CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. : 500-11-036133-094

SUPERIOR COURT

Commercial Division
(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

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

ABITIBIBOWATER INC. et al.

Petitioners

and

ERNST & YOUNG INC.

Monitor

MEMORANDUM OF ARGUMENT OF THE PETITIONERS ON THE SENIOR SECURED NOTEHOLDERS' CONTESTATION TO THE MPCO MOTION

All capitalized terms not otherwise defined herein shall have the meaning ascribed thereto in the following documents:

- the *Initial Order* (as amended and restated) issued by this Court on April 17, 2009;
- the Petitioners' *Amended Motion for the Issuance of an Order Authorizing the Sale of Petitioner Abitibi-Consolidated Company of Canada's Indirect Interest in the McCormick Hydroelectric Facility* (the "**MPCo Motion**") dated September 15, 2009; and
- the *Contestation* of the MPCo Motion (the "**Contestation**") by the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes (respectively, the "**Senior Secured Committee**" and "**Trustee**", collectively the "**SSNs**").

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I. INTRODUCTION

1. In the context of these CCAA proceedings, the Petitioners seek to implement certain transactions designed to transfer the indirect interest of ACCC in the business of MPCo to Hydro-Québec or a wholly-owned subsidiary of Hydro-Québec (collectively,"**HQ**").

2. Accordingly, in addition to such further orders as this Court may deem appropriate in the circumstances, ACI and ACCC hereby seek authorization or approval from this Court:

    (a) of a certain Implementation Agreement, Exhibit R-1 (the "**Implementation Agreement**") among ACI, ACCC, MPCo, Alcoa Canada and Alcoa Ltd. ("**Alcoa Ltd.**" and collectively with Alcoa Canada and a new wholly-owned subsidiary of Alcoa Ltd. referred to as "**Newco**" in Section 3.6 of the Implementation Agreement, "**Alcoa**"), to which HQ intervened; and

    (b) to effect the various transactions (the "**Proposed Transactions**") contemplated in the Implementation Agreement in respect of the business currently owned and operated by MPCo (the "**Business**").

3. In the Contestation, the SSNs raise several grounds of opposition to the Proposed Transactions, all of which are addressed hereinafter. The SSNs do not, however, challenge or contest the following elements of the MPCo Motion:

    (a) the process which led to the selection of HQ as a proposed purchaser of ACCC's interest in the Business on or about February 19, 2009;

    (b) the proposed purchase price of $615 million for ACCC's interest in the Business;

    (c) the existence of potential contingent pension liabilities in respect of the Business and HQ's position in that regard;

    (d) the fact that the sale of ACCC's interest in the Business may and should take place prior to the filing of a plan of arrangement; and

    (e) the importance of selling the Business as a going concern as opposed to a liquidation scenario.

4. The SSNs only seek amendments to certain structural elements of the Proposed Transactions and to the proposed use of the sale proceeds derived from said transactions. In this regard, the second conclusion sought in the Contestation provides that ACCC be at liberty "*to reapply for approval of the proposed transaction as it may be amended following good faith negotiations with the Ad Hoc Committee of Senior Secured Noteholders and the Trustee.*"

II. SUMMARY OF ARGUMENT

5. It is submitted that when the smoke is cleared away and the rhetoric of the Contestation is carefully reviewed, there is no party standing before the Court demanding that the Petitioners refrain from selling MPCo or that they refrain from selling it on the terms negotiated with HQ and with Alcoa. The agreements reflect the result of arm's length negotiations with parties under no compulsion to negotiate or reach an arrangement. The price and terms are unquestionably the best obtainable in the circumstances and not a single party suggests that, if better terms cannot be obtained, the Petitioners should opt instead to retain MPCo shares and avoid a sale altogether.

6. The real foundation of the objections to the Proposed Transactions is not the Proposed Transactions themselves but the failure to agree, in advance of the hearing, as to the precise use of proceeds arising therefrom. The Petitioners submit that this is a matter which can and should be left to be dealt with by the Court on subsequent motion or, if need be, in the Plan itself providing the SSNs have a full and adequate replacement lien (as has been proposed here).

7. The reluctance of the SSNs to flatly oppose approval of the Proposed Transactions (their Contestation amounting to an attempt at saying "yes, but") is understandable since the Proposed Transactions remain the surest existing path to raise the funds necessary to satisfy their claims upon emergence from CCAA. The challenging credit environment which has resulted in such limited available credit being available for the Petitioners to this point in the proceedings has not improved materially as regards the Petitioners and there exists no other presently available means of sourcing the funds necessary to repay the Senior Secured Noteholders. In other words, should the Proposed Transactions be lost, the foreseeable impact of such an event would be that, instead of being almost certainly unaffected creditors in an eventual CCAA Plan of Compromise and Arrangement, the SSNs would very likely be affected creditors whose claims would have to be dealt with over time unless alternative sources of financing to provide for the repayment of their claim emerge between now and the filing of an eventual Plan.

8. The Contestation thus resolves itself into a dispute regarding the use of proceeds arising from the Proposed Transactions. In the present circumstances, the Petitioners submit that a dispute regarding use of proceeds should not obstruct the court from approving the Proposed Transactions having regard to the following important factors:

   (a) the SSNs will receive a replacement lien - subject only to proof of their claim and ranking of their security - over 100% of the net proceeds of the Proposed Transactions attributable to the shares over which they have a pledge subject only to reserves in favour of third parties which, in the case of the largest reserve in particular (i.e. for pension claims), is a reserve for possible claims which would rank ahead of the security of the SSNs in any event (being a corporate obligation of the company whose shares they have in pledge);

(b) the only net cash proceeds of the Proposed Transactions (net of required payments to HQ and Alcoa) will be used either to repay the DIP in accordance with the Order of this Court dated May 6, 2009 (which order was not objected to by the SSNs) or be held under the control of the Monitor pending further order of this Court such that the potential for prejudice to the interests of the SSNs is precisely zero given the Court's involvement and control and their opportunity to be heard and make submissions;

(c) the assets over which the SSNs will have a replacement lien are of sufficient value to provide a means of satisfying all or substantially all of the claims of the Senior Secured Notes. As noted in the Monitor's Sixteenth Report (the "**Monitor's Report**"), the interest of the SSNs (assuming their claims are proved and security verified) would extend to $97.2 million of subrogated DIP claims, $137.6 million in cash plus the Petitioner's interest in reserve accounts held by the ULC (established pursuant to the Proposed Transaction) totalling $282.3 million and a further reserve of $30.8 million held by HQ for a total of $547.9 million. By contrast, the claims of the Senior Secured Notes amount to $413 million plus accrued interest. While claims against some reserve amounts may not be finally determined for some time, the largest reserve amount ($202.3 million) in respect of contingent pension liability will return to the Petitioners upon plan emergence unless claims are made against it prior to that time;

(d) the Proposed Transactions and approval orders substantially comply with all of the protections the SSNs bargained for in section 4.10 of the Indenture dated as of April 1, 2008 (the "**Trust Indenture**");

(e) there is no credible basis to believe that a higher or better price for the assets can be obtained by deferring sale to a later date or rejecting the Proposed Transactions altogether; and

(f) the completion of the Proposed Transactions would both materially advance the restructuring of the Petitioners (by providing a means of satisfying the SSNs claims upon emergence) and benefit stakeholders, while the failure of the Proposed Transactions would greatly complicate the restructuring if not completely frustrate it. The balance of interests clearly favours approval.

III. BACKGROUND

9. An accurate background of the MPCo transaction is provided in the Monitor's Report at paragraphs 17 and following. Below are set out certain facts designed to complement that narrative.

10. On March 13, 2009, this Court granted an interim order (the "**CBCA Order**") pursuant to an application made by ACI and certain affiliated applicants under sections 192 and 248 of the *Canada Business Corporations Act* (the "**CBCA Proceedings**") in connection with a proposed plan of arrangement which, ultimately, was not successfully completed.

11. The MPCo transaction was initially projected to close on or around the end of April, 2009. For reasons more fully detailed below, the negotiations took longer than anticipated and the closing date was pushed back until November 2009.

12. On March 13, 2009, the Petitioners issued a press release announcing the MPCo transaction (the "**Press Release**"), Exhibit R-4 to the MPCo Motion, which refers to "[...] *a non-binding agreement in principle with Hydro-Quebec for the sale of its 60 percent interest in the hydroelectric facility located on the Manicouagan River* [...], *for gross proceeds of C$615 million*." While the Petitioners have at all relevant times favored a share deal, the nature or structure of the proposed transaction was never formally announced, a fact admitted during the examination of the SSNs' representative, Mr. Andrew Boyd.

13. The March 13 Press Release came in the context of the Petitioners' CBCA Proceedings pursuant to which this Court granted a stay of proceedings affecting, *inter alia*, the Senior Secured Notes. The stay of proceedings so granted extended to May 5, 2009 in order to permit time for the MPCo transaction to be closed and the CBCA Plan to be voted upon.

14. Between March 13 and early August, 2009, the Petitioners and HQ continued their negotiations with respect to the proposed sale of ACCC's interest in MPCo. The LOI dated February 18, 2009 (Exhibit R-3 to the MPCo Motion) was extended twice, first on March 20, 2009 (Exhibit R-5 to the MPCo Motion) and a second time on April 28, 2009 (Exhibit R-6 to the MPCo Motion).

15. During the course of these negotiations, HQ raised certain pension and tax issues described in greater detail in the Monitor's Report and in the MPCo Motion. The Petitioners, with the assistance of their advisors, analyzed possible solutions in order to address HQ's concerns about potential contingent pension liabilities in the context of a share transaction.

16. At some point in the discussions, HQ formally advised the Petitioners that it would no longer entertain a purchase of the shares of MPCo and that the only alternative was to proceed with an asset transaction which would provide adequate measures to address the aforesaid pension and tax issues identified during the buyer's due diligence process.

17. As outlined at paragraphs 34 and 35 of the MPCo Motion, the effect of HQ's demand was to trigger Alcoa's request for certain indemnities and an undertaking from ACCC to pay for fees and expenses in connection with the proposed transaction.

18. Following the filing by the Petitioners under the CCAA on April 17, 2009, an application was made for the approval of a DIP loan which was described as a "bridge" to permit the closing of the MPCo sale. This Court approved the ACI DIP Facility on May 6, 2009. The DIP loan was structured to require its repayment out of the proceeds of the MPCo transaction. While initially contesting the approval of the DIP, the SSNs ultimately withdrew their contestation and did not oppose the

approval of the DIP.

19. In early August 2009, the Petitioners initiated contact with the SSNs in respect of the sale of MPCo and representatives of the parties spent the following weeks discussing the execution and negotiating the contents of Non-Disclosure Agreements. The Petitioners' position was that, in order to comply with applicable securities legislation, no confidential information could be disclosed to the SSNs unless same were bound by confidentiality and standstill undertakings.

20. On August 20, 2009, a meeting was held between the Petitioners, the SSNs and their respective advisors. At said meeting, the Proposed Transactions contemplated in the Implementation Agreement were explained to the SSNs and their advisors.

21. Between August 20 and September 3, 2009 (the date of execution of the IP), there were virtually no communications between the SSNs and the Petitioners. Within minutes following the execution of the Implementation Agreement, the MPCo Motion was filed. An executed copy of the Implementation Agreement was served and filed in support of the MPCo Motion.

IV. THE IMPLEMENTATION AGREEMENT

1. The Proposed Transactions

22. The Implementation Agreement sets out, *inter alia*, the Proposed Transactions to be carried out by the Parties in order that the Revised MPCo Sale and the transfer of the ACCC/MPCo Power Purchase Agreements be effected in the most efficient manner while complying with Alcoa's conditions for cooperating therewith. In particular, the Implementation Agreement contemplates 19 steps, as set out in Schedule A thereto, which include:

    (a) the acquisition by ACCC of the Alcoa Interest in consideration for the issuance by ACCC of a promissory note;

    (b) the winding-up of MPCo into ACCC and the subsequent transfer by ACCC to a limited partnership formed under the laws of the Province of Québec ("**New LP**") of the assets of MPCo, including the McCormick Hydroelectric Facility and the liabilities related to the Business other than Excluded Liabilities (as defined in the Implementation Agreement) to New LP;

    (c) the sale by ACCC to HQ of a 59.9994% interest in New LP and of its rights, title and interest in the ACCC/MPCo Power Purchase Agreements and the sale by ACCC to HQ, directly or indirectly, of a 60% interest in the general partner of New LP (the "**GP**") for gross proceeds of $615 million (the "**HQ Acquisition**"), the whole subject to all the conditions set forth in the Intervention section of the Implementation Agreement; and

    (d) as repayment for the promissory note issued by ACCC in consideration for the transfer of the Alcoa Interest, the transfer by ACCC to Alcoa of a 39.9996%

interest in New LP and the transfer by ACCC to Alcoa (or an entity owned by Alcoa) of a 40% interest in the GP, the whole in replacement of the Alcoa Interest.

23. The outline of the corporate structure prior to the Proposed Transactions and the outline of the corporate structure following the Proposed Transactions were communicated, respectively, as Exhibits R-7 and R-8 to the MPCo Motion.

24. In the event the MPCO Motion is granted, the execution of the acquisition agreement among HQ and ACCC in respect of the HQ Acquisition is expected to take place on or about September 30, 2009 and the closing of the Proposed Transactions is expected to take place on or about October 15, 2009.

25. It is anticipated that the Petitioners will seek approval and vesting orders in connection with the definitive agreements contemplated in the Implementation Agreement.

2. <u>Use of Proceeds and Replacement Liens</u>

26. The Petitioners expect that the gross proceeds of approximately $615 million from the Proposed Transactions will be applied as follows (subject to adjustments):

    (a) about $25 million for the payment of the taxes reimbursed to Alcoa at closing;

    (b) about $31 million to HQ for the payment of the ACCC Debt estimated by HQ;

    (c) about $30.75 million by way of a 2-year purchase price holdback by HQ (the "**Holdback**");

    (d) up to $282.3 million to be held by ULC as Permitted Investments (the "**ULC Reserve**");

    (e) up to US$87.5 million for the repayment of the ACI DIP Facility, of which about US $58.4 million is currently outstanding, plus any accrued interest and expenses; and

    (f) about $10 million in other amounts paid or payable in connection with or pursuant to the Transaction Documents.

27. As appears from the conclusions of the MPCo Motion, the following measures will be taken in connection with the Proposed Transactions to ensure that the rights of the SSNs are protected:

    (a) the granting of a replacement charge (the "**MPCo Noteholder Charge**") in favour of the SSNs with the same rank and priority as the existing security held in respect of the shares of MPCo held by ACCC over: (i) the net proceeds from the Proposed Transactions; and (ii) the shares of ULC;

    (b) the granting of a guarantee in favour of the SSNs by ULC (the "**ULC**

Subordinated Guarantee");

(c) an order (the "**Subrogation Order**") which provides that the SSNs shall be subrogated in the ACI DIP Charge in accordance with paragraph 61.10 of the Initial Order to the extent that any payment from the transaction proceeds is made to the ACI DIP Lender under the ACI DIP Agreement;

(d) an order (the "**Net Cash Proceeds Order**") which provides that the cash component of the MPCo Share Proceeds and the ULC Reserve shall be paid to and be held by the Monitor; and

(e) an order (the "**ULC Borrowing Order**") which provides that the Abitibi Petitioners may not borrow any portion of the ULC Reserve except on terms and conditions permitted under the Implementation Agreement, including as to amount, security, priority, interest rates, fees, default, reporting and repayment, and except upon approval of the Court made on notice to the Trustee.

V. THE LAW

1. Sale of Assets Prior to a Creditor Vote on a Plan of Arrangement

28. The SSNs acknowledge at paragraph 93 of the Contestation "*that CCAA courts in other cases have authorized sales of assets in advance of the presentation of a plan* [of arrangement]", this was indeed recently the case in *Nortel*, where Justice Morawetz sought to determine whether "[...] *the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote.*"

- *Nortel Networks Corp., Re,* 2009 CarswellOnt 4467 (July 23, 2009) ["**Nortel July 23**"], **TAB 1** at para. 24.

29. The Nortel Court noted the broad remedial powers granted to courts under the CCAA and the fact that these powers must be informed by the purpose of the CCAA, namely to preserve the going concern of the debtor's business for all the stakeholders. Justice Morawetz also listed several precedents from various Canadian provinces where courts had approved a sale of assets in the absence of a plan of arrangement.

- See cases cited in *Nortel July 23* at paras. 35 and 41, including, *inter alia, Canadian Red Cross, Re* [1998] O.J. No. 3306 (Ont. S.C.J.) **TAB 2**, at paragraphs 43 and 46.

30. In concluding that the Court has jurisdiction to authorize a sale under the CCAA in the absence of a plan, the Court finally laid to rest any doubts which had been cast upon the matter by the BC Court of Appeal in *Cliffs over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008, 46 C.B.R. (5th) 7 (B.C. C.A.).

31. According to the Nortel July 23 decision, the following factors must be considered by this Court in order to determine whether it is appropriate, in this case, to approve the sale of MPCo under the CCAA in the absence of a plan:

(a) is a sale warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

> *Nortel July 23*, TAB 1, para. 49.

32. While the authority of a court to approve a sale transaction within CCAA proceedings has now been well established by precedent, it is also relevant to note that Section 4.10 of the Trust Indenture governing the SSNs permits "Asset Sales" including a "Sale of Collateral" providing fair market value is received and at least 75% of the consideration is in the form of cash and cash equivalents (which would include reserve accounts). Indeed, providing the Indenture Trustee has a replacement lien and cash is kept in a segregated account, the Petitioners would have 360 days after receipt to re-invest the proceeds or make an offer to purchase Senior Secured Notes by the terms of section 4.10 of the Trust Indenture. This approval of the Proposed Transactions subject to protection but not distribution of proceeds is both consistent with the jurisdiction of this Court in CCAA sale transactions and consistent with the spirit and indeed letter of the Trust Indenture.

> *Indenture dated as of April 1, 2008*, Exhibit SN-2 to the Contestation, Section 4.10.

2. <u>Approval of a Sale of Assets</u>

33. The Court's duties in respect of its review of the MPCo sale are the following:

(a) it should consider whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

(b) it should consider the interests of all parties;

(c) it should consider the efficacy and integrity of the process by which offers have been obtained; and

(d) it should consider whether there has been unfairness in the working out of the process.

> *Nortel Networks Corp., Re*, 2009 CarswellOnt 4838 (July 28, 2009) ("**Nortel July 28**"), **TAB 3** at para. 35; *Tiger Brand Knitting Corp., Re*, 9 C.B.R. (5th) 315 (Ontario S.C., Commercial List), **TAB 4** at para. 34.

34. In *PSINET*, Courts authorized, over the objections of a secured creditor, that a sale of assets be set-aside with the Monitor pending further determination of entitlement.

   - PSINET Ltd., Re, 2001 CarswellOnt 3405, **TAB 5**, at paras. 2 and 3:

     "I see no prejudice in monetizing the claim and having the amount and priority issue dealt with in other proceedings given that the full amount of the Bank's claim is set aside with the Monitor."

35. It is also well established that major transactions can and often are given over the objections of one or more parties.

   - *Calpine Canada Energy Ltd., Re*, 2007 CarswellAlta 1050 (Alta. Q.B.), **TAB 6**.

36. The recommendation of the Monitor, a court-appointed officer experienced in the insolvency field, should normally carry great weight with the Court in the approval process. Moreover, absent some compelling, exceptional factor to the contrary, the case law provides that the Court should accept an applicant's proposed sale process where it is recommended by the Monitor and supported by the disinterested major creditors.

   - *Consumers Packaging Inc., Re*, 2001 CarswellOnt 3331, **TAB 7**, at para. 2;

   - *Ivaco Inc., Re*, 2004 CarswellOnt 2397, **TAB 8**, at para. 21.

3. The CCAA Status Quo

37. In *Alberta-Pacific Terminals Ltd.*, the Court ruled as follows:

   - Alberta-Pacific Terminals Ltd., Re, 1991 CarswellBC 494 (B.C. S.C.), **TAB 9** at para. 23:

     *"23 **The status quo is not always easy to find. It is difficult to freeze any ongoing business at a moment in time long enough to make an accurate picture of its financial condition. Such a picture is at best an artist's view, more so if the real value of the business, including goodwill, is to be taken into account. Nor is the status quo easy to define. The preservation of the status quo cannot mean merely the preservation of the relative pre-stay debt status of each creditor. Other interests are served by the CCAA**. Those of investors, employees, and landlords among them, and in the case of the Fraser Surrey terminal, the public too, not only of British Columbia, but also of the prairie provinces. The status quo is to be preserved in the sense that manoeuvres by creditors that would impair the financial position of the company while it attempts to reorganize are to be prevented, not in the sense that all creditors are to be treated equally or to be maintained at the same relative level. It is the company and all the interests its demise would affect that must be considered"*

VI. DISCUSSION

1. Sale of Assets Prior to a Creditor Vote on a Plan of Arrangement

38. Applying the principles set out in *Nortel July 23*, the Petitioners submit the following:

    (a) the sale is warranted at this time because the Petitioners need cash to repay the ACI DIP Agreement and to continue and implement their restructuring. Moreover, the projected costs of holding onto MPCo are too high (the renewal of the water rights expiring in 2011 would require important infrastructure investments) and a sale is inevitable – such sale should be undertaken as a going concern while the only potential buyer (HQ) as well as ACCC's partner (Alcoa) are willing and ready to proceed;

    (b) the sale will benefit the whole economic community because it will allow the Petitioners to monetize certain non-liquid assets, use net cash proceeds to repay certain secured creditors (including the SSNs) and secure cash to fund their ongoing restructuring effort, for the benefit of all stakeholders;

    (c) the SSNs do not have a *bona fide* reason to object the sale of ACCC's interest in the Business because what they are being offered (i.e.: the MPCo Noteholder Charge, the ULC Subordinated Guarantee, the Subrogation Order, the Net Cash Proceeds Order and the ULC Borrowing Order) effectively safeguards their rights and because the value of their security is also adversely affected by MPCo's contingent liabilities, to which they are structurally subordinated; and

    (d) there is no viable alternative to closing this transaction rapidly. The only other alternative is to postpone the deal to enter into lengthy negotiations with the SSNs which are in large part doomed to failure, thus creating the risk that the purchaser may reduce the proposed purchase price or simply walk away from the transaction altogether.

39. The Petitioners contend that this Court is competent to issue the orders sought. The true debate is upon what conditions a Court may authorize a sale of assets in the absence of a plan of arrangement.

2. The Proposed Transactions

40. The Petitioners submit that the Implementation and the Proposed Transactions should be approved for the following reasons:

    (a) the Monitor has reviewed and approved the proposed purchase price for the MPCo assets, as appears from paragraphs 73 and following of the Monitor's Report;

    (b) there would be material prejudice to the Petitioners' other stakeholders if the transaction did not proceed because in a liquidation scenario, the value of MPCo's assets would be likely to be far less than the proposed going concern sale. Despite the fact that ACCC will have to purchase electricity at a higher price as a result of the transaction, the Petitioners are of the view that the Baie-Comeau Mill will remain competitive;

(c) the Monitor has reviewed and approved the sale process which led to the Implementation Agreement. This sale process was limited in light of the fact that HQ was the only potential purchaser, as appears from paragraphs 73 and following of the Monitor's Report;

(d) the purported unfairness alleged by the SSNs is non-existent in light of the fact that the order sought in connection with the MPCo Motion provides for the following assurances, all in favor of the SSNs: (i) the MPCo Noteholder Charge; (ii) the ULC Subordinated Guarantee; (iii) the Subrogation Order; (iv) the Net Cash Proceeds Order; and (v) the ULC Borrowing Order (collectively the "**Noteholder Assurances**").

41. The SSNs contend at paragraph 93 of their Contestation that in no case has any court authorized such a sale without either (a) the consent, participation and support of affected creditors; or (b) an order stipulating that all proceeds of the transaction stand in the place of assets sold and are subject to the security rights of the secured creditors.

42. The Petitioners are of the view that the Noteholder Assurances are functionally equivalent to an order stipulating that all proceeds stand in the place of assets sold and be subject to the rights of the SSNs.

3. The Arguments raised in the Contestation

(a) Information Supplied to the SSNs

43. The Contestation alleges that the Petitioners sought to hide from the SSNs that the transaction was an asset deal rather than a share deal until the Implementation Agreement was executed, thus presenting the SSNs with a *fait accompli*. According to the SSNs, the Petitioners' **goal** was to confiscate the SSNs' collateral and force upon the SSNs an asset deal with greater costs and less value for the SSNs than what they would have received under the initially contemplated share deal. These allegations are baseless. The uncontested and uncontestable facts are:

(a) there is no suggestion that the SSNs were ever intentionally misled or lied to;

(b) there is no evidence that the SSNs ever made any inquiries as to the nature of the Proposed Transactions - be it share sale or asset sale;

(c) although the SSNs knew or ought to have known that there were issues causing a delay in the timeline to close the Proposed Transactions from April 30, 2009 to the point where a DIP with an expiry of November 1, 2009 became necessary as a bridge to closing, no attempt was made to solicit more information regarding the nature of the difficulties or the changes being made to the Proposed Transactions to address them; and

(d) as soon as the Proposed Transactions had proceeded to the point where it appeared that approval by the counterparts (Alcoa and HQ) appeared imminent, the SSNs were sought out and brought into the tent by the Petitioners before its signature and public announcement.

44. The SSNs' real issue is not whether sale of MPCo should be structured as a sale of shares or a sale of assets. Were it a share sale, price adjustments to reflect the large majority of the risks and potential contingent liabilities that ultimately resulted in an asset sale being the alternative desired by the purchaser would have been required in any event. The real issue that the SSNs complain about is the size of the reserve for contingent claims which obviously has come as a surprise to them (although they made no inquiries about the subject in advance).

45. The simple answer to SSNs' surprise at the size of the reserve accounts is that they are required in order to secure the transaction. The potential contingent pension claim – which reflects a contingency the Petitioners view as remote – would rank ahead of a pledge of shares at all event. This reserve amounts to $202 million of the $282 million ULC reserve account.

46. While the SSNs may express surprise about the existence or size of the various reserves established pursuant to the Proposed Transactions, the evidence discloses no efforts on their part to learn of these details in advance of August, 2009 (when invited by the Petitioners to sign confidentiality agreements and become restricted). Further, the evidence discloses that the evolution of the Proposed Transactions from a share sale to an asset sale and the creation and quantification of the various reserve amounts reflected bona fide arm's length negotiations with HQ and with Alcoa and cannot conceivably be attributed to any abusive motive.

47. Since the filing of the MPCo Motion, the Petitioners have deployed their best efforts to facilitate, upon short notice, the requests for information (including examinations of the Petitioners' representatives) made by the SSNs and to negotiate with the latter in view of reaching an arrangement acceptable to them.

48. As appears from the foregoing, the allegations made by the SSNs with respect to the alleged conduct of the Petitioners are unsubstantiated.

(b) Projected Use of Proceeds

49. The SSNs' argument that the Petitioners are unjustly hoarding transaction proceeds from the sale of assets on which the SSNs hold security is wholly without merit in light of the fact that the proposed transaction provides for the proceeds to be placed in a trust account pending further order of this Court.

50. As noted above, the scheme of the Trust Indenture (section 4.10) is to permit sales of

collateral providing the interest of the Trustee in any proceeds is protected and a re-investment or purchase of Senior Notes is made within a year. In this case, the Petitioners are proposing to protect the Trustee's interest as to proceeds completely. There is no requirement in the Trust Indenture for a decision to be taken on use of proceeds for one year.

(c) Negotiation of an Alternative Source of Financing

51. The ACI DIP Loan expires on November 1, 2009. The intention of the Petitioners has always been to reimburse the ACI DIP with proceeds from the MPCo sale. The current timeline for the sale of MPCo, if respected, will allow the Petitioners to live up to their obligations under the ACI DIP Agreement.

52. The SSNs rightly state, at paragraph 48 of the Contestation, that at the time the Abitibi Petitioners sought approval of the DIP facility, they advised the SSNs and this Court that if the sale of MPCo could not be completed by November 2009, they would seek out and arrange a replacement DIP facility.

53. The fact that the Abitibi Petitioners have yet to arrange for an alternative DIP financing or request an extension under the ACI DIP Agreement only illustrates the fact that the Abitibi Petitioners believe that the Proposed Transactions can be closed in a timely manner.

54. The premise to the SSNs approach is that the Proposed Transactions will fail and that the Petitioners, in addition to making efforts to monetize their assets, should have a contingency plan in place for additional financing. To proceed in this fashion is unrealistic and would only detract time and resources away from the Petitioners ongoing restructuring efforts.

55. As noted in the Monitor's Report, at paragraph 124, the conditions which made it difficult for the Petitioners to obtain the ACI DIP financing in the first place (a DIP financing which, incidentally, was not even obtained at the date of the Initial Order) still prevail today.

(d) Voting Rights in the MPCo Shares

56. The SSNs contend that given the default in making the April 1, 2009 payment, they are now in a position, as secured creditors, to exercise the voting rights in respect of the MPCo Shares.

57. The SSNs' argument seem to be that since the default occurred pre-filing they would be in a position to exercise such rights post-filing.

58. In *Timber Lodge Limited*, the Court, facing a similar argument, ruled as follows:

- *Timber Lodge Limited v. All Creditors of Timber Lodge Limited*, 1992 CarswellPEI 14 (PEI S.C.), **TAB 10** at para. 16:

  " *16 Returning to the position taken in the Northland (trial court)*

> *and Horizon cases, that the Act was not applicable as the creditor's right had vested prior to the stay order or implementation of the plan, I am unable to agree with such a narrow interpretation of the Act. If that interpretation were to be applied here, the result I have described would occur. The applicant would have no money and would be unable to carry on business, thereby thwarting the intent of the Act. Insofar as the Act is concerned, **I do not believe it is reasonable to say that once a right is vested, that it can never be reversed or stopped**. The creditor always has the option of putting an end to the action that it took. Similarly, I feel that the court can take similar action for the purpose of bringing about the intent of the Act. In conclusion, I find that under the Act a stay can be placed on the assignment of rents served upon the tenants by the objecting respondents."*

(e) Paulian Action

59. The Petitioners submit that the argument according to which the transaction could be subject to a Paulian action is without merit. The very objective of the Court process is to validate the transactions made by an insolvent debtor. The Court only does so after it has become clear that the interests of all stakeholders are considered. To bring a Paulian action on a transaction approved by the Court would be tantamount to a collateral attack on the Order authorizing said transaction and would defy the very purpose of the procedures designed to approve sales of assets under the CCAA.

THE WHOLE RESPECTFULLY SUBMITTED

Montreal, September 24, 2009

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