under the Securitization Program Agreements, and the

consummation of the transactions contemplated by the Securitization Program Agreements, and the conduct by ACI, ACSC and ACUSFC of their respective businesses, whether occurring prior to or subsequent to the Effective Time, do not, and shall not, provide a basis for a substantive consolidation of the assets and liabilities of ACI and ACSC, or any of them, with the assets and liabilities of ACUSFC or a finding that the separate corporate identities of ACI, ACSC and ACUSFC may be ignored. Notwithstanding any other provision of this Order, the Agent, Citibank, Eureka and the other parties thereto have agreed to enter into the Securitization Program Agreements in express reliance on ACUSFC being a separate and distinct legal entity, with assets and liabilities separate and distinct from those of any of the Petitioners.

[37] **DECLARES** that the transfers of Receivables and Related Security by ACI pursuant to the Securitization Program Agreements and this Order shall be valid and enforceable as against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioners, for all purposes.

[38] **DECLARES**, for greater certainty, that the Facility Termination Date and the Commitment Termination Date (as each is defined in the Receivables Agreements) have not occurred as a consequence of the commencement of these proceedings, the U.S. Proceedings, ACI's Chapter 15 Proceedings or the taking of corporate actions by ACI or ACSC to approve such proceedings, or the failure of ACI or ACSC to pay any debts that are otherwise stayed by any of the foregoing or the written admission by ACI or ACSC of its inability to pay such debts.

[39] **ORDERS AND DECLARES** that collections of Receivables and other funds which are subject to the Deposit Account Control Agreement dated as of January 31, 2008, the Agreement Re: Pledged Deposit Accounts dated as of October 27, 2005 and the Second Amended and Restated Four Party Agreement for Sold Accounts (General), dated as of January 31, 2008 referred to above, shall be processed and transferred pursuant to such deposit account agreements and each deposit bank party thereto is directed to comply therewith.

[40] **ORDERS** that ACI is hereby authorized and empowered to make, execute and deliver all instruments and documents and perform all other acts (including, without limitation, the perfection of ACUSFC's ownership interest in the Receivables) that may be required in connection with the Securitization Program Agreements and the transactions contemplated thereby; it being expressly contemplated that pursuant to the terms of the Securitization Program Agreements, ACI and ACSC shall be expressly authorized and empowered to service, administer and collect the Receivables on behalf of ACUSFC pursuant to the Securitization Program Agreements, and with respect to ACI, ACSC and ACUSFC, each shall be expressly authorized and empowered to make, execute and deliver all instruments and documents and perform all other acts that may be required in connection with the Securitization Program Agreements and the transactions contemplated thereby.

[41] **ORDERS** that ACI is hereby authorized and empowered to use the proceeds of the arrangements contemplated by the Securitization Program Agreements in the operation of the Petitioners' businesses, provided however, that the use of the proceeds are consistent with the terms of the Securitization Program Agreements, this Order or as may otherwise be agreed in writing by the Securitization Agent.

[42] **ORDERS AND DECLARES** that without limiting ACI's duty to comply with and fulfill any obligations under the Securitization Program Agreements, ACI shall perform and pay all indemnification and other obligations to the Securitization Agent, Eureka, Citibank and any other Indemnified Parties (as defined in the RPA) under the Securitization Program Agreements, all obligations to ACUFSC under the Securitization Program Agreements, and all of its obligations in respect of the Insurance Policy (as defined in the RPA).

[43] **ORDERS AND DECLARES** that, notwithstanding the terms of this Order, the parties to the Securitization Program Agreements other than ACI shall in that capacity be unaffected in these proceedings and by any plan of compromise or arrangement proposed by any of the Petitioners under the CCAA or by any proposal filed by any of the Petitioners under the BIA, and for greater certainty, paragraph 46(f) of this Order shall not apply to the Securitization Program Agreements.

[44] **DECLARES** that this Order shall not stay or otherwise apply to restrict in any way the exercise of any rights of any Person under any of the Securitization Program Agreements.

[45] **ORDERS AND DECLARES** that subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraph 28 hereof in respect of the Securitization Program, or inventory sales by ACI and the sale of inventory by ACI to ACSC and paragraphs 29 to 45 hereof or any other reference to the Securitization Program or the Securitization Program Agreements herein, unless either (a) notice of a motion for such order is served on the Securitization Agent and ACI by the moving party within seven (7) days after that party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) the Securitization Agent and ACI apply for or consent to such order.

Restructuring

[46] **DECLARES** that, to facilitate the orderly restructuring of their business and financial affairs (the "**Restructuring**"), the Petitioners and Partnerships shall have the right, subject to approval of the Monitor or further order of the Court and to:

a) permanently or temporarily cease, downsize or shut down any of their operations or locations as they deem appropriate and make provisions for the consequences thereof in the Plan;

b) pursue all avenues to market and sell, subject to subparagraph (c), their Property, in whole or part;

c) convey, transfer, assign, lease, or in any other manner dispose of their Property, in whole or in part, provided that the price in each case does not exceed $10 million or $50 million in the aggregate, and provided that Petitioners or Partnerships apply any proceeds thereof in accordance with the Interim Financing Documents (as defined hereinafter) and the Securitization Program Agreements;

d) terminate the employment of such of their employees or temporarily or permanently lay off such of their employees as they deem appropriate and, to the extent any amounts in lieu of notice, termination or severance pay or other amounts in respect thereof are not paid in the ordinary course, make provision for any consequences thereof in the Plan, as the Petitioners or Partnerships may determine;

e) subject to paragraphs 48 and 49 hereof, vacate or abandon any leased real property or repudiate any lease and ancillary agreements related to any leased premises as they deem appropriate, provided that the Petitioners or Partnerships give the relevant landlord at least seven days prior written notice, on such terms as may be agreed between the Petitioners or Partnerships and such landlord, or failing such agreement, to make provision for any consequences thereof in the Plan; and

f) repudiate such of their agreements, contracts or arrangements of any nature whatsoever, whether oral or written, as they deem appropriate, on such terms as may be agreed between the Petitioners or Partnerships and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan and to negotiate any amended or new agreements or arrangements.

[47] **DECLARES** that, in order to facilitate the Restructuring, the Petitioners and Partnerships may, subject to approval of the Monitor:

a) settle claims of customers and suppliers that are in dispute; and

b) subject to further orders from this Court, establish a plan for the retention of key employees and the making of retention payments or bonuses in connection therewith.

[48] **DECLARES** that, if leased premises are vacated or abandoned by the Petitioners or Partnerships pursuant to subparagraph 46(e), the landlord may take possession of any such leased premises without waiver of, or prejudice to, any claims or rights of the landlord against the Petitioners or Partnerships, provided the landlord

mitigates its damages, if any, and re-leases any such leased premises to third parties on such terms as any such landlord may determine.

[49] **ORDERS** that the Petitioners and Partnerships shall provide to any relevant landlord notice of the Petitioners' or Partnerships' intention to remove any fixtures or leasehold improvements at least seven days in advance. If the Petitioners or Partnerships have already vacated the leased premises, they shall not be considered to be in occupation of such location pending the resolution of any dispute.

[50] **DECLARES** that, pursuant to sub-paragraph 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c.5, the Petitioners and Partnerships are permitted, in the course of these proceedings, to disclose personal information of identifiable individuals in their possession or control to stakeholders or prospective investors, financiers, buyers or strategic partners and to their advisers (individually, a **"Third Party"**), but only to the extent desirable or required to negotiate and complete the Restructuring or the preparation and implementation of the Plan or a transaction for that purpose, provided that the Persons to whom such personal information is disclosed enter into confidentiality agreements with the Petitioners or Partnerships binding them to maintain and protect the privacy of such information and to limit the use of such information to the extent necessary to complete the transaction or Restructuring then under negotiation. Upon the completion of the use of personal information for the limited purpose set out herein, the personal information shall be returned to the Petitioners or Partnerships or destroyed. In the event that a Third Party acquires personal information as part of the Restructuring or the preparation and implementation of the Plan or a transaction in furtherance thereof, such Third Party may continue to use the personal information in a manner which is in all respects identical to the prior use thereof by the Petitioners or Partnerships.

Directors' Indemnification and Charge

[51] **ORDERS** that, in addition to any existing indemnities, the Petitioners shall indemnify each of the Directors from and against the following (collectively, **"D&O Claims"**):

a) all costs (including, without limitation, full defence costs), charges, expenses, claims, liabilities and obligations, of any nature whatsoever, which may arise on or after the date of this Order (including, without limitation, an amount paid to settle an action or a judgment in a civil, criminal, administrative or investigative action or proceeding to which a Director may be made a party), provided that any such liability relates to such Director in that capacity, and, provided that such Director (i) acted honestly and in good faith in the best interests of the Petitioners and Partnerships and (ii) in the case of a criminal or administrative action or proceeding in which such Director would be liable to a monetary penalty, such Director had reasonable grounds for believing his or her conduct was

lawful, except if such Director has actively breached any fiduciary duties or has been grossly negligent or guilty of willful misconduct; and

b) all costs, charges, expenses, claims, liabilities and obligations relating to the failure of the Petitioners or Partnerships to make any payments or to pay amounts in respect of employee or former employee entitlements to wages, vacation pay, termination pay, severance pay, pension or other benefits, or any other amount for services performed prior to or after the date of this Order and that such Directors sustain, by reason of their association with the Petitioners as a Director, except to the extent that they have actively breached any fiduciary duties or have been grossly negligent or guilty of willful misconduct.

The foregoing shall not constitute a contract of insurance or other valid and collectible insurance, as such term may be used in any existing policy of insurance issued in favour of the Petitioners, the Partnerships or any of the Directors.

[52] **DECLARES** that, as security for the obligation of the Abitibi Petitioners to indemnify the Directors of the Abitibi Petitioners pursuant to paragraph 51 hereof, the Directors of the Abitibi Petitioners are hereby granted a hypothec on, mortgage of, lien on and security interest in the Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements) to the extent of the aggregate amount of $75 million (the "**Abitibi D&O Charge**"), having the priority established by paragraphs 89 and 91 hereof. Such Abitibi D&O Charge shall not constitute or form a trust. Notwithstanding any language in any applicable policy of insurance to the contrary, (a) such Abitibi D&O Charge shall only apply to the extent that the Directors of the Abitibi Petitioners (collectively, the "**Abitibi Respondent Directors**") do not have coverage under any directors' and officers' insurance, which shall not be excess insurance to the Abitibi D&O Charge or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 51 of this Order and (b) no insurer shall be entitled to be subrogated to or claim the benefit of the Abitibi D&O Charge.

[53] **DECLARES** that, as security for the obligation of the Bowater Petitioners to indemnify the Directors of the Bowater Petitioners pursuant to paragraph 51 hereof, the Directors of the Bowater Petitioners are hereby granted a hypothec on, mortgage of, lien on and security interest in the Property of the Bowater Petitioners to the extent of the aggregate amount of $25 million (the "**Bowater D&O Charge**"), having the priority established by paragraphs 90 and 91 hereof. Such Bowater D&O Charge shall not constitute or form a trust. Notwithstanding any language in any applicable policy of insurance to the contrary, (a) such Bowater D&O Charge shall only apply to the extent that the Directors of the Bowater Petitioners (collectively, the "**Bowater Respondent Directors**") do not have coverage under any directors' and officers' insurance, which shall not be excess insurance to the Bowater D&O Charge or to the extent that such

coverage is insufficient to pay amounts indemnified in accordance with paragraph 51 of this Order and (b) no insurer shall be entitled to be subrogated to or claim the benefit of the Bowater D&O Charge.

BCFPI DIP Financing

[54] **ORDERS** that the Bowater Petitioners (which for the purposes only of paragraphs 54 to 60, 90, 91, 93, 94 and 97 of this Order shall include, in addition to the Bowater Petitioners, Bowater Pulp and Paper Canada Holdings Limited Partnership and Bowater Canada Finance Limited Partnership and Bowater Ventures Inc., in its capacity as the general partner of Bowater Pulp and Paper Canada Holdings Limited Partnership) are hereby authorized and empowered to enter into, obtain and borrow under credit facilities provided pursuant to a Senior Secured Superpriority Debtor in Possession Credit Agreement among Avenue Investments, L.P., as a lender, Fairfax Financial Holdings Limited (**"Fairfax"**), as a lender, the other lenders party thereto from time to time (collectively, the **"BI DIP Lenders"** and, Fairfax as Administrative Agent and Collateral Agent (the Administrative Agent and the Collateral Agent, as either such agent may be replaced from time to time in accordance with the BI DIP Documents, as hereinafter defined, collectively, the **"BI DIP Agent"**) substantially in the form communicated as **Exhibit R-23** in support of the Petition (subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor) (the **"BI DIP Credit Agreement"**), provided that borrowings under such credit facility shall not exceed the principal amount of US$600 million unless permitted by further Order of this Court, and the BI DIP Credit Agreement is hereby approved.

[55] **ORDERS** that the Bowater Petitioners are hereby authorized and empowered to execute and deliver the BI DIP Credit Agreement and such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees and other definitive documents (collectively, with the BI DIP Credit Agreement, the **"BI DIP Documents"**), as are contemplated by the BI DIP Credit Agreement or as may be reasonably required by the BI DIP Lenders or the BI DIP Agent pursuant to the terms thereof, and the Bowater Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the BI DIP Lenders and the BI DIP Agent under and pursuant to the BI DIP Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

[56] **ORDERS** that all of the Property of the Bowater Petitioners is hereby charged by a movable and immovable hypothec, mortgage, lien and security interest to the extent of the aggregate amount of CDN$728,760,000 (such hypothec, mortgage, lien and security interest, together with any other hypothec, mortgage, lien or security interest created or contemplated by the DIP Documents, the **"BI DIP Lenders Charge"**) in favour of the BI DIP Agent, in its capacity as Collateral Agent, for and on behalf of the Secured Parties (as defined in the BI DIP Credit Agreement) (collectively, the **"BI DIP Secured Parties"**) as security for all obligations of the Bowater Petitioners to the BI DIP

Secured Parties with respect to all amounts owing, including principal, interest and the BI DIP Lenders Expenses (as defined hereinafter) and all obligations required to be performed under or in connection with the BI DIP Documents. The BI DIP Lenders Charge shall have the priority established by paragraphs 90 and 91 hereof.

[56.1] **ORDERS AND DIRECTS** all the Registrars of all the Land Registry Offices for all Registration Divisions where property, immovables, lands and premises of the Bowater Petitioners are located and to whom certified copies of this Order (and any and all documentation ancillary thereto, if presented to them) will be presented, to accept, upon payment of the prescribed fees and filing of the required applications, such certified copies for registration in their respective register, of a charge and hypothec in an amount of CDN$728,760,000 on immovables, lands and premises of the Bowater Petitioners, in favour of the BI DIP Agent, in its capacity as Collateral Agent, for and on behalf of the Secured Parties (as defined in the BI DIP Credit Agreement).

[57] **ORDERS** that, notwithstanding any other provision of this Order, the Bowater Petitioners shall pay to the BI DIP Agent and the BI DIP Lenders when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the BI DIP Agent and the BI DIP Lenders on a full indemnity basis (the **"BI DIP Lenders Expenses"**)) under the BI DIP Documents and shall perform all of their other obligations to the BI DIP Agent and to the BI DIP Lenders pursuant to the BI DIP Documents and this Order.

[58] **ORDERS** that the claims of the BI DIP Agent and the BI DIP Lenders pursuant to the BI DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the BI DIP Agent and the BI DIP Lenders, in that capacity, shall be treated as unaffected creditors in these proceedings and in any Plan or any proposal filed by a Bowater Petitioner under the BIA.

[59] **ORDERS** that the BI DIP Agent and the BI DIP Lenders may:

a) notwithstanding any other provision of this Order, take such steps from time to time as they may deem necessary or appropriate to register, record or perfect the BI DIP Lenders Charge and the BI DIP Documents in all jurisdictions where they deem it is appropriate; and

b) notwithstanding the terms of paragraphs 10 and 11 hereof, upon the occurrence of an Event of Default (as defined in the BI DIP Documents), refuse to make any advance to the Bowater Petitioners and terminate, reduce or restrict any further commitment to the Bowater Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the BI DIP Agent or by the BI DIP Lenders to the Bowater Petitioners against the obligations of the Bowater Petitioners to the BI DIP Agent and the BI DIP Lenders under the BI DIP Documents or the BI DIP Lenders Charge, make demand, accelerate payment or give other similar notices, and the foregoing rights and remedies of the BI DIP Lenders

under this paragraph shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Bowater Petitioners or the Property of the Bowater Petitioners, the whole in accordance with and to the extent provided in the BI DIP Documents.

[60] **ORDERS** that the BI DIP Lenders shall not take any enforcement steps under the BI DIP Documents or the BI DIP Lenders Charge without providing a five (5) business days (the "**Notice Period**") written enforcement notice of a default thereunder to the Bowater Petitioners, the Monitor and to creditors requesting a copy of such notice. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the BI DIP Agent and the BI DIP Lenders shall be entitled to take any and all steps and exercise all rights and remedies provided for under the BI DIP Documents and the BI DIP Lenders Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the BIA.

[61] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 54 to 61 hereof, the approval of the BI DIP Documents or the BI DIP Lenders Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, the BI DIP Agent and the BI DIP Lenders by the moving party and returnable within seven (7) days after that party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) the BI DIP Agent and the BI DIP Lenders apply for or consent to such order.

ACI DIP Financing

[61.1] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a "Letter Loan Agreement US$100,000,000 Super-priority, Senior Secured Debtor-in-Possession Credit Facility" among Abitibi and Donohue Corp., as borrowers, and the Bank of Montreal, as lender (the "**ACI DIP Lender**") (the "**ACI DIP Agreement**") and to enter into the offer of loan guarantee from Investissement Québec ("**IQ**") (the "**IQ Guarantee Offer**"), in each case substantially in the forms communicated as Exhibits R-1 and R-2 in support of the Motion for Approval of DIP Financing in Respect of the Abitibi Petitioners dated April 27, 2009 (subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor), provided that borrowings under such credit facility shall not exceed the principal amount of US$100 million, unless permitted by further Order of this Court, and the ACI DIP Agreement and the IQ Guarantee Offer are hereby approved, subject to the terms of this Order.

[61.2] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ACI DIP Agreement and the IQ Guarantee Offer, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents

(collectively with the ACI DIP Agreement and the IQ Guarantee Offer, the **"ACI DIP Documents"**), as are contemplated by the ACI DIP Agreement or the IQ Guarantee Offer or as may be reasonably required by the ACI DIP Lender or IQ pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ACI DIP Lender or IQ under and pursuant to the ACI DIP Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

[61.3] **ORDERS** that all of the Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge (as defined below) shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) is hereby charged by a movable and immovable hypothec, mortgage, lien and security interest to the extent of the aggregate amount of CDN$140 million (such hypothec, mortgage, lien and security interest, together with any other hypothec, mortgage, lien or security interest created or contemplated by the DIP Documents, the **"ACI DIP Charge"**) in favour of the ACI DIP Lender and IQ as security for all obligations of the Abitibi Petitioners to the ACI DIP Lender and IQ with respect to all amounts owing, including principal, interest and the ACI DIP Expenses (as defined hereinafter) and all obligations required to be performed under or in connection with the ACI DIP Documents. The ACI DIP Charge shall have the priority established by paragraphs 89 and 91 hereof.

[61.4] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ACI DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ACI DIP Lender and IQ on a full indemnity basis (the **"ACI DIP Expenses"**) under the ACI DIP Documents and shall perform all of their other obligations to the ACI DIP Lender and IQ pursuant to the ACI DIP Documents and this Order.

[61.5] **ORDERS** that the claims of the ACI DIP Lender and IQ pursuant to the ACI DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ACI DIP Lender and IQ, in such capacities, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the BIA.

[61.6] **ORDERS** that the ACI DIP Lender may:

(a) notwithstanding any other provision of this Order, take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ACI DIP Documents in all jurisdictions where it deems it to be appropriate; and

(b) notwithstanding the terms of paragraphs 10 and 11 hereof, upon the occurrence of a Specified Event of Default or a Termination Event (as each such term is defined in the ACI DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ACI DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ACI DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ACI DIP Documents, the ACI DIP Lender shall be entitled to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ACI DIP Lender in accordance with the ACI DIP Documents and the DIP Lender's Charge.

[61.7] **ORDERS** that the foregoing rights and remedies of the ACI DIP Lender under this paragraph shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ACI DIP Documents.

[61.8] **ORDERS** that the ACI DIP Lender shall not take any enforcement steps under the ACI DIP Documents or the ACI DIP Charge without providing a five (5) business days (the **"Notice Period"**) written enforcement notice of a default thereunder to the Abitibi Petitioners and the Monitor. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ACI DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ACI DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the BIA. For greater certainty, the ACI DIP Lender may issue a prior notice pursuant to Article 2757 CCQ concurrently with the written enforcement notice of a default mentioned above.

[61.9] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 hereof, the approval of the ACI DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, the ACI DIP Lender and IQ by the moving party on or before June 5, 2009 or (b) the ACI DIP Lender applies for or consents to such order.

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of **(i)** any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay the ACI DIP Lender (including by any means of realization) on account of principal, interest or costs, in whole or in part as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and **(ii)** the unpaid amounts due and/or becoming due and/or owing to the Impaired Secured Creditor that are secured by its Existing Security. For this purpose "ACI DIP Lender" shall be read to include Bank of Montreal, IQ, and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce the right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that the right of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer and for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge, such Impaired Secured Creditors shall rank *pari passu* as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary.

[61.11] **ORDERS** that, subject to the execution and delivery of non-disclosure agreements satisfactory to the Petitioners and the Monitor, **(i)** copies of any borrowing request given to the Lender and the Sponsor pursuant to the ACI DIP Agreement shall be provided concurrently to the Monitor, the Secured Creditors and their respective financial advisors and the Ad Hoc Committee of Unsecured Noteholders (collectively, the "**Notice Parties**"); and **(ii)** all financial information, documents and reports required to be provided to the Lender or the Sponsor pursuant to the ACI DIP Agreement shall be provided concurrently to the Monitor and the Notice Parties. The Monitor will advise the Notice Parties of the Monitor's understanding of the proposed timing of any

requested advance. All advances shall be subject to the prior approval of the Monitor and any Notice Party may apply to the Court to contest any Borrowing Request.

Inter-Company Advances

[62] **ORDERS** that any Abitibi Petitioner is authorized to borrow, repay and reborrow (such party being an "**ACI Inter-Company Borrower**") from any member of the ABH Group (such party being an "**ACI Inter-Company Lender**"), such amounts from time to time as it may consider necessary or desirable on a revolving basis (the "**ACI Inter-Company Advances**") pursuant to a promissory note issued in favour of the ACI Inter-Company Lender as evidence thereof, to fund its ongoing expenditures and to pay such other amounts as are permitted by the terms of this Order.

[63] **ORDERS** that all of the Property of an ACI Inter-Company Borrower (other than the Property subject to the Securitization Program Agreements) is hereby charged by a lien, mortgage and security interest (the "**ACI Inter-Company Advances Charge**") in favour of the ACI Inter-Company Lender as security for the obligations of the ACI Inter-Company Borrower to the ACI Inter-Company Lender with respect to the ACI Inter-Company Advances made to it. The ACI Inter-Company Advances Charge shall have the priority established by paragraphs 89 and 91 hereof.

[64] **ORDERS** that the claims of the ACI Inter-Company Lender pursuant to the ACI Inter-Company Advances shall not be compromised or arranged pursuant to the Plan or these proceedings, but unless otherwise ordered, the exercise of any remedies by the ACI Inter-Company Lender in respect thereof under the ACI Inter-Company Advances Charge shall be subject to the stay provided for in this Order.

[65] **ORDERS** that, subject to the terms of the BI DIP Documents, any Bowater Petitioner is authorized to borrow, repay and reborrow (such party being a "**BI Inter-Company Borrower**") from any member of the ABH Group (such party being a "**BI Inter-Company Lender**"), such amounts from time to time as it may consider necessary or desirable on a revolving basis (the "**BI Inter-Company Advances**") pursuant to a promissory note issued in favour of the BI Inter-Company Lender as evidence thereof, to fund its ongoing expenditures and to pay such other amounts as are permitted by the terms of this Order.

[66] **ORDERS** that all of the Property of an BI Inter-Company Borrower is hereby charged by a lien, mortgage and security interest the ("**BI Inter-Company Advances Charge**") in favour of the BI Inter-Company Lender as security for the obligations of the BI Inter-Company Borrower to the BI Inter-Company Lender with respect to the BI Inter-Company Advances made to it. The BI Inter-Company Advances Charge shall have the priority established by paragraphs 90 and 91 hereof.

[67] **ORDERS** that the claims of the BI Inter-Company Lender pursuant to the BI Inter-Company Advances shall not be compromised or arranged pursuant to the Plan or these proceedings, but unless otherwise ordered, the exercise of any remedies by the

BI Inter-Company Lender in respect thereof under the BI Inter-Company Advances Charge shall be subject to the stay provided for in this Order.

Bowater Adequate Protection Charge

[68] **ORDERS** that all of the Property of the Bowater Petitioners is hereby charged by a lien, mortgage and security interest the (**"Bowater Adequate Protection Charge"**) as security for the diminution in the value of the BI Bank Syndicate Security (as defined below), if any, subsequent to April 16, 2009 by sale, lease or use of the BI Bank Syndicate Security. The Bowater Adequate Protection Charge shall have the priority established by paragraphs 90 and 91 hereof.

[69] **ORDERS** that the obligations secured and the Property affected by the Bowater Adequate Protection Charge shall be subject to approval of such charge in the U.S. Proceedings and, in the event a lesser charge is approved or a lesser obligation is secured, the Bowater Adequate Protection Charge shall be reduced *pro tanto*. The exercise of any remedies under the Bowater Adequate Protection Charge shall be subject to the stay provided for in this Order.

Powers of the Monitor

[70] **ORDERS** that Ernst & Young Inc. is hereby appointed to monitor the business and financial affairs of the Petitioners and Partnerships as an officer of this Court and that the Monitor shall, in addition to the duties and functions referred to in Section 11.7 of the CCAA:

a) give notice of this Order, within 10 days, to every known creditor of the Petitioners having a claim of more than $5,000.00 against it, advising that such creditor may obtain a copy of this Order on the internet at the website of the Monitor (the **"Website"**) or, failing that, from the Monitor and the Monitor shall, upon request, so provide it. Such notice shall be deemed sufficient in accordance with Subsection 11(5) of the CCAA;

b) review and monitor the receipts and disbursements of the Petitioners and Partnerships including without limitation the intercompany transactions referred to in paragraphs 28 and 62 to 67 of this Order;

c) assist the Petitioners, to the extent required by the Petitioners and Partnerships, in dealing with their creditors and other interested Persons during the Stay Period;

d) assist the Petitioners, to the extent required by the Petitioners and Partnerships, with the preparation of their cash flow projections and any other projections or reports and the development, negotiation and implementation of the Plan;

e) advise and assist the Petitioners, to the extent required by the Petitioners and Partnerships, to review the Petitioners' and Partnerships' business and assess opportunities for cost reduction, revenue enhancement and operating efficiencies;

f) assist the Petitioners, to the extent required by the Petitioners and Partnerships, with the Restructuring and in their negotiations with their creditors and other interested Persons and with the holding and administering of any meetings held to consider the Plan;

g) report to the Court on the state of the business and financial affairs of the Petitioners and Partnerships or developments in these proceedings or any related proceedings within the time limits set forth in the CCAA and at such time as considered appropriate by the Monitor or as the Court may order;

h) report to this Court and interested parties, including but not limited to creditors affected by the Plan, with respect to the Monitor's assessment of, and recommendations with respect to, the Plan;

i) retain and employ such agents, advisers and other assistants as are reasonably necessary for the purpose of carrying out the terms of this Order, including, without limitation, one or more entities related to or affiliated with the Monitor;

j) engage legal counsel to the extent the Monitor considers necessary in connection with the exercise of its powers or the discharge of its obligations in these proceedings and any related proceedings, under this Order or under the CCAA;

k) may act as a foreign representative of the Petitioners in any proceedings outside of Canada;

l) may give any consents or approvals as are contemplated by this Order; and

m) perform such other duties as are required by this Order, the CCAA or this Court from time to time.

The Monitor shall not otherwise interfere with the business and financial affairs carried on by the Petitioners and Partnerships, and the Monitor is not empowered to take possession of the Property nor to manage any of the business and financial affairs of the Petitioners and Partnerships.

[71] **ORDERS** that the Petitioners and their directors, officers, employees and agents, accountants, auditors and all other Persons having notice of this Order shall forthwith

provide the Monitor with unrestricted access to all of the Property, including, without limitation, the premises, books, records, data, including data in electronic form, and all other documents of the Petitioners and Partnerships in connection with the Monitor's duties and responsibilities hereunder.

[72] **DECLARES** that the Monitor may provide creditors and other relevant stakeholders of the Petitioners with information in response to requests made by them in writing addressed to the Monitor and copied to the Petitioners' counsel. The Monitor shall not have any duties or liabilities in respect of such information disseminated by it pursuant to the provisions of this Order or the CCAA, other than as provided in paragraph 74 hereof. In the case of information that the Monitor has been advised by the Petitioners, the BI DIP Agent or the BI DIP Lenders is confidential, proprietary or competitive, the Monitor shall not provide such information to any Person without the consent of the Petitioners, the BI DIP Agent and the BI DIP Lenders unless otherwise directed by this Court.

[73] **DECLARES** that the Monitor shall not be, nor be deemed to be, an employer or a successor employer of the employees of the Petitioners and Partnerships or a related employer in respect of the Petitioners and Partnerships within the meaning of any federal, provincial or municipal legislation governing employment, labour relations, pay equity, employment equity, human rights, health and safety or pensions or any other statute, regulation or rule of law or equity for any similar purpose and, further, that the Monitor shall not be, nor be deemed to be, in occupation, possession, charge, management or control of the Property or business and financial affairs of the Petitioners pursuant to any federal, provincial or municipal legislation, statute, regulation or rule of law or equity which imposes liability on the basis of such status, including, without limitation, the *Environment Quality Act* (Québec), the *Canadian Environmental Protection Act*, 1999 or the *Act Respecting Occupational Health and Safety* (Québec) or similar other federal or provincial legislation.

[74] **DECLARES** that, in addition to the rights and protections afforded to the Monitor by the CCAA, this Order or its status as an officer of the Court, the Monitor shall not incur any liability or obligation as a result of its appointment and the fulfilment of its duties or the provisions of this Order, save and except any liability or obligation arising from a breach of its duties to act honestly, in good faith and with due diligence, and no action or other proceedings shall be commenced against the Monitor relating to its appointment, its conduct as Monitor or the carrying out the provisions of any order of this Court, except with prior leave of this Court, on at least seven days notice to the Monitor and its counsel.

[75] **ORDERS** that the Petitioners shall pay the fees and disbursements of the Monitor, the Monitor's legal counsel, the Petitioners' legal counsel and other advisers, incurred in connection with or with respect to the Restructuring, whether incurred before or after this Order, and shall provide each with a reasonable retainer in advance on account of such fees and disbursements, if so requested.

[76] **DECLARES** that the Monitor, the Monitor's legal counsel, the Abitibi Petitioners' legal counsel and other advisers, as security for the professional fees and disbursements incurred both before and after the making of this Order by the Abitibi Petitioners in respect of these proceedings, the Plan and the Restructuring, in addition to the retainers referred to paragraph 75 hereof, be entitled to the benefit of and are hereby granted a hypothec on, mortgage of, lien on, and security interest in the Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements) to the extent of the aggregate amount of $6 million (the "**Abitibi Administration Charge**"), having the priority established by paragraphs 89 and 91 hereof.

[77] **DECLARES** that the Monitor, the Monitor's legal counsel, the Bowater Petitioners' legal counsel and other advisers, as security for the professional fees and disbursements incurred both before and after the making of this Order by the Bowater Petitioners in respect of these proceedings, the Plan and the Restructuring, in addition to the retainers referred to paragraph 75 hereof, be entitled to the benefit of and are hereby granted a hypothec on, mortgage of, lien on, and security interest in the Property of the Bowater Petitioners to the extent of the aggregate amount of $2 million (the "**Bowater Administration Charge**"), having the priority established by paragraphs 90 and 91 hereof.

Appointment of Information Officer in Respect of U.S. Proceedings

[78] **ORDERS** that, in respect of the U.S. Proceedings of the 18.6 Petitioners, Ernst & Young Inc. is hereby appointed as an information officer with the powers and obligations set out herein (the "**Information Officer**").

[79] **ORDERS** that the Information Officer shall report to this Court at such times and intervals as the Information Officer deems appropriate and, in any event, shall deliver a report to this Court at least once every two months outlining the status of the U.S. Proceedings of the 18.6 Petitioners, and such other information as the Information Officer believes to be material with copies of such reports provided to the BI DIP Agent and the BI DIP Lenders and report to the BI DIP Lenders on such additional issues related thereto upon the request of the BI DIP Agent and the BI DIP Lenders or their counsel.

[80] **ORDERS** that, in addition to the rights and protections afforded to the Information Officer as an officer of this Court, the Information Officer shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except from a failure to act in good faith and to take reasonable care. Nothing in this Order shall derogate from the protections afforded to the Information Officer by the CCAA or any applicable legislation.

[81] **ORDERS** that the Information Officer shall provide any creditor of the 18.6 Petitioners located in Canada with information provided by the 18.6 Petitioners in response to reasonable requests for information made in writing by such creditor

addressed to the Information Officer. The Information Officer shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Information Officer has been advised by the 18.6 Petitioners is confidential, the Information Officer shall not provide such information to creditors unless as otherwise directed by this Court or on such terms as the Information Officer and the 18.6 Petitioners may agree upon.

[82] **ORDERS** that the Information Officer shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the business of the 18.6 Petitioners and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the business or Property of the 18.6 Petitioners, or any part thereof. For greater certainty, the Information Officer shall not employ any employee of the 18.6 Petitioners;

[83] **ORDERS** that nothing herein contained shall require the Information Officer to occupy or to take control, care, charge, possession or management of any of the Property of the 18.6 Petitioners that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Environment Quality Act* (Quebec), the *Canadian Environmental Protection Act,* 1999 or similar other federal or provincial legislation and regulations under such legislation (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Information Officer from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Information Officer shall not, as a result of this Order or anything done in pursuance of the Information Officer's duties and powers under this Order, be deemed to be in possession of any of the Property of the 18.6 Petitioners within the meaning of any Environmental Legislation, unless it is actually in possession of such property.

[84] **[Intentionally omitted]**

[85] **[Intentionally omitted]**

[86] **[Intentionally omitted]**

[87] **[Intentionally omitted]**

[88] **[Intentionally omitted]**

Priorities and General Provisions Relating to CCAA Charges

[89] **DECLARES** that the priorities of the Abitibi Administration Charge, Abitibi D&O Charge, ACI Inter-Company Advances Charge and the ACI DIP Charge (collectively,

the "**Abitibi CCAA Charges**"), as between them with respect to any Property of the Abitibi Petitioners to which they apply, shall be as follows:

a) first, the Abitibi Administration Charge;

b) second, the Abitibi D&O Charge, up to a maximum of $22.5 million (the "**Abitibi D&O First Tranche**");

c) third, the ACI DIP Charge;

d) fourth, the ACI Inter-Company Advances Charge; and

e) fifth, the Abitibi D&O Charge in respect of the balance of amounts, if any, secured thereby (the "**Abitibi D&O Second Tranche**").

[90] **DECLARES** that the priorities of the Bowater Administration Charge, Bowater D&O Charge, BI DIP Lenders Charge, Bowater Adequate Protection Charge and BI Inter-Company Advances Charge (collectively, the "**Bowater CCAA Charges**"), as between them with respect to any Property of the Bowater Petitioners to which they apply, shall be as follows:

a) first, the Bowater Administration Charge;

b) second, the Bowater D&O Charge, up to a maximum of $7.5 million (the "**Bowater D&O First Tranche**");

c) third, the BI DIP Lenders Charge;

d) fourth, the Bowater Adequate Protection Charge;

e) fifth, the BI Inter-Company Advances Charge; and

f) sixth, the Bowater D&O Charge in respect of the balance of amounts, if any, secured thereby (the "**Bowater D&O Second Tranche**").

[91] **DECLARES** that the Abitibi CCAA Charges and the Bowater CCAA Charges (collectively, the "**CCAA Charges**") shall rank in priority to any and all other hypothecs, mortgagees, liens, trusts, security, priorities, conditional sale agreements, financial leases, charges, encumbrances or security of whatever nature or kind (collectively, "**Encumbrances**") affecting the Property of the Petitioners, other than:

a) in the case of the BI DIP Lenders Charge, the Bowater Adequate Protection Charge, the BI Inter-Company Advances Charge and the Bowater D&O Second Tranche, valid and perfected Encumbrances in respect of principal and interest, affecting the Property of the Bowater Petitioners and currently held pursuant to the Credit Agreement dated as of May 31, 2006, as amended and restated (the "**Canadian Credit Agreement**") or supplemented, among BCFPI, as borrower, the lenders named thereto and the Bank of Nova Scotia, as administrative agent (the

"BI Bank Syndicate Security"), which BI Bank Syndicate Security shall rank in priority to the BI DIP Lenders Charge, the Bowater Adequate Protection Charge, the BI Inter-Company Advances Charge and the Bowater D&O Second Tranche; and

b) in the case of the ACI Inter-Company Advances Charge and the Abitibi D&O Second Tranche above:

a. valid and perfected Encumbrances in respect of principal and interest affecting the Property of the Abitibi Petitioners and currently held pursuant to the Credit and Guaranty Agreement dated as of April 1, 2008 among, *inter alia*, ACI, as borrower, Abitibi-Consolidated Company of Canada (**"ACCC"**) as guarantor, the Lenders party thereto and Goldman Sachs Credit Partners L.P. as administrative agent (the **"ACI Bank Security"**); and

b. valid and perfected Encumbrances in respect of principal and interest, affecting the Property of the Abitibi Petitioners and currently held pursuant to the US$413 million 13.75% Senior Secured Notes due April 1, 2011 (the **"Senior Notes Security"**);

which ACI Bank Security and Senior Notes Security shall rank in priority to the ACI Inter-Company Advances Charge and the Abitibi D&O Second Tranche.

[92] **ORDERS** that nothing in this Order shall affect any determination of (i) the validity or perfection of the BI Bank Syndicate Security, the ACI Bank Security or the Senior Notes Security, (ii) whether such security is opposable to third parties, or (iii) whether such security is avoidable under applicable Canadian or United States laws.

[92.1] **DECLARES** that nothing in this Order, including the CCAA Charges, shall affect or charge in any manner whatsoever (i) any Perfected Encumbrances affecting and charging the cash deposits held to secure amounts owing or which in the future may be owing to CIBC by ACCC under the Facility Agreement dated as of April 1st, 2008, as it may be renewed or amended (the **"Facility Agreement"**); and (ii) set-off rights available to CIBC under the Facility Agreement or at law.

[92.2] **DECLARES** that nothing in this Order, including the CCAA Charges, shall affect or charge in any manner whatsoever any Perfected Encumbrances affecting and charging the cash deposits held to secure amounts owing or which in the future may be owing to Bank of Nova Scotia by ACCC with respect to that certain letter of credit bearing number S 51151-178519 in the face amount of $1,075,824.97 issued by Bank of Nova Scotia to WSIB at the request of ACCC.

[93] **ORDERS** that, except as otherwise expressly provided for herein, the Petitioners shall not grant any Encumbrances in or against any Property that rank in priority to, or *pari passu* with, any of the CCAA Charges unless the Petitioners obtain the prior written consent of the Monitor and in the case of the Bowater Petitioners, the prior consent of the BI DIP Agent, the BI DIP Lenders and the prior approval of the Court.

[94] **DECLARES** that each of the CCAA Charges shall attach, as of the Effective Time of this Order, to all present and future Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements) or the Bowater Petitioners, as the case may be, notwithstanding any requirement for the consent of any party to any such charge or to comply with any condition precedent.

[95] **DECLARES** that the CCAA Charges and the rights and remedies of the beneficiaries of such Charges, as applicable, shall be valid and enforceable and shall not otherwise be limited or impaired in any way by: (i) these proceedings and the declaration of insolvency made herein; (ii) any application for a bankruptcy order filed pursuant to the BIA in respect of the Petitioners or any bankruptcy order made pursuant to any such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioners; (iii) proceedings taken by any of the Petitioners under Chapter 11 of Title 11 of The United States Code; or (iv) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, or the granting of financial assistance between affiliated companies, contained in (y) any federal or provincial statute or (z) any agreement, lease, sub-lease, offer to lease or other arrangement which binds the Petitioners (a "**Third Party Agreement**"), and notwithstanding any provision to the contrary in any Third Party Agreement:

a) the creation of any of the CCAA Charges shall not create or be deemed to constitute a breach, by the Petitioners, of any Third Party Agreement to which they are a party; and

b) any beneficiary of the CCAA Charges shall not be held liable against any Person whatsoever as a result of any breach of any Third Party Agreement caused by or resulting from the creation of the CCAA Charges.

[96] **DECLARES** that notwithstanding: (i) these proceedings and any declaration of insolvency made herein, (ii) any petition for a bankruptcy order filed pursuant to the BIA in respect of the Petitioners and any bankruptcy order allowing such petition or any assignment in bankruptcy made or deemed to be made in respect of the Petitioners; (iii) proceedings taken by any of the Petitioners under Chapter 11 of Title11 of The United States Code; or (iv) the provisions of any federal or provincial statute, the payments or disposition of Property made by the Petitioners pursuant to this Order and the granting of the CCAA Charges, do not and will not constitute settlements, fraudulent preferences, fraudulent conveyances or other challengeable or reviewable transactions or conduct meriting an oppression remedy under any applicable law.

[97] **DECLARES** that the CCAA Charges shall be valid and enforceable as against all Property of the Abitibi Petitioners (other than the Property subject to the Securitization Program Agreements) or of the Bowater Petitioners as the case may be and against all Persons, including, without limitation, any trustee in bankruptcy, receiver, receiver and manager or interim receiver of the Petitioners, for all purposes.

General

[98] **DECLARES** that this Order and any proceeding or affidavit leading to this Order, shall not, in and of themselves, constitute a default or failure to comply, by the Petitioners, under any statute, regulation, license, permit, contract, permission, covenant, agreement, undertaking or other written document or requirement.

[99] **DECLARES** that, except as otherwise specified herein, the Petitioners are at liberty to serve any notice, proof of claim form, proxy, circular or other document in connection with these proceedings by forwarding copies by prepaid ordinary mail, courier, personal delivery or electronic transmission to Persons or other appropriate parties at their respective given addresses as last shown on the records of the Petitioners and that any such service shall be deemed to be received on the date of delivery (if by personal delivery or electronic transmission), on the following business day (if delivered by courier), or three business days after mailing (if by ordinary mail).

[100] **DECLARES** that the Petitioners may serve any Court materials in these proceedings on all represented parties electronically, by emailing a PDF or other electronic copy of such materials to counsels' email addresses, provided that the Petitioners shall deliver "hard copies" of such materials upon request to any party as soon as practicable thereafter.

[101] **DECLARES** that any party in these proceedings, other than the Petitioners, may serve any Court materials electronically, by emailing a PDF or other electronic copy of all materials to counsels' email addresses, provided that such party shall deliver both PDF or other electronic copies and "hard copies" of all materials to counsel to the Petitioners and the Monitor and to any other party requesting same.

[102] **DECLARES** that, unless otherwise provided herein or ordered by this Court, no document, order or other material need be served on any Person in respect of these proceedings, unless such Person has served a Notice of Appearance on the solicitors for the Petitioners and the Monitor and has filed such notice with this Court.

[103] **DECLARES** that the Petitioners or the Monitor may, from time to time, apply to this Court for directions concerning the exercise of their respective powers, duties and rights hereunder or in respect of the proper execution of this Order on notice only to each other.

[104] **DECLARES** that any interested Person may apply to this Court to vary or rescind this Order or seek other relief upon seven days notice to the Petitioners, the Monitor,

the BI DIP Agent, the BI DIP Lenders and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

Effect, Recognition and Assistance

[105] **DECLARES** that this Order and all other orders in these proceedings shall have full force and effect in all provinces and territories in Canada.

[106] **REQUESTS** the aid and recognition of any Court or administrative body in any Province of Canada and any Canadian Federal Court or administrative body and any federal or State Court or administrative body in the United States of America including, without limitation, the U.S. Bankruptcy Court, and other nations and states to give effect to this Order and to assist the Petitioners, the Monitor and their respective agents in carrying out the terms of this Order and any other Order in these proceedings. All Courts or administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Petitioners and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to ACI and/or the Monitor in any foreign proceedings and to assist the Petitioners and the Monitor and their respective agents in carrying out the terms of this Order and any other Order in these proceedings, including, without limitation, recognizing the Petitioners' CCAA proceedings as a foreign main proceeding under applicable law.

[107] **DECLARES** that each of the Petitioners and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and any other Order granted by this Court including, without limitation, applications under Chapter 15 of the U.S. Bankruptcy Code in respect of ACI and ACCC, and to recognize or give effect to or otherwise further the Restructuring.

[108] **DECLARES** that for the purposes of seeking the aid and recognition of any court or any judicial, regulatory or administrative body outside of Canada and in particular in the U.S. Bankruptcy Court in respect of proceedings commenced under Chapter 15 of the U.S. Bankruptcy Code and any ancillary relief in respect thereto, ACI shall be appointed as and is hereby authorized and directed to act as the foreign representative of the Petitioners and to seek such aid and recognition.

[109] **DECLARES** that for the purposes of seeking the aid and recognition of any court or any judicial, regulatory or administrative body outside of Canada, the Petitioners' centre of main interest (COMI) is ACI's principal executive offices situated at 1155 Metcalfe Street, in the city and district of Montréal, Province of Québec.

[110] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[111] **THE WHOLE WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C. J. S. C.

Me Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud et Me Mélanie Béland
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Attorneys for Fairfax Financial Holdings Ltd.

Me Nicolas Plourde
HEENAN BLAIKIE
Attorneys for Fairfax Financial Holdings Ltd.

Dates of hearing May 1, 5 and 6, 2009

SCHEDULE "A"

ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY,
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.

SCHEDULE "B"

BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

SCHEDULE "D"
PARTNERSHIPS

1. BOWATER CANADA FINANCE LIMITED PARTNERSHIP
2. BOWATER PULP AND PAPER CANADA HOLDINGS LIMITED PARTNERSHIP
3. ABITIBI-CONSOLIDATED FINANCE LP

TAB 15

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2004 CarswellOnt 1211

Stelco Inc., Re
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED IN SCHEDULE "A"
APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
Ontario Superior Court of Justice [Commercial List]
Farley J.
Heard: March 5, 2004
Judgment: March 22, 2004
Docket: 04-CL-5306

Counsel: Michael E. Barrack, James D. Gage, Geoff R. Hall for Applicants

David Jacobs, Michael McCreary for Locals, 1005, 5328, 8782 of the United Steel Workers of America

Ken Rosenberg, Lily Harmer, Rob Centa for United Steelworkers of America

Bob Thornton, Kyla Mahar for Ernst & Young Inc., Monitor of the Applicants

Kevin J. Zych for Informal Committee of Stelco Bondholders

David R. Byers for CIT

Kevin McElcheran for GE

Murray Gold, Andrew Hatnay for Retired Salaried Beneficiaries

Lewis Gottheil for CAW Canada and its Local 523

Virginie Gauthier for Fleet

H. Whiteley for CIBC

Gail Rubenstein for FSCO

Kenneth D. Kraft for EDS Canada Inc.

Subject: Insolvency

Bankruptcy and insolvency --- Proposal -- Companies' Creditors Arrangement Act -- Application of Act

Steel company S Inc. applied for protection under Companies' Creditors Arrangement Act ("CCAA") on January 29, 2004 -- Union locals moved to rescind initial order and dismiss initial application of S Inc. and its subsidiaries on ground S Inc. was not "debtor company" as defined in s. 2 of CCAA because S Inc. was not insolvent -- Motion dismissed -- Given time and steps involved in reorganization, condition of insolvency perforce required expanded meaning under CCAA -- Union affiant stated that S Inc. will run out of funding by November 2004 -- Given that November was ten months away from date of filing, S Inc. had liquidity problem -- S Inc. realistically cannot expect any increase in its credit line with its lenders or access to further outside funding -- S Inc. had negative equity of $647 million -- On balance of probabilities, S Inc. was insolvent and therefore was "debtor company" as at date of filing and entitled to apply for CCAA protection.

Cases considered by Farley J.:

A Debtor (No. 64 of 1992), Re (1993), [1993] 1 W.L.R. 264 (Eng. Ch. Div.) -- considered

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) -- considered

Bank of Montreal v. I.M. Krisp Foods Ltd. (1996), [1997] 1 W.W.R. 209, 140 D.L.R. (4th) 33, 148 Sask. R. 135, 134 W.A.C. 135, 6 C.P.C. (4th) 90, 1996 CarswellSask 581 (Sask. C.A.) -- considered

Barsi v. Farcas (1923), [1924] 1 W.W.R. 707, 2 C.B.R. 299, 18 Sask. L.R. 158, [1924] 1 D.L.R. 1154, 1923 CarswellSask 227 (Sask. C.A.) -- referred to

Bell ExpressVu Ltd. Partnership v. Rex (2002), 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 100 B.C.L.R. (3d) 1, [2002] 5 W.W.R. 1, 212 D.L.R. (4th) 1, 287 N.R. 248, 18 C.P.R. (4th) 289, 166 B.C.A.C. 1, 271 W.A.C. 1, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) -- considered

Challmie, Re (1976), 22 C.B.R. (N.S.) 78, 1976 CarswellBC 63 (B.C. S.C.) -- considered

Clarkson v. Sterling (1887), 14 O.R. 460 (Ont. C.P.) -- considered

Consolidated Seed Exports Ltd., Re (1986), 69 B.C.L.R. 273, 62 C.B.R. (N.S.) 156, 1986 CarswellBC 481 (B.C. S.C.) -- considered

Cumberland Trading Inc., Re (1994), 23 C.B.R. (3d) 225, 1994 CarswellOnt 255 (Ont. Gen. Div. [Commercial List]) -- considered

Davidson v. Douglas (1868), 15 Gr. 347, 1868 CarswellOnt 167 (Ont. Ch.) -- considered

Diemaster Tool Inc. v. Skvortsoff (Trustee of) (1991), 3 C.B.R. (3d) 133, 1991 CarswellOnt 168 (Ont. Gen. Div.) -- referred to

Enterprise Capital Management Inc. v. Semi-Tech Corp. (1999), 1999 CarswellOnt 2213, 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) -- considered

Gagnier, Re (1950), 30 C.B.R. 74, 1950 CarswellOnt 101 (Ont. S.C.) -- considered

Gardner v. Newton (1916), 10 W.W.R. 51, 26 Man. R. 251, 29 D.L.R. 276, 1916 CarswellMan 83 (Man. K.B.) -- considered

Inducon Development Corp., Re (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.) -- considered

Kenwood Hills Development Inc., Re (1995), 30 C.B.R. (3d) 44, 1995 CarswellOnt 38 (Ont. Bktcy.) -- considered

King Petroleum Ltd., Re (1978), 29 C.B.R. (N.S.) 76, 1978 CarswellOnt 197 (Ont. S.C.) -- considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) -- considered

Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd. (1989), 92 N.S.R. (2d) 283, 75 C.B.R. (N.S.) 317, 45 B.L.R. 14, 237 A.P.R. 283, 1989 CarswellNS 27 (N.S. T.D.) -- considered

Montreal Trust Co. of Canada v. Timber Lodge Ltd. (1992), 15 C.B.R. (3d) 14, (sub nom. Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1)) 101 Nfld. & P.E.I.R. 73, (sub nom. Timber Lodge Ltd. v. Montreal Trust Co. of Canada (No. 1)) 321 A.P.R. 73, 1992 CarswellPEI 13 (P.E.I. C.A.) -- referred to

MTM Electric Co., Re (1982), 42 C.B.R. (N.S.) 29, 1982 CarswellOnt 170 (Ont. Bktcy.) -- considered

New Quebec Raglan Mines Ltd. v. Blok-Andersen (1993), 9 B.L.R. (2d) 93, 1993 CarswellOnt 173 (Ont. Gen. Div. [Commercial List]) -- referred to

Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, (sub nom. Elan Corp. v. Comiskey) 1 O.R. (3d) 289, (sub nom. Elan Corp. v. Comiskey) 41 O.A.C. 282, 1990 CarswellOnt 139 (Ont. C.A.) -- considered

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2001), 2001 CarswellOnt 2954, 16 B.L.R. (3d) 74, 28 C.B.R. (4th) 294 (Ont. S.C.J. [Commercial List]) -- considered

Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp. (2003), 2003 CarswellOnt 5210, 46 C.B.R. (4th) 313, (sub nom. Olympia & York Developments Ltd. (Bankrupt) v. Olympia & York Realty Corp.) 180 O.A.C. 158 (Ont. C.A.) -- considered

Optical Recording Laboratories Inc., Re (1990), 2 C.B.R. (3d) 64, 75 D.L.R. (4th) 747, 42 O.A.C. 321, (sub nom. Optical Recording Laboratories Inc. v. Digital Recording Corp.) 1 O.R. (3d) 131, 1990 CarswellOnt 143 (Ont. C.A.) -- referred to

Pacific Mobile Corp., Re (1979), 32 C.B.R. (N.S.) 209, 1979 CarswellQue 76 (Que. S.C.) -- referred to

PWA Corp. v. Gemini Group Automated Distribution Systems Inc. (1993), 103 D.L.R. (4th) 609, 49 C.P.R. (3d) 456, 64 O.A.C. 274, 15 O.R. (3d) 730, 10 B.L.R. (2d) 109, 1993 CarswellOnt 149 (Ont. C.A.) -- considered

PWA Corp. v. Gemini Group Automated Distribution Systems Inc. (1993), 49 C.P.R. (3d) ix, 10 B.L.R. (2d) 244 (note), 104 D.L.R. (4th) vii, 68 O.A.C. 21 (note), 164 N.R. 78 (note), 16 O.R. (3d) xvi (S.C.C.) -- referred to

R. v. Proulx (2000), [2000] 4 W.W.R. 21, 2000 SCC 5, 2000 CarswellMan 32, 2000 CarswellMan 33, 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 182 D.L.R. (4th) 1, 249 N.R. 201, 49 M.V.R. (3d) 163, [2000] 1 S.C.R. 61, 142 Man. R. (2d) 161, 212 W.A.C. 161 (S.C.C.) -- referred to

Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia (1991), 8 C.B.R. (3d) 312, 86 D.L.R. (4th) 621, 1991 CarswellOnt 220 (Ont. Gen. Div.) -- considered

Standard Trustco Ltd. (Trustee of) v. Standard Trust Co. (1993), 13 O.R. (3d) 7, 21 C.B.R. (3d) 25, 1993 CarswellOnt 219 (Ont. Gen. Div.) -- considered

TDM Software Systems Inc., Re (1986), 60 C.B.R. (N.S.) 92, 1986 CarswellOnt 203 (Ont. S.C.) -- referred to

Viteway Natural Foods Ltd., Re (1986), 63 C.B.R. (N.S.) 157, 1986 CarswellBC 499 (B.C. S.C.) -- referred to

Webb v. Stenton (1883), 11 Q.B.D. 518 (Eng. C.A.) -- referred to

633746 Ontario Inc. (Trustee of) v. Salvati (1990), 79 C.B.R. (N.S.) 72, 73 O.R. (2d) 774, 1990 CarswellOnt 181 (Ont. S.C.) -- considered

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3

Generally -- referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally -- referred to

s. 2(1) "insolvent person" -- referred to

s. 2(1) "insolvent person" (a) -- considered

s. 2(1) "insolvent person" (b) -- considered

s. 2(1) "insolvent person" (c) -- considered

s. 43(7) -- referred to

s. 121(1) -- referred to

s. 121(2) -- referred to

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

Generally -- referred to

s. 2 "debtor company" -- referred to

s. 2 "debtor company" (a) -- considered

s. 2 "debtor company" (b) -- considered

s. 2 "debtor company" (c) -- considered

s. 2 "debtor company" (d) -- considered

s. 12 -- referred to

s. 12(1) "claim" -- referred to

Winding-up and Restructuring Act, R.S.C. 1985, c. W-11

Generally -- referred to

Words and phrases considered:

debtor company

It seems to me that the [Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36] test of insolvency . . . which I have determined is a proper interpretation is that the [Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3] definition of [s. 2(1)] (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring.

MOTION by union that steel company was not "debtor company" as defined in Companies' Creditors Arrangement Act.

***Farley J.*:**

1 As argued this motion by Locals 1005, 5328 and 8782 United Steel Workers of America (collectively "Union") to rescind the initial order and dismiss the application of Stelco Inc. ("Stelco") and various of its subsidiaries (collectively "Sub Applicants") for access to the protection and process of the *Companies' Creditors Arrangement Act* ("CCAA") was that this access should be denied on the basis that Stelco was not a "debtor company" as defined in s. 2 of the CCAA because it was not insolvent.

2 Allow me to observe that there was a great deal of debate in the materials and submissions as to the reason(s) that Stelco found itself in with respect to what Michael Locker (indicating he was "an expert in the area of corporate restructuring and a leading steel industry analyst") swore to at paragraph 12 of his affidavit was the "current crisis":

> 12. Contending with weak operating results and resulting tight cash flow, management has deliberately chosen not to fund its employee benefits. By contrast, Dofasco and certain other steel companies have consistently funded both their employee benefit obligations as well as debt service. If Stelco's manage-

ment had chosen to fund pension obligations, presumably with borrowed money, *the current crisis* and related restructuring plans would focus on debt restructuring as opposed to the reduction of employee benefits and related liabilities. [Emphasis added.]

3 For the purpose of determining whether Stelco is insolvent and therefore could be considered to be a debtor company, it matters not what the cause or who caused the financial difficulty that Stelco is in as admitted by Locker on behalf of the Union. The management of a corporation could be completely incompetent, inadvertently or advertently; the corporation could be in the grip of ruthless, hard hearted and hard nosed outside financiers; the corporation could be the innocent victim of uncaring policy of a level of government; the employees (unionized or non-unionized) could be completely incompetent, inadvertently or advertently; the relationship of labour and management could be absolutely poisonous; the corporation could be the victim of unforeseen events affecting its viability such a as a fire destroying an essential area of its plant and equipment or of rampaging dumping. One or more or all of these factors (without being exhaustive), whether or not of varying degree and whether or not in combination of some may well have been the cause of a corporation's difficulty. The point here is that Stelco's difficulty exists; the only question is whether Stelco is insolvent within the meaning of that in the "debtor company" definition of the CCAA. However, I would point out, as I did in closing, that no matter how this motion turns out, Stelco does have a problem which has to be addressed - addressed within the CCAA process if Stelco is insolvent or addressed outside that process if Stelco is determined not to be insolvent. The status quo will lead to ruination of Stelco (and its Sub Applicants) and as a result will very badly affect its stakeholder, including pensioners, employees (unionized and non-unionized), management, creditors, suppliers, customers, local and other governments and the local communities. In such situations, time is a precious commodity; it cannot be wasted; no matter how much some would like to take time outs, the clock cannot be stopped. The watchwords of the Commercial List are equally applicable in such circumstances. They are communication, cooperation and common sense. I appreciate that these cases frequently invoke emotions running high and wild; that is understandable on a human basis but it is the considered, rational approach which will solve the problem.

4 The time to determine whether a corporation is insolvent for the purpose of it being a "debtor company" and thus able to make an application to proceed under the CCAA is the date of filing, in this case January 29, 2004.

5 The Monitor did not file a report as to this question of insolvency as it properly advised that it wished to take a neutral role. I understand however, that it did provide some assistance in the preparation of Exhibit C to Hap Steven's affidavit.

6 If I determine in this motion that Stelco is not insolvent, then the initial order would be set aside. See *Montreal Trust Co. of Canada v. Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 14 (P.E.I. C.A.). The onus is on Stelco as I indicated in my January 29, 2004 endorsement.

7 S. 2 of the CCAA defines "debtor company" as:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of *Bankruptcy and Insolvency Act* ["BIA"] or deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;

> (c) has made an authorized assignment against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound-up under the *Winding-Up and Restructuring Act* because the company is insolvent.

8 Counsel for the Existing Stelco Lenders and the DIP Lenders posited that Stelco would be able to qualify under (b) in light of the fact that as of January 29, 2004 whether or not it was entitled to receive the CCAA protection under (a) as being insolvent, it had ceased to pay its pre-filing debts. I would merely observe as I did at the time of the hearing that I do not find this argument attractive in the least. The most that could be said for that is that such game playing would be ill advised and in my view would not be rewarded by the exercise of judicial discretion to allow such an applicant the benefit of a CCAA stay and other advantages of the procedure for if it were capriciously done where there is not reasonable need, then such ought not to be granted. However, I would point out that if a corporation did capriciously do so, then one might well expect a creditor-initiated application so as to take control of the process (including likely the ouster of management including directors who authorized such unnecessary stoppage); in such a case, while the corporation would not likely be successful in a corporation application, it is likely that a creditor application would find favour of judicial discretion.

9 This judicial discretion would be exercised in the same way generally as is the case where s. 43(7) of the BIA comes into play whereby a bankruptcy receiving order which otherwise meets the test may be refused. See *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.) where at p. 45 I observed:

> The discretion must be exercised judicially based on credible evidence; it should be used according to common sense and justice and in a manner which does not result in an injustice: See *Re Churchill Forest Industries (Manitoba) Ltd.* (1971), 16 C.B.R. (NS) 158 (Man. Q.B.).

10 Anderson J. in *MTM Electric Co., Re* (1982), 42 C.B.R. (N.S.) 29 (Ont. Bktcy.) at p. 30 declined to grant a bankruptcy receiving order for the eminently good sense reason that it would be counterproductive: "Having regard for the value of the enterprise and having regard to the evidence before me, I think it far from clear that a receiving order would confer a benefit on anyone." This common sense approach to the judicial exercise of discretion may be contrasted by the rather more puzzling approach in *TDM Software Systems Inc., Re* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.).

11 The Union, supported by the International United Steel Workers of America ("International"), indicated that if certain of the obligations of Stelco were taken into account in the determination of insolvency, then a very good number of large Canadian corporations would be able to make an application under the CCAA. I am of the view that this concern can be addressed as follows. The test of insolvency is to be determined on its own merits, not on the basis that an otherwise technically insolvent corporation should not be allowed to apply. However, if a technically insolvent corporation were to apply and there was no material advantage to the corporation and its stakeholders (in other words, a pressing need to restructure), then one would expect that the court's discretion would be judicially exercised against granting CCAA protection and ancillary relief. In the case of Stelco, it is recognized, as discussed above, that it is in crisis and in need of restructuring - which restructuring, if it is insolvent, would be best accomplished within a CCAA proceeding. Further, I am of the view that the track record of CCAA proceedings in this country demonstrates a healthy respect for the fundamental concerns of interested parties and stakeholders. I have consistently observed that much more can be achieved by negotiations outside the courtroom where there is a reasonable exchange of information, views and the exploration of possible solu-

tions and negotiations held on a without prejudice basis than likely can be achieved by resorting to the legal combative atmosphere of the courtroom. A mutual problem requires a mutual solution. The basic interest of the CCAA is to rehabilitate insolvent corporations for the benefit of all stakeholders. To do this, the cause(s) of the insolvency must be fixed on a long term viable basis so that the corporation may be turned around. It is not achieved by positional bargaining in a tug of war between two parties, each trying for a larger slice of a defined size pie; it may be achieved by taking steps involving shorter term equitable sacrifices and implementing sensible approaches to improve productivity to ensure that the pie grows sufficiently for the long term to accommodate the reasonable needs of the parties.

12 It appears that it is a given that the Sub Applicants are in fact insolvent. The question then is whether Stelco is insolvent.

13 There was a question as to whether Stelco should be restricted to the material in its application as presented to the Court on January 29, 2004. I would observe that CCAA proceedings are not in the nature of the traditional adversarial lawsuit usually found in our courtrooms. It seems to me that it would be doing a disservice to the interest of the CCAA to artificially keep the Court in the dark on such a question. Presumably an otherwise deserving "debtor company" would not be allowed access to a continuing CCAA proceeding that it would be entitled to merely because some potential evidence were excluded for traditional adversarial technical reasons. I would point out that in such a case, there would be no prohibition against such a corporation reapplying (with the additional material) subsequently. In such a case, what would be the advantage for anyone of a "pause" before being able to proceed under the rehabilitative process under the CCAA. On a practical basis, I would note that all too often corporations will wait too long before applying, at least this was a significant problem in the early 1990s. In *Inducon Development Corp., Re* (1991), 8 C.B.R. (3d) 306 (Ont. Gen. Div.), I observed:

> Secondly, CCAA is designed to be remedial; it is not, however, designed to be preventative. CCAA should not be the *last* gasp of a dying company; it should be implemented, if it is to be implemented, at a stage prior to the death throe.

14 It seems to me that the phrase "death throe" could be reasonably replaced with "death spiral". In *Cumberland Trading Inc., Re* (1994), 23 C.B.R. (3d) 225 (Ont. Gen. Div. [Commercial List]), I went on to expand on this at p. 228:

> I would also observe that all too frequently debtors wait until virtually the last moment, the last moment, or in some cases, beyond the last moment before even beginning to think about reorganizational (and the attendant support that any successful reorganization requires from the creditors). I noted the lamentable tendency of debtors to deal with these situations as "last gasp" desperation moves in *Re Inducon Development Corp.* (1992), 8 C.B.R. (3d) 308 (Ont. Gen. Div.). To deal with matters on this basis minimizes the chances of success, even if "success" may have been available with earlier spade work.

15 I have not been able to find in the CCAA reported cases any instance where there has been an objection to a corporation availing itself of the facilities of the CCAA on the basis of whether the corporation was insolvent. Indeed, as indicated above, the major concern here has been that an applicant leaves it so late that the timetable of necessary steps may get impossibly compressed. That is not to say that there have not been objections by parties opposing the application on various other grounds. Prior to the 1992 amendments, there had to be debentures (plural) issued pursuant to a trust deed; I recall that in *Nova Metal Products Inc. v. Comiskey (Trustee of)*

(1990), 1 C.B.R. (3d) 101, 1 O.R. (3d) 289 (Ont. C.A.), the initial application was rejected in the morning because there had only been one debenture issued but another one was issued prior to the return to court that afternoon. This case stands for the general proposition that the CCAA should be given a large and liberal interpretation. I should note that there was in *Enterprise Capital Management Inc. v. Semi-Tech Corp.* (1999), 10 C.B.R. (4th) 133 (Ont. S.C.J. [Commercial List]) a determination that in a creditor application, the corporation was found not to be insolvent, but see below as to BIA test (c) my views as to the correctness of this decision.

16 In *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) I observed at p. 32:

> One of the purposes of the CCAA is to facilitate ongoing operations of a business where its assets have a greater value as part of an integrated system than individually. The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

17 In *Anvil Range Mining Corp., Re* (2002), 34 C.B.R. (4th) 157 (Ont. C.A.), the court stated to the same effect:

> The second submission is that the plan is contrary to the purposes of the CCAA. Courts have recognized that the purpose of the CCAA is to enable compromises to be made for the common benefit of the creditors and the company and to keep the company alive and out of the hands of liquidators.

18 Encompassed in this is the concept of saving employment if a restructuring will result in a viable enterprise. See *Diemaster Tool Inc. v. Skvortsoff (Trustee of)* (1991), 3 C.B.R. (3d) 133 (Ont. Gen. Div.). This concept has been a continuing thread in CCAA cases in this jurisdiction stretching back for at least the past 15 years, if not before.

19 I would also note that the jurisprudence and practical application of the bankruptcy and insolvency regime in place in Canada has been constantly evolving. The early jails of what became Canada were populated to the extent of almost half their capacity by bankrupts. Rehabilitation and a fresh start for the honest but unfortunate debtor came afterwards. Most recently, the *Bankruptcy Act* was revised to the BIA in 1992 to better facilitate the rehabilitative aspect of making a proposal to creditors. At the same time, the CCAA was amended to eliminate the threshold criterion of there having to be debentures issued under a trust deed (this concept was embodied in the CCAA upon its enactment in 1933 with a view that it would only be large companies with public issues of debt securities which could apply). The size restriction was continued as there was now a threshold criterion of at least $5 million of claims against the applicant. While this restriction may appear discriminatory, it does have the practical advantage of taking into account that the costs (administrative costs including professional fees to the applicant, and indeed to the other parties who retain professionals) is a significant amount, even when viewed from the perspective of $5 million. These costs would be prohibitive in a smaller situation. Parliament was mindful of the time horizons involved in proposals under BIA where the maximum length of a proceeding including a stay is six months (including all possible extensions) whereas under CCAA, the length is in the discretion of the court judicially exercised in accordance with the facts and the circumstances of the case. Certainly sooner is better than later. However, it is fair to observe that virtually all CCAA cases which proceed go on for over six months and those with complexity frequently exceed a year.

20 Restructurings are not now limited in practical terms to corporations merely compromising their debts with their creditors in a balance sheet exercise. Rather there has been quite an emphasis recently on operational re-

structuring as well so that the emerging company will have the benefit of a long term viable fix, all for the benefit of stakeholders. See *Sklar-Peppler Furniture Corp. v. Bank of Nova Scotia* (1991), 8 C.B.R. (3d) 312 (Ont. Gen. Div.) at p. 314 where Borins J. states:

> The proposed plan exemplifies the policy and objectives of the Act as it proposes a regime for the court-supervised re-organization for the Applicant company intended to avoid the devastating social and economic effects of a creditor-initiated termination of its ongoing business operations and enabling the company to carry on its business in a manner in which it is intended to cause the least possible harm to the company, its creditors, its employees and former employees and the communities in which its carries on and carried on its business operations.

21 The CCAA does not define "insolvent" or "insolvency". Houlden & Morawetz, *The 2004 Annotated Bankruptcy and Insolvency Act* (Toronto, Carswell; 2003) at p. 1107 (N5) states:

> In interpreting "debtor company", reference must be had to the definition of "insolvent person" in s. 2(1) of the *Bankruptcy and Insolvency Act* . . .
>
> To be able to use the Act, a company must be bankrupt or insolvent: *Reference re Companies' Creditors Arrangement Act (Canada)*, 16 C.B.R. 1, [1934] S.C.R. 659, [1934] 4 D.L.R. 75. The company must, in its application, admit its insolvency.

22 It appears to have become fairly common practice for applicants and others when reference is made to insolvency in the context of the CCAA to refer to the definition of "insolvent person" in the BIA. That definition is as follows:

> s. 2(1) . . .
>
> "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

23 Stelco acknowledges that it does not meet the test of (b); however, it does assert that it meets the test of both (a) and (c). In addition, however, Stelco also indicates that since the CCAA does not have a reference over to the BIA in relation to the (a) definition of "debtor company" as being a company that is "(a) bankrupt or insolvent", then this term of "insolvent" should be given the meaning that the overall context of the CCAA requires. See the modern rule of statutory interpretation which directs the court to take a contextual and purposive approach to the language of the provision at issue as illustrated by *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559 (S.C.C.) at p. 580:

> Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

24 I note in particular that the (b), (c) and (d) aspects of the definition of "debtor company" all refer to other statutes, including the BIA; (a) does not. S. 12 of the CCAA defines "claims" with reference over to the BIA (and otherwise refers to the BIA and the *Winding-Up and Restructuring Act*). It seems to me that there is merit in considering that the test for insolvency under the CCAA may differ somewhat from that under the BIA, so as to meet the special circumstances of the CCAA and those corporations which would apply under it. In that respect, I am mindful of the above discussion regarding the time that is usually and necessarily (in the circumstances) taken in a CCAA reorganization restructuring which is engaged in coming up with a plan of compromise and arrangement. The BIA definition would appear to have been historically focussed on the question of bankruptcy - and not reorganization of a corporation under a proposal since before 1992, secured creditors could not be forced to compromise their claims, so that in practice there were no reorganizations under the former *Bankruptcy Act* unless all secured creditors voluntarily agreed to have their secured claims compromised. The BIA definition then was essentially useful for being a pre-condition to the "end" situation of a bankruptcy petition or voluntary receiving order where the upshot would be a realization on the bankrupt's assets (not likely involving the business carried on - and certainly not by the bankrupt). Insolvency under the BIA is also important as to the Paulian action events (eg., fraudulent preferences, settlements) as to the conduct of the debtor *prior* to the bankruptcy; similarly as to the question of provincial preference legislation. Reorganization under a plan or proposal, on the contrary, is with a general objective of the applicant continuing to exist, albeit that the CCAA may also be used to have an orderly disposition of the assets and undertaking in whole or in part.

25 It seems to me that given the time and steps involved in a reorganization, and the condition of insolvency perforce requires an expanded meaning under the CCAA. Query whether the definition under the BIA is now sufficient in that light for the allowance of sufficient time to carry through with a realistically viable proposal within the maximum of six months allowed under the BIA? I think it sufficient to note that there would not be much sense in providing for a rehabilitation program of restructuring/reorganization under either statute if the entry test was that the applicant could not apply until a rather late stage of its financial difficulties with the rather automatic result that in situations of complexity of any material degree, the applicant would not have the financial resources sufficient to carry through to hopefully a successful end. This would indeed be contrary to the renewed emphasis of Parliament on "rescues" as exhibited by the 1992 and 1997 amendments to the CCAA and the BIA.

26 Allow me now to examine whether Stelco has been successful in meeting the onus of demonstrating with credible evidence on a common sense basis that it is insolvent within the meaning required by the CCAA in regard to the interpretation of "debtor company" in the context and within the purpose of that legislation. To a similar effect, see *PWA Corp. v. Gemini Group Automated Distribution Systems Inc.* (1993), 103 D.L.R. (4th) 609 (Ont. C.A.), leave to appeal to S.C.C. dismissed [(1993), 49 C.P.R. (3d) ix (S.C.C.)] wherein it was determined that the trial judge was correct in holding that a party was not insolvent and that the statutory definition of insolvency pursuant to the BIA definition was irrelevant to determine that issue, since the agreement in question effectively provided its own definition by implication. It seems to me that the CCAA test of insolvency advocated by Stelco and which I have determined is a proper interpretation is that the BIA definition of (a), (b) or (c) of insolvent person is acceptable with the caveat that as to (a), a financially troubled corporation is insolvent if it is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. That is, there should be a reasonable cushion, which cushion

may be adjusted and indeed become in effect an encroachment depending upon reasonable access to DIP between financing. In the present case, Stelco accepts the view of the Union's affiant, Michael Mackey of Deloitte and Touche that it will otherwise run out of funding by November 2004.

27 On that basis, allow me to determine whether Stelco is insolvent on the basis of (i) what I would refer to as the CCAA test as described immediately above, (ii) BIA test (a) or (iii) BIA test (c). In doing so, I will have to take into account the fact that Stephen, albeit a very experienced and skilled person in the field of restructurings under the CCAA, unfortunately did not appreciate that the material which was given to him in Exhibit E to his affidavit was modified by the caveats in the source material that in effect indicated that based on appraisals, the fair value of the real assets acquired was in excess of the purchase price for two of the U.S. comparators. Therefore the evidence as to these comparators is significantly weakened. In addition at Q. 175-177 in his cross examination, Stephen acknowledged that it was reasonable to assume that a purchaser would "take over some liabilities, some pension liabilities and OPEB liabilities, for workers who remain with the plant." The extent of that assumption was not explored; however, I do note that there was acknowledgement on the part of the Union that such an assumption would also have a reciprocal negative effect on the purchase price.

28 The BIA tests are disjunctive so that anyone meeting any of these tests is determined to be insolvent: see *Optical Recording Laboratories Inc., Re* (1990), 75 D.L.R. (4th) 747 (Ont. C.A.) at p. 756; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at p. 161. Thus, if I determine that Stelco is insolvent on *any one* of these tests, then it would be a "debtor company" entitled to apply for protection under the CCAA.

29 In my view, the Union's position that Stelco is not insolvent under BIA (a) because it has not entirely used up its cash and cash facilities (including its credit line), that is, it is not yet as of January 29, 2004 run out of liquidity conflates inappropriately the (a) test with the (b) test. The Union's view would render the (a) test necessarily as being redundant. See *R. v. Proulx* , [2000] 1 S.C.R. 61 (S.C.C.) at p. 85 for the principle that no legislative provision ought to be interpreted in a manner which would "render it mere surplusage." Indeed the plain meaning of the phrase "unable to meet his obligations as they generally become due" requires a construction of test (a) which permits the court to take a purposive assessment of a debtor's ability to meet his future obligations. See *King Petroleum Ltd., Re* (1978), 29 C.B.R. (N.S.) 76 (Ont. S.C.) where Steele J. stated at p. 80:

> With respect to cl. (a), it was argued that at the time the disputed payments were made the company was able to meet its obligations as they generally became due because no major debts were in fact due at that time. This was premised on the fact that the moneys owed to Imperial Oil were not due until 10 days after the receipt of the statements and that the statements had not then been received. I am of the opinion that this is not a proper interpretation of cl. (a). *Clause (a) speaks in the present and future tenses and not in the past.* I am of the opinion that the company was an "insolvent person" within the meaning of cl. (a) because by the very payment-out of the money in question it placed itself in a position that it was unable to meet its obligations as they would generally become due. In other words, it had placed itself in a position that it would not be able to pay the obligations that it knew it had incurred and which it knew would become due in the immediate future. [Emphasis added.]

30 *King Petroleum Ltd.* was a case involving the question in a bankruptcy scenario of whether there was a fraudulent preference during a period when the corporation was insolvent. Under those circumstances, the "immediate future" does not have the same expansive meaning that one would attribute to a time period in a restructuring forward looking situation.

31 Stephen at paragraphs 40-49 addressed the restructuring question in general and its applicability to the Stelco situation. At paragraph 41, he outlined the significant stages as follows:

> The process of restructuring under the CCAA entails a number of different stages, the most significant of which are as follows:
>
> (a) identification of the debtor's stakeholders and their interests;
>
> (b) arranging for a process of meaningful communication;
>
> (c) dealing with immediate relationship issues arising from a CCAA filing;
>
> (d) sharing information about the issues giving rise to the debtor's need to restructure;
>
> (e) developing restructuring alternatives; and
>
> (f) building a consensus around a plan of restructuring.

32 I note that January 29, 2004 is just 9-10 months away from November 2004. I accept as correct his conclusion based on his experience (and this is in accord with my own objective experience in large and complicated CCAA proceedings) that Stelco would have the liquidity problem within the time horizon indicated. In that regard, I also think it fair to observe that Stelco realistically cannot expect any increase in its credit line with its lenders or access further outside funding. To bridge the gap it must rely upon the stay to give it the uplift as to prefiling liabilities (which the Union misinterpreted as a general turnaround in its cash position without taking into account this uplift). As well, the Union was of the view that recent price increases would relieve Stelco's liquidity problems; however, the answers to undertaking in this respect indicated:

> With respect to the Business Plan, the average spot market sales price per ton was $514, and the average contract business sales price per ton was $599. The Forecast reflects an average spot market sales price per ton of $575, and average contract business sales price per ton of $611. The average spot price used in the forecast considers further announced price increases, recognizing, among other things, the timing and the extent such increases are expected to become effective. The benefit of the increase in sales prices from the Business Plan is essentially offset by the substantial increase in production costs, and in particular in raw material costs, primarily scrap and coke, as well as higher working capital levels and a higher loan balance outstanding on the CIT credit facility as of January 2004.

I accept that this is generally a cancel out or wash in all material respects.

33 I note that $145 million of cash resources had been used from January 1, 2003 to the date of filing. Use of the credit facility of $350 million had increased from $241 million on November 30, 2003 to $293 million on the date of filing. There must be a reasonable reserve of liquidity to take into account day to day, week to week or month to month variances and also provide for unforeseen circumstances such as the breakdown of a piece of vital equipment which would significantly affect production until remedied. Trade credit had been contracting as a result of appreciation by suppliers of Stelco's financial difficulties. The DIP financing of $75 million is only available if Stelco is under CCAA protection. I also note that a shut down as a result of running out of liquidity would be complicated in the case of Stelco and that even if conditions turned around more than reasonably expected, start-up costs would be heavy and quite importantly, there would be a significant erosion of the customer base (reference should be had to the Slater Hamilton plant in this regard). One does not liquidate assets which

one would not sell in the ordinary course of business to thereby artificially salvage some liquidity for the purpose of the test: see *Pacific Mobile Corp., Re* (1979), 32 C.B.R. (N.S.) 209 (Que. S.C.) at p. 220. As a rough test, I note that Stelco (albeit on a consolidated basis with all subsidiaries) running significantly behind plan in 2003 from its budget of a profit of $80 million now to a projected loss of $192 million and cash has gone from a positive $209 million to a negative $114 million.

34 Locker made the observation at paragraph 8 of his affidavit that:

> 8. Stelco has performed poorly for the past few years primarily due to an inadequate business strategy, poor utilization of assets, inefficient operations and generally weak management leadership and decision-making. This point is best supported by the fact that Stelco's local competitor, Dofasco, has generated outstanding results in the same period.

Table 1 to his affidavit would demonstrate that Dofasco has had superior profitability and cashflow performance than its "neighbour" Stelco. He went on to observe at paragraphs 36-37:

> 36. Stelco can achieve significant cost reductions through means other than cutting wages, pensions and benefits for employees and retirees. Stelco could bring its cost levels down to those of restructured U.S. mills, with the potential for lowering them below those of many U.S. mills.
>
> 37. Stelco could achieve substantial savings through productivity improvements within the mechanisms of the current collective agreements. More importantly, a major portion of this cost reduction could be achieved through constructive negotiations with the USWA in an out-of-court restructuring that does not require intervention of the courts through the vehicle of CCAA protection.

I accept his constructive comments that there is room for cost reductions and that there are substantial savings to be achieved through productivity improvements. However, I do not see anything detrimental to these discussions and negotiations by having them conducted within the umbrella of a CCAA proceeding. See my comments above regarding the CCAA in practice.

35 But I would observe and I am mystified by Locker's observations at paragraph 12 (quoted above), that Stelco should have borrowed to fund pension obligations to avoid its current financial crisis. This presumes that the borrowed funds would not constitute an obligation to be paid back as to principal and interest, but rather that it would assume the character of a cost-free "gift".

36 I note that Mackey, without the "laundry list" he indicates at paragraph 17 of his second affidavit, is unable to determine at paragraph 19 (for himself) whether Stelco was insolvent. Mackey was unable to avail himself of all available information in light of the Union's refusal to enter into a confidentiality agreement. He does not closely adhere to the BIA tests as they are defined. In the face of positive evidence about an applicant's financial position by an experienced person with expertise, it is not sufficient to displace this evidence by filing evidence which goes no further than raising questions: see *Anvil Range Mining Corp., supra* at p. 162.

37 The Union referred me to one of my decisions *Standard Trustco Ltd. (Trustee of) v. Standard Trust Co.* (1993), 13 O.R. (3d) 7 (Ont. Gen. Div.) where I stated as to the MacGirr affidavit:

> The Trustee's cause of action is premised on MacGirr's opinion that STC was insolvent as at August 3, 1990 and therefore the STC common shares and promissory note received by Trustco in return for the

> Injection had no value at the time the Injection was made. Further, MacGirr ascribed no value to the opportunity which the Injection gave to Trustco to restore STC and salvage its thought to be existing $74 million investment. In stating his opinion MacGirr defined solvency as:
>
> (a) the ability to meet liabilities as they fall due; and
>
> (b) that assets exceed liabilities.
>
> On cross-examination MacGirr testified that in his opinion on either test STC was insolvent as at August 3, 1990 since as to (a) STC was experiencing then a negative cash flow and as to (b) the STC financial statements incorrectly reflected values. As far as (a) is concerned, I would comment that while I concur with MacGirr that at some time in the long run a company that is experiencing a negative cash flow will eventually not be able to meet liabilities as they fall due but that is not the test (which is a "present exercise"). On that current basis STC was meeting its liabilities on a timely basis.

38 As will be seen from that expanded quote, MacGirr gave his own definitions of insolvency which are not the same as the s. 2 BIA tests (a), (b) and (c) but only a very loose paraphrase of (a) and (c) and an omission of (b). Nor was I referred to the *King Petroleum Ltd.* or *Proulx* cases *supra*. Further, it is obvious from the context that "*sometime in the long run . . . eventually*" is not a finite time in the foreseeable future.

39 I have not given any benefit to the $313 - $363 million of improvements referred to in the affidavit of William Vaughan at paragraph 115 as those appear to be capital expenditures which will have to be accommodated within a plan of arrangement or after emergence.

40 It seems to me that if the BIA (a) test is restrictively dealt with (as per my question to Union counsel as to how far in the future should one look on a prospective basis being answered "24 hours") then Stelco would not be insolvent under that test. However, I am of the view that that would be unduly restrictive and a proper contextual and purposive interpretation to be given when it is being used for a restructuring purpose even under BIA would be to see whether there is a reasonably foreseeable (at the time of filing) expectation that there is a looming liquidity condition or crisis which will result in the applicant running out of "cash" to pay its debts as they generally become due in the future without the benefit of the say and ancillary protection and procedure by court authorization pursuant to an order. I think this is the more appropriate interpretation of BIA (a) test in the context of a reorganization or "rescue" as opposed to a threshold to bankruptcy consideration or a fraudulent preferences proceeding. On that basis, I would find Stelco insolvent from the date of filing. Even if one were not to give the latter interpretation to the BIA (a) test, clearly for the above reasons and analysis, if one looks at the meaning of "insolvent" within the context of a CCAA reorganization or rescue solely, then of necessity, the time horizon must be such that the liquidity crisis would occur in the sense of running out of "cash" but for the grant of the CCAA order. On that basis Stelco is certainly insolvent given its limited cash resources unused, its need for a cushion, its rate of cash burn recently experienced and anticipated.

41 What about the BIA (c) test which may be roughly referred to as an assets compared with obligations test. See *New Quebec Raglan Mines Ltd. v. Blok-Andersen*, [1993] O.J. No. 727 (Ont. Gen. Div. [Commercial List]) as to fair value and fair market valuation. The Union observed that there was no intention by Stelco to wind itself up or proceed with a sale of some or all of its assets and undertaking and therefore some of the liabilities which Stelco and Stephen took into account would not crystallize. However, as I discussed at the time of the hearing, the (c) test is what one might reasonably call or describe as an "artificial" or notional/hypothetical test. It presumes certain things which are in fact not necessarily contemplated to take place or to be involved. In that

respect, I appreciate that it may be difficult to get one's mind around that concept and down the right avenue of that (c) test. See my views at trial in *Olympia & York Developments Ltd. (Trustee of) v. Olympia & York Realty Corp.*, [2001] O.J. No. 3394 (Ont. S.C.J. [Commercial List]) at paragraphs 13, 21 and 33; affirmed [2003] O.J. No. 5242 (Ont. C.A.). At paragraph 33, I observed in closing:

> 33 . . . They (and their expert witnesses) all had to contend with dealing with rambling and complicated facts and, in Section 100 BIA, a section which is difficult to administer when fmv [fair market value] in a notational or hypothetical market involves ignoring what would often be regarded as self evidence truths but at the same time appreciating that this notational or hypothetical market requires that the objects being sold have to have realistic true to life attributes recognized.

42 The Court of Appeal stated at paragraphs 24-25 as follows:

> 24. Nor are the appellants correct to argue that the trial judge also assumed an imprudent vendor in arriving at his conclusion about the fair market value of the OYSF note would have to know that in order to realize value from the note any purchaser would immediately put OYSF and thus OYDL itself into bankruptcy to pre-empt a subsequent triggering event in favour of EIB. While this was so, and the trial judge clearly understood it, the error in this submission is that it seeks to inject into the analysis factors subjected to the circumstances of OYDL as vendor and not intrinsic to the value of the OYSF note. The calculation of fair market value does not permit this but rather must assume an unconstrained vendor.
>
> 25. The Applicants further argue that the trial judge eroded in determining the fair market value of the OYSF note by reference to a transaction which was entirely speculative because it was never considered by OYDL nor would have it been since it would have resulted in OYDL's own bankruptcy. I disagree. The transaction hypothesized by the trial judge was one between a notational, willing, prudent and informed vendor and purchaser based on factors relevant to the OYSF note itself rather than the particular circumstances of OYDL as the seller of the note. This is an entirely appropriate way to determine the fair market value of the OYSF note.

43 Test (c) deems a person to be insolvent if "the aggregate of [its] property is not, at a fair valuation, sufficient, or of disposed at a fairly conducted sale under legal process would not be sufficient to enable payment of all [its] obligations, due and accruing due." The origins of this legislative test appear to be the decision of Spragge V-C in *Davidson v. Douglas* (1868), 15 Gr. 347 (Ont. Ch.) at p. 351 where he stated with respect to the solvency or insolvency of a debtor, the proper course is:

> to see and examine whether all his property, real and personal, be sufficient if presently realized for the payment of his debts, and in this view we must estimate his land, as well as his chattel property, not at what his neighbours or others may consider to be its value, but at what it would bring in the market at a forced sale, or a sale where the seller cannot await his opportunities, but must sell.

44 In *Clarkson v. Sterling* (1887), 14 O.R. 460 (Ont. C.P.) at p. 463, Rose J. indicted that the sale must be fair and reasonable, but that the determination of fairness and reasonableness would depend on the facts of each case.

45 The Union essentially relied on garnishment cases. Because of the provisions relating as to which debts may or may not be garnished, these authorities are of somewhat limited value when dealing with the test (c)

question. However I would refer to one of the Union's cases *Bank of Montreal v. I.M. Krisp Foods Ltd.*, [1996] S.J. No. 655 (Sask. C.A.) where it is stated at paragraph 11:

> 11. Few phrases have been as problematic to define as "debt due or accruing due". The Shorter Oxford English Dictionary, 3rd ed. defines "accruing" as "arising in due course", but an examination of English and Canadian authority reveals that not all debts "arising in due course" are permitted to be garnisheed. (See Professor Dunlop's extensive research for his British Columbia Law Reform Commission's Report on Attachment of Debts Act, 1978 at 17 to 29 and is text Creditor-Debtor Law in Canada, 2nd ed. at 374 to 385.)

46 In *Barsi v. Farcas* (1923), [1924] 1 D.L.R. 1154 (Sask. C.A.), Lamont J.A. was cited for his statement at p. 522 of *Webb v. Stenton* (1883), 11 Q.B.D. 518 (Eng. C.A.) that: "an accruing debt, therefore, is a debt not yet actually payable, but a debt which is represented by an existing obligation."

47 Saunders J. noted in *633746 Ontario Inc. (Trustee of) v. Salvati* (1990), 79 C.B.R. (N.S.) 72 (Ont. S.C.) at p. 81 that a sale out of the ordinary course of business would have an adverse effect on that actually realized.

48 There was no suggestion by any of the parties that any of the assets and undertaking would have any enhanced value from that shown on the financial statements prepared according to GAAP.

49 In *King Petroleum Ltd., supra* at p. 81 Steele J. observed:

> To consider the question of insolvency under cl. (c) I must look to the aggregate property of the company and come to a conclusion as to whether or not it would be sufficient to enable payment of all obligations due and accruing due. There are two tests to be applied: First, its fair value and, secondly, its value if disposed of at a fairly conducted sale under legal process. The balance sheet is a starting point, but the evidence relating to the fair value of the assets and what they might realize if disposed of at a fairly conducted sale under legal process must be reviewed in interpreting it. In this case, I find no difficulty in accepting the obligations shown as liabilities because they are known. I have more difficulty with respect to the assets.

50 To my view the preferable interpretation to be given to "sufficient to enable payment of all his obligations, due and accruing due" is to be determined in the context of this test as a whole. What is being put up to satisfy those obligations is the debtor's assets and undertaking *in total*; in other words, the debtor in essence is taken as having sold everything. There would be no residual assets and undertaking to pay off any obligations which would not be encompassed by the phrase "all of his obligations, due and accruing due". Surely, there cannot be "orphan" obligations which are left hanging unsatisfied. It seems to me that the intention of "due and accruing due" was to cover off all obligations of whatever nature or kind and leave nothing in limbo.

51 S. 121(1) and (2) of the BIA, which are incorporated by reference in s. 12 of the CCAA, provide in respect to provable claims:

> S. 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

> (2) The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such claim shall be made in accordance with s. 135.

52 *Houlden and Morawetz 2004 Annotated supra* at p. 537 (G28(3)) indicates:

> The word "liability" is a very broad one. It includes all obligations to which the bankrupt is subject on the day on which he becomes bankrupt except for contingent and unliquidated claims which are dealt with in s. 121(2).

However contingent and unliquidated claims would be encompassed by the term "obligations".

53 In *Gardner v. Newton* (1916), 29 D.L.R. 276 (Man. K.B.), Mathers C.J.K.B. observed at p. 281 that "contingent claim, that is, a claim which may or may not ripen into a debt, according as some future event does or does not happen." See *A Debtor (No. 64 of 1992), Re*, [1993] 1 W.L.R. 264 (Eng. Ch. Div.) at p. 268 for the definition of a "liquidated sum" which is an amount which can be readily ascertained and hence by corollary an "unliquidated claim" would be one which is not easily ascertained, but will have to be valued. In *Gagnier, Re* (1950), 30 C.B.R. 74 (Ont. S.C.), there appears to be a conflation of not only the (a) test with the (c) test, but also the invocation of the judicial discretion not to grant the receiving order pursuant to a bankruptcy petition, notwithstanding that "[the judge was] unable to find the debtor is bankrupt". The debtor was able to survive the (a) test as he had the practice (accepted by all his suppliers) of providing them with post dated cheques. The (c) test was not a problem since the judge found that his assets should be valued at considerably more than his obligations. However, this case does illustrate that the application of the tests present some difficulties. These difficulties are magnified when one is dealing with something more significantly complex and a great deal larger than a haberdashery store - in the case before us, a giant corporation in which, amongst other things, is engaged in a very competitive history including competition from foreign sources which have recently restructured into more cost efficient structures, having shed certain of their obligations. As well, that is without taking into account that a sale would entail significant transaction costs. Even of greater significance would be the severance and termination payments to employees not continued by the new purchaser. Lastly, it was recognized by everyone at the hearing that Stelco's plants, especially the Hamilton-Hilton works, have extremely high environmental liabilities lurking in the woodwork. Stephen observed that these obligations would be substantial, although not quantified.

54 It is true that there are no appraisals of the plant and equipment nor of the assets and undertaking of Stelco. Given the circumstances of this case and the complexities of the market, one may realistically question whether or not the appraisals would be all that helpful or accurate.

55 I would further observe that in the notional or hypothetical exercise of a sale, then all the obligations which would be triggered by such sale would have to be taken into account.

56 All liabilities, contingent or unliquidated would have to be taken into account. See *King Petroleum Ltd., supra* p. 81; *Salvati, supra* pp. 80-1; *Maybank Foods Inc. (Trustee of) v. Provisioners Maritimes Ltd.* (1989), 45 B.L.R. 14 (N.S. T.D.) at p. 29; *Challmie, Re* (1976), 22 C.B.R. (N.S.) 78 (B.C. S.C.), at pp. 81-2. In *Challmie* the debtor ought to have known that his guarantee was very much exposed given the perilous state of his company whose liabilities he had guaranteed. It is interesting to note what was stated in *Maybank Foods Inc. (Trustee of)*, even if it is rather patently obvious. Tidman J. said in respect of the branch of the company at p. 29:

> Mr. MacAdam argues also that the $4.8 million employees' severance obligation was not a liability on January 20, 1986. The *Bankruptcy Act* includes as obligations both those due and accruing due. Al-

though the employees' severance obligation was not due and payable on January 20, 1986 it was an obligation "accruing due". The Toronto facility had experienced severe financial difficulties for some time; in fact, it was the major, if not the sole cause, of Maybank's financial difficulties. I believe it is reasonable to conclude that a reasonably astute perspective buyer of the company has a going concern would have considered that obligation on January 20, 1986 and that it would have substantially reduced the price offered by that perspective buyer. Therefore that obligation must be considered as an obligation of the company on January 20, 1986.

57 With the greatest of respect for my colleague, I disagree with the conclusion of Ground J. in *Enterprise Capital Management Inc., supra* as to the approach to be taken to "due and accruing due" when he observed at pp. 139- 140:

> It therefore becomes necessary to determine whether the principle amount of the Notes constitutes an obligation "due or accruing due" as of the date of this application.
>
> There is a paucity of helpful authority on the meaning of "accruing due" for purposes of a definition of insolvency. Historically, in 1933, in *P. Lyall & Sons Construction Co. v. Baker*, [1933] O.R. 286 (Ont. C.A.), the Ontario Court of Appeal, in determining a question of set-off under the *Dominion Winding-Up Act* had to determine whether the amount claimed as set-off was a debt due or accruing due to the company in liquidation for purposes of that Act. Marsten J. at pp. 292-293 quoted from Moss J.A. in *Mail Printing Co. v. Clarkson* (1898), 25 O.R. 1 (Ont. C.A.) at p. 8:
>
> > A debt is defined to be a sum of money which is certainly, and at all event, payable without regard to the fact whether it be payable now or at a future time. And an accruing debt is a debt not yet actually payable, but a debt which is represented by an existing obligation: Per Lindley L.J. in *Webb v. Stenton* (1883), 11 Q.D.D. at p. 529.
>
> Whatever relevance such definition may have had for purposes of dealing with claims by and against companies in liquidation under the old winding-up legislation, it is apparent to me that it should not be applied to definitions of insolvency. To include every debt payable at some future date in "accruing due" for the purposes of insolvency tests would render numerous corporations, with long term debt due over a period of years in the future and anticipated to be paid out of future income, "insolvent" for the purposes of the BIA and therefore the CCAA. For the same reason, I do not accept the statement quoted in the Enterprise factum from the decision of the Bankruptcy Court for the Southern District of New York in *Centennial Textiles Inc., Re*, 220 B.R. 165 (U.S.N.Y.D.C. 1998) that "if the present saleable value of assets are less than the amount required to pay existing debt as they mature, the debtor is insolvent". In my view, the obligations, which are to be measured against the fair valuation of a company's property as being obligations due and accruing due, must be limited to obligations currently payable or properly chargeable to the accounting period during which the test is being applied as, for example, a sinking fund payment due within the current year. Black's Law Dictionary defines "accrued liability" as "an obligation or debt which is properly chargeable in a given accounting period, but which is not yet paid or payable". The principal amount of the Notes is neither due nor accruing due in this sense.

58 There appears to be some confusion in this analysis as to "debts" and "obligations", the latter being much broader than debts. Please see above as to my views concerning the floodgates argument under the BIA and

CCAA being addressed by judicially exercised discretion even if "otherwise warranted" applications were made. I pause to note that an insolvency test under general corporate litigation need not be and likely is not identical, or indeed similar to that under these insolvency statutes. As well, it is curious to note that the cut off date is the end of the current fiscal period which could have radically different results if there were a calendar fiscal year and the application was variously made in the first week of January, mid-summer or the last day of December. Lastly, see above and below as to my views concerning the proper interpretation of this question of "accruing due".

59 It seems to me that the phrase "accruing due" has been interpreted by the courts as broadly identifying obligations that will "become due". See *Viteway Natural Foods Ltd.* below at pp. 163-4 - at least at some point in the future. Again, I would refer to my conclusion above that *every obligation* of the corporation in the hypothetical or notional sale must be treated as "accruing due" to avoid orphan obligations. In that context, it matters not that a wind-up pension liability may be discharged over 15 years; in a test (c) situation, it is crystallized on the date of the test. See *Optical Recording Laboratories Inc. supra* at pp. 756-7; *Viteway Natural Foods Ltd., Re* (1986), 63 C.B.R. (N.S.) 157 (B.C. S.C.) at pp. 164-63-4; *Consolidated Seed Exports Ltd., Re* (1986), 62 C.B.R. (N.S.) 156 (B.C. S.C.) at p. 163. In *Consolidated Seed Exports Ltd.*, Spencer J. at pp. 162-3 stated:

> In my opinion, a futures broker is not in that special position. The third definition of "insolvency" may apply to a futures trader at any time even though he has open long positions in the market. Even though Consolidated's long positions were not required to be closed on 10th December, the chance that they might show a profit by March 1981 or even on the following day and thus wipe out Consolidated's cash deficit cannot save it from a condition of insolvency on that day. The circumstances fit precisely within the third definition; if all Consolidated's assets had been sold on that day at a fair value, the proceeds would not have covered its obligations due and accruing due, including its obligations to pay in March 1981 for its long positions in rapeseed. The market prices from day to day establish a fair valuation.
>
> . . .
>
> The contract to buy grain at a fixed price at a future time imposes a present obligation upon a trader taking a long position in the futures market to take delivery in exchange for payment at that future time. It is true that in the practice of the market, that obligation is nearly always washed out by buying an offsetting short contract, but until that is done the obligation stands. The trader does not know who will eventually be on the opposite side of his transaction if it is not offset but all transactions are treated as if the clearing house is on the other side. It is a present obligation due at a future time. It is therefore an obligation accruing due within the meaning of the third definition of "insolvency".

60 The possibility of an expectancy of future profits or a change in the market is not sufficient; *Consolidated Seed Exports Ltd.* at p. 162 emphasizes that the test is to be done on that day, the day of filing in the case of an application for reorganization.

61 I see no objection to using Exhibit C to Stephen's affidavit as an aid to review the balance sheet approach to test (c). While Stephen may not have known who prepared Exhibit C, he addressed each of its components in the text of his affidavit and as such he could have mechanically prepared the exhibit himself. He was comfortable with and agreed with each of its components. Stelco's factum at paragraphs 70-1 submits as follows:

> 70. In Exhibit C to his Affidavit, Mr. Stephen addresses a variety of adjustments to the Shareholder's Equity of Stelco necessary to reflect the values of assets and liabilities as would be required to

> determine whether Stelco met the test of insolvency under Clause C. In cross examination of both Mr. Vaughan and Mr. Stephen only one of these adjustments was challenged - the "Possible Reductions in Capital Assets."
>
> 71. The basis of the challenge was that the comparative sales analysis was flawed. In the submission of Stelco, none of these challenges has any merit. Even if the entire adjustment relating to the value in capital assets is ignored, the remaining adjustments leave Stelco with assets worth over $600 million less than the value of its obligations due and accruing due. This fundamental fact is not challenged.

62 Stelco went on at paragraphs 74-5 of its factum to submit:

> 74. The values relied upon by Mr. Stephen if anything, understate the extent of Stelco's insolvency. As Mr. Stephen has stated, and no one has challenged by affidavit evidence or on cross examination, in a fairly conducted sale under legal process, the value of Stelco's working capital and other assets would be further impaired by: (i) increased environmental liabilities not reflected on the financial statements, (ii) increased pension deficiencies that would be generated on a wind up of the pension plans, (iii) severance and termination claims and (iv) substantial liquidation costs that would be incurred in connection with such a sale.
>
> 75. No one on behalf of the USWA has presented any evidence that the capital assets of Stelco are in excess of book value on a stand alone basis. Certainly no one has suggested that these assets would be in excess of book value if the related environmental legacy costs and collective agreements could not be separated from the assets.

63 Before turning to that exercise, I would also observe that test (c) is also disjunctive. There is an insolvency condition if the total obligation of the debtor exceed either (i) a fair valuation of its assets or (ii) the proceeds of a sale fairly conducted under legal process of its assets.

64 As discussed above and confirmed by Stephen, if there were a sale under legal process, then it would be unlikely, especially in this circumstance that values would be enhanced; in all probability they would be depressed from book value. Stephen took the balance sheet GAAP calculated figure of equity at November 30, 2003 as $804.2 million. From that, he deducted the loss for December 2003 - January 2004 of $17 million to arrive at an equity position of $787.2 million as at the date of filing.

65 From that, he deducted, reasonably in my view, those "booked" assets that would have no value in a test (c) sale namely: (a) $294 million of future income tax recourse which would need taxable income in the future to realize; (b) $57 million for a write-off of the Platemill which is presently hot idled (while Locker observed that it would not be prohibitive in cost to restart production, I note that neither Stephen nor Vaughn were cross examined as to the decision not to do so); and (c) the captialized deferred debt issue expense of $3.2 million which is being written off over time and therefore, truly is a "nothing". This totals $354.2 million so that the excess of value over liabilities before reflecting obligations not included in the financials directly, but which are, substantiated as to category in the notes would be $433 million.

66 On a windup basis, there would be a pension deficiency of $1252 million; however, Stephen conservatively in my view looked at the Mercer actuary calculations on the basis of a going concern finding deficiency of $656 million. If the $1252 million windup figure had been taken, then the picture would have been even bleaker

than it is as Stephen has calculated it for test (c) purposes. In addition, there are deferred pension costs of $198.7 million which under GAAP accounting calculations is allowed so as to defer recognition of past bad investment experience, but this has no realizable value. Then there is the question of Employee Future Benefits. These have been calculated as at December 31, 2003 by the Mercer actuary as $909.3 million but only $684 million has been accrued and booked on the financial statements so that there has to be an increased provision of $225.3 million. These off balance sheet adjustments total $1080 million.

67 Taking that last adjustment into account would result in a *negative* equity of ($433 million minus $1080 million) or *negative* $647 million. On that basis without taking into account possible reductions in capital assets as dealt with in the somewhat flawed Exhibit E nor environmental and other costs discussed above, Stelco is insolvent according to the test (c). With respect to Exhibit E, I have not relied on it in any way, but it is entirely likely that a properly calculated Exhibit E would provide comparators (also being sold in the U.S. under legal process in a fairly conducted process) which tend to require a further downward adjustment. Based on test (c), Stelco is significantly, not marginally, under water.

68 In reaching my conclusion as to the negative equity (and I find that Stephen approached that exercise fairly and constructively), please note my comments above regarding the possible assumption of pension obligations by the purchaser being offset by a reduction of the purchase price. The 35% adjustment advocated as to pension and employee benefits in this regard is speculation by the Union. Secondly, the Union emphasized cash flow as being important in evaluation, but it must be remembered that Stelco has been negative cash flow for some time which would make that analysis unreliable and to the detriment of the Union's position. The Union treated the $773 million estimated contribution to the shortfall in the pension deficiency by the Pension Benefits Guarantee Fund as eliminating that as a Stelco obligation. That is not the case however as that Fund would be subrogated to the claims of the employees in that respect with a result that Stelco would remain liable for that $773 million. Lastly, the Union indicated that there should be a $155 million adjustment as to the negative equity in Sub Applicants when calculating Stelco's equity. While Stephen at Q. 181-2 acknowledged that there was no adjustment for that, I agree with him that there ought not to be since Stelco was being examined (and the calculations were based) on an unconsolidated basis, not on a consolidated basis.

69 In the end result, I have concluded on the balance of probabilities that Stelco is insolvent and therefore it is a "debtor company" as at the date of filing and entitled to apply for the CCAA initial order. My conclusion is that (i) BIA test (c) strongly shows Stelco is insolvent; (ii) BIA test (a) demonstrates, to a less certain but sufficient basis, an insolvency and (iii) the "new" CCAA test again strongly supports the conclusion of insolvency. I am further of the opinion that I properly exercised my discretion in granting Stelco and the Sub Applicants the initial order on January 29, 2004 and I would confirm that as of the present date with effect on the date of filing. The Union's motion is therefore dismissed.

70 I appreciate that all the employees (union and non-union alike) and the Union and the International have a justifiable pride in their work and their workplace - and a human concern about what the future holds for them. The pensioners are in the same position. Their respective positions can only be improved by engaging in discussion, an exchange of views and information reasonably advanced and conscientiously listened to and digested, leading to mutual problem solving, ideas and negotiations. Negative attitudes can only lead to the detriment to all stakeholders. Unfortunately there has been some finger pointing on various sides; that should be put behind everyone so that participants in this process can concentrate on the future and not inappropriately dwell on the past. I understand that there have been some discussions and interchange over the past two weeks since the hearing and that is a positive start.

Motion dismissed.

Appendix

END OF DOCUMENT

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO FRASER PAPERS INC., FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H. LLC

Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

Proceedings commenced at Toronto

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