CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

N°: 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)

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"

Abitibi Petitioners,

AND

ERNST & YOUNG INC.

Monitor,

AND

The Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes

Respondents

ARGUMENT BRIEF

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1. SUMMARY

1. ACCC wants to monetize its 60% share interest in the MPCo and proposes to do that through the sale of its interest to HQ, which ACCC says is for a purchase price of C$615 million.

2. In large measure ACCC monetized its interest in MPCo in April 2008 when it borrowed US$413 million on the security of its interest in MPCo.

3. At that time the Senior Secured Loan on the strength of ACCC's interest in MPCo along with certain other collateral.

4. Before ACCC's CCAA filing it announced that it would sell its share interest in MPCo to Hydro Quebec for the sum of C$615 million.

5. Before ACCC's CCAA filing it said, in the context of its CBCA filing, that it would use the proceeds of the sale of its interest in MPCo to repay the Senior Secured Loan. The CBCA arrangement is produced as Exhibit SN-1.

6. What was originally a share transaction changed through negotiations amongst ACCC, MPCo, HQ and Alcoa to a complex multi-step transaction involving the disposition of assets, wind-ups, the creation of a limited partnership, stipulations for holdbacks, price reductions and a variety of indemnities.

7. At no time during these months of negotiations did ACCC notify the Senior Secured Noteholders, the Trustee or their advisors of these fundamental changes, consult with them or seek to involve them, notwithstanding Trustee's and the Senior Secured Noteholders' rights in the MPCo shares and the critical importance of the MPCo collateral to them.

8. Only after negotiating an Implementation Agreement did ACCC advise of the nature of the transaction and then less than two weeks before presenting ACCC's first motion in connection with the MPCo transaction.

9. The changes to the transaction enormously increase the cost of the transaction and hence equally enormously reduce the proceeds available to the Senior Secured Noteholders, this was done without the consent of the Senior Secured Noteholders and without consultation with them.

10. The changes to the transaction effect transfers of proceeds of the Senior Secured Noteholders' collateral so that it is free of the Senior Secured Noteholders' security depriving the Senior Secured Noteholders security and control rights.

11. In this respect, the transaction fundamentally alters the status quo and effects a confiscation of the Senior Secured Noteholders' collateral. Again, this is entirely inconsistent with the purposes and foundational principles of the CCAA.

12. ACCC's conduct should not be approved by the court as approval of this transaction in its present form would amount to an endorsement of such conduct and confiscation.

2. SENIOR SECURED NOTEHOLDERS' RIGHTS AND ACCC'S OBLIGATIONS WITH RESPECT TO THE SENIOR SECURED NOTEHOLDERS

13. Under the Senior Secured Loan, the Senior Secured Noteholders advanced approximately US$413 million to ACCC in April 2008:

    ➢ *Para. 26 of the Amended Contestation of the 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 "**Contestation**").*

14. With accrued interest, the approximate amount presently owing in respect of the Senior Secured Loan is in excess of US$450 million , and interest continues to accrue on the Notes monthly:

    ➢ *Para. 27 of the Contestation.*

15. To secure the obligations of ACCC and the Guarantors, ACCC, ACI and the Guarantors granted security to the Collateral Trustee which includes Senior Secured Notes Hypothec and Issue of Debentures dated March 28, 2009:

    ➢ *Para. 32 of the Contestation.*

    ➢ *The Principal Security Documents (including the Senior Secured Notes' Hypothec), Exhibit SN-4.*

16. The Senior Secured Notes' Hypothec provides specific rights to the Senior Secured Noteholders with respect to the equity interest detained by ACCC in MPCo.

17. Those rights granted to the Senior Secured Noteholders restrict ACCC in how it exercises its voting rights in MPCo, whether before or after the occurrence of an event of default:

    ➢ *The Principal Security Documents (including the Senior Secured Notes' Hypothec), Exhibit SN-4.*

18. ACCC cannot vote on the MPCo shares in a manner that is detrimental to the Senior Secured Noteholders' rights under the Senior Secured Notes' Hypothec.

19. Section 5.5 of the Senior Secured Notes' Hypothec (Exhibit SN-4) specifies some of the restrictions to which ACCC is submitted in the exercise of its rights pertaining to its shares in MPCo:

    "Section 5.5 Grantor to exercise voting rights, etc.

Until the occurrence of an Event of Default which is continuing and subject to the terms of this Deed and the other Fixed Assets Debt Documents, each Grantor may:

(a) exercise any and all voting rights and all rights of conversion, exchange or retraction or other similar rights with respect to any of the Securities, provided that any property arising from any such conversion, exchange or retraction shall form part of the Collateral; and

(b) receive any and all notices or other communications delivered in respect of the Securities;

Provided, however, that no votes shall be cast or other rights exercised which would:

(i) be prejudicial to the hypothec created under this Deed;

(ii) impair or reduce the value of or restrict the transferability of the Securities; or

(iii) be inconsistent with or violate any provisions of this Deed or any other Fixed Assets Debt Document;" [Emphasis added]

- *Para. 122 of the Contestation.*
- *The Principal Security Documents (including the Senior Secured Notes' Hypothec), Exhibit SN-4.*

20. The Abitibi Petitioners were in default of their obligations under the Principal Security Documents before the issuance of the April 17, 2009 Initial Order in this case:

- *Para. 28 of the Contestation.*

21. ACCC is in default of making the April 1, 2009 interest payment and as of that date no longer has the right to exercise voting rights and corporate rights relating to the shares of MPCo:

- *Para. 28 of the Contestation.*
- *The Principal Security Documents (including the Senior Secured Notes' Hypothec), Exhibit SN-4.*

22. Section 5.6 of the Senior Secured Notes' Hypothec (Exhibit SN-4) provides that:

"Each Grantor hereby grants to the Attorney, for the benefit of the Debentureholders, an irrevocable proxy to, upon the occurrence of an Event of Default which is continuing and at the discretion of the Attorney, exercise all voting rights and corporate rights relating to the Securities."

> *Para. 117 of the Contestation.*

> *The Principal Security Documents (including the Senior Secured Notes' Hypothec), Exhibit SN-4.*

23. Despite the restrictions contained in Sections 5.5 and 5.6 of the Senior Secured Loan, ACCC negotiated a transaction with Alcoa and HQP, between December 2008 and August 2009, that would deprive the Senior Secured Noteholders of their security.

24. ACCC has known since March 2009 that it will proceed with the sale of MPCo's assets to HQP at a value of US $615 million:

> *Paras. 33, 38 and 40 of the Motion for the issuance of an order authorizing the sale of petitioners Abitibi-Consolidated Company of Canada's indirect interest in the McCormick Hydroelectric Facility (Section 11 of the Companies, Credit Arrangement Act ("**CCAA**").*

25. If ACCC had proceeded with the sale of MPCo' assets before April 17, 2009, it would have required the affirmative vote of the Trustee acting on behalf of the Senior Secured Noteholders:

> *The Principal Security Documents (including the Senior Secured Notes' Hypothec) Exhibit SN-4.*

26. In proceeding with the Proposed Transaction after the date of the Initial Order, ACCC is trying to use the protection granted by the CCAA to proceed with the Proposed Transaction without having to be submitted to the terms and conditions set up in the Senior Secured Notes' Hypothec:

27. We respectfully submit that the Motion has failed to meet the requirements of a sale of assets under the rules of the CCAA.

28. In addition, we respectfully submit that granting the Motion would be to legitimate a behavior that goes against the rules of the *Civil Code of Québec* (the "**CCQ**") for the three following reasons:

(i) the Proposed Transaction could be successfully challenged under a paulian recourse as ACCC (the debtor) causes a prejudice to the Senior Secured Noteholders (the creditor) in fraud of their rights, since ACCC (the alter ego of MPCo), being insolvent, seeks to further impoverish its patrimony ;

(ii) ACCC failed to fulfill its obligation to act in good faith towards the Senior Secured Noteholders as it concluded an agreement with third parties to proceed with the sale of all of the assets of MPCo, the shares of which (60%) are subject to the Senior Secured Noteholders without having involved the latter in its negotiation and ensuring that it be compensated adequately;

The directors of MPCo, whose assets are the object of the present Motion, have a duty of loyalty towards the Senior Secured Noteholders but have failed to fulfill their loyalty obligation has they knowingly consented to a sale that would prejudice the secured creditor.

29. For all the above-mentioned reasons, we respectfully request that this Court dismiss the Motion and grant the Order sought in the Contestation, namely:

> "ORDER that the Amended Motion for the Issuance of an Order Authorizing the Sale of the Petitioner Abitibi-Consolidated Company of Canada's Indirect Interest in the McCormick Hydroelectric Facility is dismissed with liberty to the Abitibi Petitioners 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.
>
> ORDER the lift of the stay to allow the Trustee and Senior Secured Noteholders to exercise the following rights:
>
> a) issue a notice of withdrawal of its authorization to collect;
>
> b) exercise voting rights attached to the MPCo shares including receiving or giving notice of shareholders' meeting and voting such shares at such meetings;"

3. LEGISLATIVE PURPOSE OF THE CCAA AND THE NATURE OF THE JUDICIARY'S ROLE

30. The CCAA is a remedial legislation which should receive a large and liberal interpretation:

- *Canadian Airlines Corp., Re, 2000* CarswellAlta 622 (Alta. Q.B.), at para. 12.

31. However, the legislative purpose of the CCAA is to facilitate arrangements or compromise in order to assist the debtors to work out a survival strategy <u>that is acceptable to their creditors</u>.

32. The ultimate purpose of the CCAA is to enable the court to sanction a compromise that is beneficial to the stakeholders generally :

- *Janis Sarra, "Judicial exercise of the inherent jurisdiction under the CCAA*", Canadian Business Law Journal , vol. 40 at paras. 281-282.

> "The statute's full title, An Act to Facilitate Compromises and Arrangements between Companies and their Creditors, reflects its <u>aim of facilitating arrangements or compromises in order to allow debtor corporations to work out a survival strategy that is acceptable to their creditors</u>. While the courts will defer to the

business judgement of the creditors in their approval of a final plan of arrangement or compromise, the primary function of courts is to supervise the proceeding and to make rulings that keep the process moving when parties hit a particular impasse or there is a lack of clarity about their rights and responsibilities in the particular circumstance.[…]

The court observes that the CCAA was designed to serve a "broad constituency of investors, creditors and employees" and thus courts will consider the individuals and organizations directly affected by the plan, as well as the wider public interest. Those interest are generally, but not always, served by permitting a company to attempt a restructuring." [Emphasis added]

- *Lehndorff General Partner Ltd., Re,* 1993 CarswellOnt 183 (Ont. Gen. Div.), at para. 5.

"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 and the court. In the interim, a judge has great discretion under the CCAA to make orders 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." [Emphasis added]

33. Furthermore, a debtor company should negotiate a plan of arrangement with its creditors that is not unfairly or unreasonably depriving secured creditors of their rights under their security:

- *Olympia & York Developments Ltd. v. Royal Trust Co.,* 1993 CarswellOnt 182 (Ont. Gen. Div.), at paras. 28-30.

"The Plan must be "fair and reasonable". That the ultimate expression of the Court's responsibility in sanctioning a Plan should find itself telescoped into those two words is not surprising. "Fairness" and "reasonableness" are, in my opinion, the two keynote concepts underscoring the philosophy and workings of the Companies' Creditors Arrangement Act. "Fairness" is the quintessential expression of the court's equitable jurisdiction -- although the jurisdiction is statutory, the broad discretionary powers given to the judiciary by the legislation make its exercise an exercise in equity -- and "reasonableness" is what lends objectivity to the process." [Emphasis added] (…)

> If a debtor company, in financial difficulties, has a reasonable chance of staving off a liquidator by negotiating a compromise arrangement with its creditors, "fairness" to its creditors as a whole, and to its shareholders, prescribes that it should be allowed an opportunity to do so, consistent with not "unfairly" or "unreasonably" depriving secured creditors of their rights under their security. Negotiations should take place in an environment structured and supervised by the court in a "fair" and balanced -- or, "reasonable" -- manner. When the negotiations have been completed and a plan of arrangement arrived at, and when the creditors have voted on it -- technical and procedural compliance with the Act aside -- the plan should be sanctioned if it is "fair and reasonable." [Emphasis added]

4. LIMITS TO THE DISCRETIONARY POWERS OF THE COURTS UNDER THE CCAA

34. The courts whether through their discretionary powers under the CCAA or event through its inherent jurisdiction, do not have the power to permanently extinguish the rights held by the Senior Secured Noteholders.

35. The courts have defined inherent jurisdiction as follows:

- *Janis Sarra, "Judicial exercise of the inherent jurisdiction under the CCAA",* Canadian Business Law Journal , vol. 40 at para. 282.

> "[...] a residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them. Inherent jurisdiction cannot be exercised in a manner that conflicts with a statute, and because it is an extraordinary power it should be exercised only sparingly and in a clear case." [Emphasis added]

36. Inherent jurisdiction is limited to filling gaps in legislation and does not operate when the court's power arises from the statute. The inherent jurisdiction is distinct from the court's statutory discretion that is derived from the CCAA. Therefore, when the court acts in CCAA proceedings, it generally applies its statutory discretion rather than its inherent jurisdiction:

- *Stelco Inc., Re,* 2005 CarswellOnt 1188 (Ont. C.A.), at paras. 35 and 36.

> "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. [...]

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 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". 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." [Emphasis added]

37. Statutory discretion is not open-ended and unfettered and its exercise must be guided by the scheme and the object of the CCAA and by the legal principles that govern corporate law issues, such as the Québec Civil Code and the *Companies Act*:

- *Stelco Inc., Re, 2005* CarswellOnt 1188 (Ont. C.A.), at para. 44.

"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 General Partner Ltd., [...], "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." [Emphasis added]

38. In matter of sale of assets, the court's power under CCAA proceedings should be exercised only when sufficient provisions have been made to care the secured creditors:

- *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re,* 1998 CarswellOnt 3346 (Ont. Gen. Div.), at paras. 13-15.

  "13 In substance, the new agencies were to acquire all fixed assets, inventory, equipment, contracts and leases associated with the Red Cross Blood Program, including intellectual property, information systems, data, software, licences, operating procedures and the very important donor and patient records. There was no doubt that the sale represented the transfer of the bulk of the significant and valuable assets of the Red Cross.

  14 A vesting order was sought as part of the relief to be granted. Such an order, if made, will have the effect of extinguishing realty encumbrances against and security interest in those assets. I am satisfied for these purposes that appropriate notification has been given to registered encumbrancers and other security interest holders to permit such an order to be made. [...].

  15 What is proposed, to satisfy the need to protect encumbrancers and holders of personal security interests is,

  a) that generally speaking, prior registered interests and encumbrances against the Red Cross's lands and buildings will not be affected i.e., the transfer and sale will take place subject to those interests, or they will be paid off on closing; and,

  b) that registered personal property interests will either be assumed by the Purchasers or paid off from the proceeds of closing in accordance with their legal entitlement."

39. In the present case, the Proposed Transaction does not take into account the priority interest of the Senior Secured Noteholders in the ACCC's 60% share interest as it eliminates the shares of MPCo on which they have security and their secured claim is not paid from the proceeds. The Proposed Transaction constitutes in fact the eradication of the Senior Secured Noteholders' rights.

40. The Court's powers under CCAA proceedings should not be exercised in order to sanction legal confiscation of rights:

- *Olympia & York Developments Ltd. v. Royal Trust Co.,* 1993 CarswellOnt 182 (Ont. Gen. Div.), at para. 72.

  "<u>I think it relatively clear that a court would not sanction a plan if the effect of doing so were to impose it upon a class, or classes, of creditors who rejected it and to bind them by it</u>. Such a sanction would be tantamount to the kind of <u>unfair confiscation</u> which the authorities unanimously indicate is not the purpose of the legislation." [Emphasis added]

5. SALE OF THE MCCORMICK HYDROELECTRIC FACILITY BEFORE A PLAN OF ARRANGEMENT AND CONFISCATION OF THE RIGHTS OF THE SENIOR SECURED NOTEHOLDERS

A) Sale of assets before a plan of arrangement is proposed

41. The court has jurisdiction to approve a sale of assets in the course of the CCAA proceeding in the absence of a plan of arrangement approved by creditors or in the absence of creditors' vote on the Proposed Transaction, but only if such a sale of assets is in the best interest of the stakeholders generally:

> ➢ *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 at para. 35 *(Ont. S.C.J.).*

> "Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, <u>where such sale is in the best interests of stakeholders generally</u>." [Emphasis added]

42. In determining whether to authorize a sale under the CCAA in the absence of a plan, the Court must consider the following factors:

> ➢ *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, 1998 CarswellOnt 3346 at para. 47 (Ont. Gen. Div.).

> "[…] the court duties are,
>
> - Whether the receiver (monitor) has made sufficient effort to get the best price and has not acted improvidently;
> - <u>The interests of the parties</u>;
> - The efficacy and integrity of the process by which offers were obtained; and
> - Whether there has been unfairness in the working out process." [Emphasis added]

43. These four principles were enunciated in *Royal Bank* v. *Soundair Corp*., 1991, CarswellOnt 205 (Ont. C.A.) and they are equally applicable *mutatis mutandis* in a CCAA sale situation which occurred before a plan of arrangement:

> ➢ *PSINet Ltd., Re*, 2001 CarswellOnt 3405 (Ont. S.C.J.), at para. 6.

44. Although the courts do not always consider each of these criteria, they systematically take into consideration the creditors' interest.

45. Following the principle mentioned above, the court should not authorize the sale of assets under the CCAA proceeding without requiring the vote of the creditors or, in the absence of a plan of arrangement, when secured creditor are opposed to the Proposed Transaction:

- See argument at para. 31.
- *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 CarswellBC 1758 (B.C. C.A.), at para. 32.

"Counsel for the Debtor Company has cited two decisions containing comments approving the use of the CCAA to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: [...] <u>I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court</u>. I need not decide the point on this appeal, <u>but I query whether the court should grant a stay under the CCAA to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors</u>." [Emphasis added]

46. In most cases, the proposed sale of assets is authorized by the court because it has the support of the debtor company's creditors, or because the proceeds of the sale would be available to the creditors on the same terms and subject to the same charge as the original collateral.

47. The only reported cases where the proposed sale was not supported by all the creditors are *Re PSINet* and *Skydome*:

- *PSINet Ltd., Re*, 2001 CarswellOnt 3405 (Ont. S.C.J.).
- *SkyDome Corp.,* Re, 1999 CarswellOnt 987 (Ont. Gen. Div.).

48. We have found only these two cases where a secured creditor (specific assets lenders) had objected to the proposed sale of assets without full payment of outstanding amounts. In those two cases, the court authorized the sale of assets and did not accept the opposition of those secured creditor because the assets affected by the transaction were being monetized and the secured creditor's interest would extend to the proceeds <u>equal to the full amount of their claim</u>.

49. In *Re PSINet*, the debtor company was seeking approval of the sale of its assets to Telus. RBC was an equipment lessor that requested that it be paid out in full with respect to the amounts owing under the leases. The debtor company proposed placing sale proceeds <u>in the full amount of RBC's claim</u> with the Monitor, so that the matter could be dealt with on a separate motion after the sale was completed. Farley J. held that there was no prejudice to RBC by the sale of assets monetizing the claim given that the full amount of RBC's claim was being delivered to the Monitor:

- *PSINet Ltd., Re*, 2001 CarswellOnt 3405 (Ont. S.C.J.), at paras. 2 and 4

"There was no opposition to the sale to Telus being approved, save and except from the Royal Bank of Canada which indicated that, with respect to its equipment leases, it wished to be paid out in full the approximately $5 million which would be the balance of payments under such financing arrangements. The PSINet companies however have proposed that the sale be approved with the provision vis-à-vis the Royal Bank that an amount of money for the full claim be set aside with the court officer, PricewaterhouseCoopers Inc., the monitor in these proceedings, pending a further determination of entitlement and, if so, how much. [Emphasis added]

50. In *Re Skydome corp.*, a purchaser of the debtor company applied to the court to have a secured creditors' registered interest in the debtor company's sky box vested out. The application was brought pursuant to the terms of the approval and vesting order which provided that the interests of the secured creditor were not to be vested out until further order of the court on notice to the secured creditor. The secured creditor did not want its interest vested out because it wanted its interest to be dealt with under certain agreements that provided for a buy out provision whereby the purchaser would have to negotiate with the secured creditor or pay an arbitrated price as opposed to the claim being against the pool of money representing the assets of the debtor company. The court found that there was no confiscation of rights contemplated by the vesting motion. If the secured creditor's registered interest was vested out, then the secured creditor would have a claim against the substituted assets (i.e. the proceeds) and the claim will be dealt with in a monetary sense upon a future priorities motion:

- *SkyDome Corp., Re*, 1999 CarswellOnt 987 (Ont. Gen. Div.), at para. 5.

"I do not see that there has been any legal confiscation of rights contemplated by this vesting motion on March 19th. If DMC's registered interest is vested out, then DMC will have a claim against the substituted assets and this claim will be dealt with in a monetary sense based upon a future priorities motion. That is, does DMC have a claim which is prior to other claims to the priority extent that it will participate in the to be available pool of money or is its priority such that it is below the Plimsol line?"

51. In these cases, the courts have authorized the sale notwithstanding the opposition of the secured creditor for the following reason:

52. In the present case, the Proposed Transaction is neither approved by the Senior Secured Noteholders nor does it provide to the latter the same terms as the original collateral. Accordingly, the proposed sale of the McCormick Hydroelectric Facility (the "**Facility**") must be refused by the court because it will cause extreme material prejudice to the Senior Secured Noteholders:

- The Abitibi Petitioners' Amended Motion proposes that the net proceeds from the transaction shall be treated as proceeds of disposition of the shares pledged in favour of the Senior Secured Noteholders, subject to a replacement charge in favour of the Trustee and for the benefit of the Senior Secured Noteholders. (Para. 63 of the Contestation)
- There are enormous exclusions from the proposed replacement charge. (Para. 64 of the Contestation)
- None of the terms and condition of the Implementation agreement take into account the priority interest of the Senior Secured Noteholders in the ACCC's 60% share interest.
- There is no charge in favour of the Senior Secured Noteholders on all proceeds of the sale. (Para. 67 of the Contestation)
- None of the proceeds of the Proposed Transaction are to be paid to the Senior Secured Noteholders. A portion of the proceeds of the transaction will be held pending further order of the court by the Monitor. (Para. 68 of the Contestation)
- The Proposed Transaction will result in terminating the Senior Secured Noteholders hypothec with respect to the MPCo shares without proper compensation to the Senior Secured Noteholders and depriving them of their collateral and

53. Furthermore, the Abitibi Petitioners are asking the court to approve a transaction that confiscates the rights of the Senior Secured Noteholders without the ability to appreciate the consequences of such a transaction in the overall context of a plan of arrangement.

54. In *Re Shermag inc.*, Mongeon J. expressed his concerns about approving changes to the articles of a corporation in order to permit implementation of a plan of arrangement without the ability to appreciate the transaction in the overall context of a comprehensive plan of arrangement approved by the creditors. He was of the view that the court may do so only if it considers changes to be in accordance with the applicable law and the proposed changes are fair and reasonable to all of the debtor company stakeholders:

- *Shermag Inc., Re*, 2009 CarswellQue 2487 (Qc. S.C.), at para. 37.

> "The circumstances of the case before me are quite different. Taken out of the context of a comprehensive plan approved by the creditors, can it be said that it will be fair and reasonable to give a blessing to the proposed changes in the share-capital and share ownership of Shermag? Am I asked to exercise my discretion in a vacuum? It should not be forgotten that the representation made

before me at this stage is a proposed cancellation of all existing shares and the issuance of a new class of shares in which none of the existing shareholders will be invited to participate, save one, which makes it a "sine qua non" condition of further financing and funding the debtor company. This whole process "looks, smells and walks" like a take-over bid without the formalities."

B) Confiscation of rights

55. By analogy, when determining whether or not to sanction a CCAA plan, the general test applied by the Courts is: (a) all statutory requirements have been fulfilled; (b) the arrangement is being put forward in good faith; and (c) the arrangement is fair and reasonable.

56. A plan will not be "fair and reasonable" if it purports to confiscate the rights of a creditor who would otherwise have recovered some or all of its claim outside of the CCAA proceedings:

- *Air Canada, Re*, 2004 CarswellOnt 469 (Ont. S.C.J.), at para. 9.

"...in considering what is fair and reasonable treatment, one must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) *and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to the confiscation of rights*."

- *Calpine Canada Energy Ltd., Re*, 2007 CarswellAlta 1050 (Alta. Q.B.), at para. 62.

"Settling with one or two claimants will invariably have an effect on the size of the estate available for other claimants. The test of whether such an adjustment results in fair and reasonable treatment requires the Court to look to the benefits of the settlement to the creditors as a whole, to consider the prejudice, if any, to the objecting creditors specifically and to ensure that rights are not unilaterally terminated or unjustly confiscated without the agreement or approval of the affected creditor." [Emphasis added]

57. It is the basic tenet of the CCAA that creditor rights may be compromised but not confiscated:

- *Olympia & York Developments Ltd. v. Royal Trust Co.,* 1993 CarswellOnt 182 (Ont. Gen. Div.), at paras. 29, 30 and 72.

"If a debtor company, in financial difficulties, has a reasonable chance of staving off a liquidator by negotiating a compromise arrangement with its creditors, 'fairness' to the creditors as a whole, and to its shareholders, prescribes that it should be allowed an opportunity to do so, consistent with not 'unfairly' or 'unreasonably' depriving secured creditors of their rights under their security.

[...]

I think it relatively clear that a court would not sanction a plan if the effect of doing so were to impose it upon a class, or classes, of creditors who rejected it and to bind them by it. Such a sanction would be tantamount to the kind of unfair confiscation which the authorities unanimously indicate is not the purpose of the legislation." [Emphasis added]

58. Moreover, even if the plan calls for a 'compromise' of creditor rights, the Courts may nevertheless refuse to sanction a plan if the compromise does not have creditor consent, or has not passed a creditor vote:

- *Menegon v. Philip Services Corp.*, 1999 CarswellOnt 3240 (Ont. S.C.J.), at para. 42.

"The rights of creditors under the CCAA cannot be compromised unless,

a) the creditor has been given a right to vote, in the appropriate class, on the proposed compromise;

b) the creditor's vote is in accordance with a value ascribed to the claim by a Court approved procedure;

c) the class in which the creditor has been appropriately placed has voted by a majority in number and two-thirds in value in favour of the compromise; and,

d) the Court has sanctioned the compromise on the basis that it is fair and reasonable (with considerable deference being given by the Court in this regard to the votes of the creditors)."

59. A compromise will not be "fair and reasonable" if it does not treat the creditors equitably, such that each creditor is treated consistently with their security rights and not unfairly prejudiced relative to other stakeholders:

- *Olympia & York Developments Ltd. v. Royal Trust Co.,* 1993 CarswellOnt 182 (Ont. Gen. Div.), at para. 50

"In keeping with an exercise of weighing the equities and balancing the prejudices, another measure of what is "fair and reasonable" is the extent to which the proposed Plan treats creditors equally in their opportunities to recover, consistent with their security rights, and whether it does so in as non-intrusive and as non-prejudicial a manner as possible." [Emphasis added]

- *Sammi Atlas Inc., Re*, 1998 CarswellOnt 1145 (Ont. Gen. Div.), at para. 4

"A Plan under the CCAA is a compromise; it cannot be expected to be perfect. It should be approved if it is fair, reasonable and

> equitable. Equitable treatment is not necessarily equal treatment. Equal treatment may be contrary to equitable treatment. One must look at the creditors as a whole (i.e. generally) and to the objecting creditors (specifically) <u>and see if rights are compromised in an attempt to balance interests (and have the pain of the compromise equitably shared) as opposed to a confiscation of rights</u>: see *Campeau Corp., Re* (1992), 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at p.109. It is recognized that the CCAA contemplates that a minority of creditors is bound by the Plan which a majority have approved - subject only to the court determining that the Plan is fair and reasonable." [Emphasis added]

60. In the present case, authorizing the Proposed Transaction will constitute an endorsement of a significant change to the *status quo* and result in a confiscation of the Senior Secured Noteholders' rights which are inconsistent with the basic tenet of the CCAA.

61. The purpose of a stay of proceedings issued under the CCAA is to maintain the *status quo* for a period of time while an insolvent company attempts to gain the approval of its creditors to a proposed plan of arrangement, which will enable the insolvent company to remain in operation for the future benefit of the company and its creditors:

- *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, 1990 CarswellBC 394 (B.C. C.A.), at para. 10.

62. It may be noted that under CCAA, the court has a supervisory role to preserve the *status quo:*

- *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, 1990 CarswellBC 394 (B.C. C.A.), at para. 10.

63. Accordingly, by authorizing the sale of the Facility and the proposed distribution of the proceeds, the court is endorsing a significant change to the *statu quo*, contrary to its role.

64. In conclusion, by monetizing the Senior Secured Noteholders' collateral and distributing the proceeds of the sale of the Facility in such a way that the Senior Secured Noteholders are likely to be deprived of the benefit of all of their securities, or at least a substantial part of their rights are being confiscated.

65. Approving the Proposed Transaction would be against all principles of secured lending in Canada and will most certainly have a negative impact on the access to financing for Canadian corporations as lenders may be deprived of their security in CCAA proceeding without compensation.

6. PAULIAN RECOURSE

66. As it is more fully detailed below, the approval of the Proposed Transaction is equivalent to approving a transaction which would be subject to paulian recourse, and accordingly cannot receive court approval.

67. The requirements of the paulian action are found in the articles 1631 to 1635 of the CCQ:

> "1631. A creditor who suffers prejudice through a juridical act made by his debtor in fraud of his rights, in particular an act by which he renders or seeks to render himself insolvent, or by which, being insolvent, he grants preference to another creditor may obtain a declaration that the act may not be set up against him.
>
> 1632**.** An onerous contract or a payment made for the performance of such a contract is deemed to be made with fraudulent intent if the contracting party or the creditor knew the debtor to be insolvent or knew that the debtor, by the juridical act, was rendering himself or was seeking to render himself insolvent.
>
> 1633**.** A gratuitous contract or a payment made for the performance of such a contract is deemed to be made with fraudulent intent, even if the contracting party or the creditor was unaware of the facts, where the debtor is or becomes insolvent at the time the contract is formed or the payment is made.
>
> 1634. The creditor may bring a claim only if it is certain at the time the action is instituted, and if it is liquid and exigible at the time the judgment is rendered.
>
> He may bring the claim only if it existed prior to the juridical act which is attacked, unless that act was made for the purpose of defrauding a later ranking creditor.
>
> 1635. The action is forfeited unless it is brought within one year from the day on which the creditor learned of the injury resulting from the act which is attacked, or, where the action is brought by a trustee in bankruptcy on behalf of all the creditors, from the date of appointment of the trustee. " [Emphasis added]

68. The Senior Secured Noteholders are secured creditors of ACCC and their claim predates the Proposed Transaction:

- ➢ Article 1634 of the CCQ.
- ➢ The Senior Secured Noteholders advanced approximately US $413 Million to ACCC in April 2008. (Para. 26 of the Contestation)
- ➢ With accrued interest, the approximate amount presently owing in respect of the Senior Secured Loan is in excess

of **US $450 million** Interest continues to accrue on the Notes at 14.75% per year . (Para. 27 of the Contestation)

- The second interest payment on the Senior Secured Loan was due on April 1, 2009 ACCC failed to make that payment when due and hence is in default and therefore ACCC and all guarantors under the Security Documentation are in default since then, before the issuance of the April 17, 2009 Initial Order in this case. (Para. 28 of the Contestation)

69. The Proposed Transaction is being driven by <u>ACCC, an insolvent corporation</u>:

- Article 1631 of the CCQ.
- All parties to the Implementation Agreement (Exhibit R-1) knew or should have known that their contracting party, ACCC is insolvent as it is under protection under the CCAA. (Para. 107 of the Contestation)

70. By the Proposed Transaction, the Abitibi Petitioners will transfer, outside the normal course of business, all of MPCo's assets, a private company of which it holds 60% of the shares and controls the Board of Directors, to a third party, rendering the shares of MPCo pledged in favour of the Senior Secured Noteholders worthless and avoiding the payment of the secured claim of the Senior Secured Noteholders.

- Para. 97 of the Contestation.

71. Evidence of elements giving rise to a paulian recourse can justify lifting of the corporate veil.

72. ACCC cannot enter into an act prejudicial to the rights of the Senior Secured Noteholders, indirectly by the actions of MPCo, its subsidiary, and if it does so, the Senior Secured Noteholders can institute a paulian action targeting the Proposed Transaction and obtain a declaration that the act may not be set up against them:

- Paul Martel et Maurice Martel, *La compagnie au Québec: Les aspects juridique*, vol. 1, Wilson & Lafleur, 2006, at para. 1-273.

"<u>*Chose certaine, le fait pour une compagnie d'être l'alter ego de l'actionnaire ou d'une autre compagnie empêchera cette compagnie de prétendre ignorer la situation financière ou les obligations contractuelles de son actionnaire ou de cette autre compagnie et vice-versa, car la connaissance de l'une entraîne celle de l'autre. Un alter ego ne peut prétendre être un tiers de bonne foi. Ceci est pertinent pour les fins notamment, d'une action en inopposabilité*</u> <u>[…]</u>." [Emphasis added]

73. As part of the steps of the Proposed Transaction, ACCC will control 100% of the shares of the MPCo and will definitively become MPCo' alter ego.

- Para. 98 of the Contestation.

74. The main steps of the Proposed Transaction can be summarized as follows:

    (i) all proceeds of the Proposed Transaction, namely CDN $615 million, are paid to ACCC;

    (ii) ACCC then transfers the sum of CDN $283.3 million to a newly formed special purpose subsidiary, (the ULC);

    (iii) ACCC pays tax reimbursement to Alcoa (CDN $25 million), pays to HQ the unpaid electricity consumption invoices owed by other related corporations (not MPCo) and pays the ACI DIP.

75. ACCC controls the whole process surrounding the Proposed Transaction. Because of its 60% holding of share capital in MPCo and the rights afforded by the Shareholders' Agreement, ACCC appointed three out of five board members of MPCo. Those three individuals who act as directors are employees and directors of the Abitibi Group:

- Exhibits SN-6 (Para. 100 of the Contestation).

76. MPCo cannot set up its juridical personality against the creditor of ACCC to counter a paulian recourse.

- Article 317 of the CCQ.

"317. In no case may a legal person set up juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right or contravention of a rule of public order."

- Paul Martel, "Le "voile corporatif" - L'attitude des tribunaux face à l'article 317 du Code civile du Québec", EYB 1998RDB12, at pp. 2 and 14.

"*Le mot «fraude», tel qu'utilisé à l' article 317, vise non seulement la fraude au sens du Code criminel, mais aussi la fraude paulienne, c'est-à-dire «l'acte accompli par un débiteur insolvable en vue de frauder ses créanciers», de même que la fraude civile en général, soit «l'acte accompli de mauvaise foi avec l'intention de porter atteinte aux droits ou aux intérêts d'autrui ou d'échapper à l'application d'une loi».*

[...] *On trouve de multiples instances de fraude paulienne ayant justifié le «soulèvement du voile» depuis 1994. Il s'agit d'actionnaires et âmes dirigeantes de compagnies insolvables tentant de soustraire, à leur bénéfice, généralement par des compagnies liées ou des personnes interposées, des biens de ces compagnies insolvables aux créanciers de celles-ci.*

[...] *Les arrêts Gestion Rachdavh inc. (Syndic de), Développements 700 de la Montagne inc. (Syndic de), Crealise Packaging Inc. c.*

Guérette et Lamarre c. Tropiques Nord 1 Montréal inc. illustrent tous des «soulèvements du voile» dans le cadre d'une action en inopposabilité en vertu des articles 1631 et suivants du Code civil du Québec. Même si l'article 317 n'y est pas toujours expressément mentionné, on est en présence de la «fraude paulienne» qui justifie son application. Il ne s'agit donc pas ici de motifs de «soulèvement» non prévus à l' article 317." [Emphasis added]

77. The Superior Court of Québec has decided that when the principal function of a subsidiary is to hold assets for its parent, and that the parent-debtor sells the assets through its subsidiary, the creditor may pursue the parent and the subsidiary through a paulian action:

> ➢ *Chassé (Faillite de)*, EYB 2007-125505 (Qc. S.C.), at para. 17-19.

"17 *Pour le syndic, 9123 est l'alter ego de la débitrice puisqu'elle en est l'actionnaire et l'administrateur unique. 9123 ne sert qu'à détenir le terrain pour la débitrice et cette dernière s'est empressée de vendre le terrain deux mois avant de faire cession de ses biens. La débitrice contrôle 9123 et elle a accompli l'opération frauduleuse par le biais de sa compagnie*.

18 *L'article 317 C.c.Q. défend d'invoquer la personnalité juridique d'une personne morale à l'encontre d'une personne de bonne foi (ici les créanciers de la débitrice) dès lors qu'on invoque cette personnalité juridique pour masquer la fraude. La débitrice ne peut pas dire «ce n'est pas moi, c'est 9123 qui a vendu». Un alter ego ne peut pas être de bonne foi dans les circonstances*:

Chose certaine, le fait pour une compagnie d'être l'alter ego de l'actionnaire ou d'une autre compagnie empêchera cette compagnie de prétendre ignorer la situation financière ou les obligations contractuelles de son actionnaire ou de cette autre compagnie, et vice-versa, car la connaissance de l'une entraîne celle de l'autre. Un alter ego ne peut prétendre être un tiers de bonne foi. Ceci est pertinent pour les fins, notamment, d'une action en inopposabilité [...].

19 *Selon Me Paul Martel, le mot «fraude», tel qu'utilisé à l'article 317 C.c.Q., vise non seulement la fraude au sens du Code criminel, mais aussi la fraude paulienne, c'est-à-dire «l'acte accompli par un débiteur insolvable en vue de frauder ses créanciers», de même que la fraude civile en général, soit «l'acte accompli de mauvaise foi avec l'intention de porter atteinte aux droits ou aux intérêts d'autrui ou d'échapper à l'application d'une loi»*." [Emphasis added]

78. The claim of the Senior Secured Noteholders is certain, liquid and exigible:

> ➢ Article 1634 of the CCQ.

79. The Proposed Transaction causes prejudice to the Senior Secure Noteholders, which is a juridical act made by ACCC in fraud of their rights:

- Article1631 of the CCQ.
- The Senior Secured Noteholders suffer great prejudice from the Proposed Transaction as it completely strips MPCo of its Assets. None of the terms and condition of the Implementation agreement take into account the priority interest of the Senior Secured Noteholders in the ACCC's 60% share interest. The proceeds of the transaction will be held pending further order of the court by the Monitor and none are to be paid to the Senior Secured Noteholders.

80. Pursuant to article 1631 of the CCQ, the creditor suffers prejudice when the debtor renders or seeks to render himself insolvent or when he diminished the value of its patrimony by removing assets from its patrimony:

- Jean-Louis Baudouin et Pierre-Gabriel Jobin, *Les obligations*, 6e ed., Cowansville, Yvon Blais, 2005, at para. 759.

"*759 – Nature de l'appauvrissement – L'acte attaqué, qu'il y ait ou non insolvabilité du débiteur, doit avoir eu pour effet d'appauvrir le patrimoine de ce dernier, c'est-à-dire de faire sortir un actif qui aurait pu y être saisi par le créancier.*

[…]

L'acte d'appauvrissement peut provenir d'un contrat à titre gratuit, d'un contrat à titre onéreux ou d'un paiement préférentiel accordé à un des créanciers. Le droit québécois, à la différence du droit français, considère que le paiement préférentiel frauduleux, d'ailleurs annulable à certaines conditions en vertu des dispositions de la Loi sur la faillite et l'insolvabilité, peut être déclaré inopposable au créancier poursuivant. Le tiers défendeur est alors tenu de restituer le montant d'argent, la chose reçue en paiement ou sa valeur." [Emphasis added]

81. The fraudulent intent referred to in Section 1631 CcQ can be described as follows:

- François Toth, Nathalie Vézina, *La bonne foi des parties au contrat à titre onéreux dans l'action en inopposabilité: réforme ou status quo ?* [1992] R.D.U.S., 220.

"*L'intention frauduleuse se situe au-delà de la simple négligence. <u>Le débiteur doit avoir connaissance ou conscience de l'effet préjudiciable susceptible de résulter de l'acte</u>. Si une telle connaissance est requise pour conclure à l'existence d'une intention frauduleuse, <u>elle est également suffisante</u>. Il faut en effet se garder de distinguer selon l'importance des manoeuvres entreprises par le débiteur en vue de nuire à ses créanciers. La fraude «passive» du débiteur opportuniste, tout comme la fraude «active» du débiteur* *malhonnête, sont également sanctionnées. En un mot, l'intention frauduleuse est synonyme, en matière paulienne, de mauvaise foi du débiteur à l'endroit de ses créanciers. Il est indifférent que le débiteur, en agissant de la sorte, n'ait pas songé à frauder un créancier en particulier*." [Emphasis added]

- Jean-Louis Baudouin et Pierre-Gabriel Jobin, *Les obligations*, 6e ed., Cowansville, Yvon Blais, 2005, at para. 761, p. 743.

"*La position majoritaire [...] requiert donc simplement que le créancier démontre la conscience ou la connaissance chez le débiteur, au moment de la passation de l'acte, des répercussions négatives que peut avoir sur son patrimoine et du préjudice qu'il peut donc causer au créancier*". [Emphasis added]

82. There is no doubt that the MPCo Directors knew or should have known that if completed, the Proposed Transaction would cause such prejudice and would be to the profit of ACCC at the expense of the Senior Secured Noteholders.

- Para. 101 of the Contestation.
- *Examination.*

83. Moreover, as a matter of fact, Alcoa and the Directors of MPCo are aware of the right of the Senior Secured Noteholders to attack the Proposed Transaction as they have requested and obtained an indemnification to protect them from such claims; furthermore, Alcoa and the Directors of MPCo are now asking the court to sanction this indemnity.

- Para. 102 of the Contestation.
- Exhibit R-1, Section 2.3.1 of the Implementation Agreement.
- See letter February 18, 2009 R-3
- Press Release of March 13, 2009, Exhibit R-4.
- Paras. 29, 33, 38 of the Amended Motion

84. Furthermore, HQE also has knowledge of the rights of the Senior Secured Notes and their rights as secured creditor of ACCC on 60% of MPCo's shares in light of the due diligence that they have performed.

- Para. 106 of the Contestation.

85. The proof of fraudulent intent is facilitated by the presumptions set out in articles 1632 and 1633 of the CCQ.

86. The Proposed transaction is deemed to be made with fraudulent intent because ACCC and MPCo knew that by selling the Facility, MPCo was rendering itself or was seeking to render itself insolvent. In fact, by the Proposed Transaction,

MPCo is rendering itself insolvent because it removes all of its assets from its patrimony and will be dissolve into ACCC, an insolvent company:

- Art. 1632 CCQ.

87. The evidence shows:

(i) that the sale price of the Facility counterparts paid by ACCC for the receipt of all assets of MCo is disproportional to the sale price of $615,000.00.

(ii) that ACCC is the alter ego of MPCo; and

(iii) that selling the Facility diminished the value of the MPCo shares and compromised the Senior Secured Noteholders ability to satisfy its claim against ACCC, fulfills the requirement for fraudulent intent:

- *Chassé (Faillite de)*, EYB 2007-125505 (C.S.), at para. 23.

"*Compte tenu de la valeur du terrain en 2003 (137 000 $) et du prix de vente en 2005 (35 000 $), de la cession de biens de la débitrice deux mois après la vente, du fait que 9123 est l'alter ego de la débitrice, que cette aliénation a fait perdre toute valeur aux actions de la débitrice et prive les créanciers de cette dernière de leur gage commun, que la débitrice était insolvable lors de l'acte ou s'est rendue insolvable par cet acte, le Tribunal estime qu'il y a suffisamment d'éléments graves, précis et concordants pour conclure que la vente du terrain par 9123 à Carrier a été faite en fraude des droits des créanciers de la débitrice*." [Emphasis added]

- *Lamarre v. Tropique Nord 1 Montréal inc.*, REJB 1998-06084 (Qc. S.C.), at para. 24.

"24 *Enfin, la cession doit être considérée comme étant frauduleuse. Elle est déjà réputée frauduleuse (par présomption irréfragable) en vertu de l'art. 1569b. C.c.B.C.: elle est également réputée frauduleuse en vertu de l'art. 1632 C.c.Q. puisqu'intervenue entre deux sociétés liées, toutes deux représentées à l'acte par leur principal dirigeant et unique propriétaire, qui connaissait et contrôlait l'état d'insolvabilité de la partie venderesse. Que celui-ci ne se soit pas personnellement souvenu de l'existence de M. Lamarre et de sa réclamation importe peu: cela ne confirme pas sa bonne foi face à la transaction inspirée par des considérations financières et fiscales qui lui appartiennent. Un tel «oubli» constitue au mieux, une erreur de la part d'un dirigeant des deux sociétés contractantes en supposant que l'on puisse oublier un procès qui vient à peine de se terminer. Il est clair que l'intention des sociétés parties à la vente était de dépouiller Tropiques Nord de son parc immobilier, de rendre cette société inactive et de diriger ses opérations commerciales vers une autre société. L'effet est on ne peut plus clair: il prive le créancier impayé de son gage sur le patrimoine de sa débitrice. Cela s'est fait en fraude de ses droits*." [Emphasis added]

- *Crealise Packaging Inc. / Créalise conditionnement inc. v. Guérette*, REJB 1997-01231 (Qc. S.C.), at para. 77-80.

"77 *Dans les circonstances, il y a lieu de lever le voile corporatif et de conclure que 171119 n'est que l'alter ego de Guérette. La résidence est, quant à Créalise, toujours la propriété de Guérette.*

78 *Quant à l'hypothèque consentie par Polaris à 171119, la demanderesse a fait la preuve qu'il s'agissait d'une transaction ayant pour but uniquement de grever l'immeuble d'une hypothèque de 1 200 000$, plus une hypothèque additionnelle de 20%, afin qu'il n'ait plus de valeur advenant une saisie après jugement. [...]*

80 *L'intention de frauder de Guérette et 171119 s'infère des actes posés qui portaient préjudice à Créalise*." [Emphasis added]

7. ACCC'S OBLIGATION TO ACT IN GOOD FAITH

88. As will be more fully demonstrated below, the Abitibi Petitioners have negotiated and concluded the Proposed Transaction with Alcoa, HQ and MPCo without complying with their obligation to act in good faith towards the Senior Secured Noteholders.

89. For that reason alone, the Court should dismiss the Motion with "liberty" to the Abitibi Petitioners 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.

- 2nd Conclusion of the Contestation.

A) Failure to act in good faith

90. The Motion describes certain of the terms and conditions agreed on by ACCC with Alcoa and HQ in order to proceed with the sale of the Facility.

- Paras. 45 to 66 of the Motion.

91. None of these terms and conditions take into account the interests detained by the Senior Secured Noteholders in the Facility through the sale of the 60 % equity interest of ACCC in MPCo.

92. The Senior Secured Noteholders are not part to the Implementation Agreement under which the Proposed Transactions would be performed.

- Implementation Agreement, *Exhibit R-1.*

93. At no time were the Senior Secured Noteholders invited to participate in the discussions for the sale of the 60% equity interest of ACCC in MPCo or in the negotiations for the sale of all the assets of the MPCo.

- Para. 12 of the Contestation.

94. It was only after ACCC had negotiated the Implementation Agreement that it advised the Senior Secured Noteholders of the nature of the Proposed Transaction and informed them that it will proceed with a motion to obtain the approval of the court.

> ➢ Para. 12 of the Contestation.

95. In fact, on August 20, 2009, two weeks before presenting Abitibi Petitioners' first Motion, representatives of some of the Senior Secured Noteholders were given a presentation outlining the basic elements of the Proposed Transaction but were given no opportunity to participate in the process.

> ➢ Paras. 12 and 54 of the Contestation.

96. During the August 20, 2009 presentation, the Proposed Transaction was presented as a "*fait accompli*".

> ➢ Para. 54 of the Contestation.

97. Up until that moment, the Secured Senior Noteholders were led to believe that the transaction to occur between the Abitibi Petitioners and HG would be a sale of MPCo shares not a sale of assets.

98. If the Proposed Transaction had been on sale of shares, the Secured Senior Noteholders would not have been prejudiced by it as proceeds of sale would have come to them.

> ➢ The Principal Security documents (including the Senior Secured Notes' Hypothec), Exhibit SN-4.

99. The Abitibi Petitioners have refused to take into account the interests of the Senior Secured Noteholders and want now to take advantage of the proceedings before this court in the present matter to deprive them of their contractual rights.

100. By the Order sought, the Abitibi Petitioners are asking this Court to proceed without the necessary approval and that the assets of MPCo be transferred to third a party "*free and clear of any charges and any and all encumbrances*".

> ➢ 6th and 7th Conclusions of the Motion.

101. By doing so, ACCC is acting in contravention of its obligations under the Senior Secured Noteholders' Hypothec which precludes ACCC from exercising rights which would "*be prejudicial to the hypothec created*" in favour of the Senior Secured Noteholders.

102. The protection granted by the CCAA to ACCC does not free the Abitibi Petitioners from their obligation to act in good faith towards the Senior Secured Noteholders.

103. During the whole process that led to the Proposed Transaction, the Abitibi Petitioners, MPCo and Alcoa, failed to consider the interests of the Senior Secured Noteholders, although they knew that the Senior Secured Noteholders had a personal and direct interest in the Proposed Transaction.

104. In doing so, the Abitibi Petitioners have failed to act in good faith towards the Senior Secured Noteholders.

105. Should the court authorize the sale of the asset as requested in the Motion, it would legitimize a contravention of the good faith rule.

B) The obligation of good faith under Québec law

106. The Abitibi Petitioners have entered into a loan agreement with the Senior Secured Noteholders with certain terms and conditions.

107. As per the saying "The contract is the law of the parties", the principles of contractual liberty and the binding force of contracts are enacted in the *Civil Code of Quebec*:

> **Art. 1378.** *Le contrat est un accord de volonté, par lequel une ou plusieurs personnes s'obligent envers une ou plusieurs autres à exécuter une prestation.*
>
> *Il peut être d'adhésion ou de gré à gré, synallagmatique ou unilatéral, à titre onéreux ou gratuit, commutatif ou aléatoire et à exécution instantanée ou successive; il peut aussi être de consommation.*

> **Art. 1378.** A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform a prestation.
>
> Contracts may be divided into contracts of adhesion and contracts by mutual agreement, synallagmatic and unilateral contracts, onerous and gratuitous contracts, commutative and aleatory contracts, and contracts of instantaneous performance or of successive performance; they may also be consumer contracts.

108. However, contracts also contains implicit obligations in accordance with their nature and in conformity with the usage, equity and the law:

> **Art. 1434.** *Le contrat valablement formé oblige ceux qui l'ont conclu non seulement pour ce qu'ils y ont exprimé, mais aussi pour tout ce qui en découle d'après sa nature et suivant les usages, l'équité ou la loi.*

> **Art. 1434**. A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law.

109. The obligation to act in good faith is an implicit obligation that is in conformity with the law.

> ➢ *Banque nationale du Canada c. Houle*, 1990 CarswellQue 37 (S.C.C.), at paras. 117 and 122.

110. In 1994, the Québec legislator, following caselaw that established a general rule to act in good faith and to not abuse one's right, incorporated the obligation to act in good faith into the CCQ:

Art. 6. *Toute personne est tenue d'exercer ses droits civils selon les exigences de la bonne foi.*	**Art. 6.** Every person is bound to exercise his civil rights in good faith.
Art. 7. *Aucun droit ne peut être exercé en vue de nuire à autrui ou d'une manière excessive et déraisonnable, allant ainsi à l'encontre des exigences de bonne foi.*	**Art. 7.** No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

111. By enacting that obligation at the beginning of the CCQ at Title One "*Enjoyment and Exercise of Civil Rights*", the legislator has established the obligation to act in good faith as the cornerstone of our civil law.

> ➢ Québec (Ministère de la Justice), Commentaires du ministre de la Justice, t. 1, Québec, Publications du Québec, 1993, at p. 829.

112. The Québec legislator has also reiterates that rule as a general provision in the Book on Obligations of the CCQ.

> ➢ Article 1375 of the CCQ.

113. Although the CCQ does not define what exactly "*acting in good faith*" consists of, it can be determine based on the circumstances:

> ➢ *Banque nationale du Canada v. Houle*, 1990 CarswellQue 37 (S.C.C.).
>
> ➢ *Lefebvre, Brigitte* , Obligations et responsabilité civile, « Fascicule 5 – Bonne foi: principe et application », *Jurisclasseur Québec,* LexisNexis, n° 4.

114. To be in "*good faith*" is a standard of behaviour that can be assessed objectively:

> "4. *Standard de comportement – La bonne foi comme norme de comportement peut s'apprécier en fonction d'un critère subjectif ou en fonction d'un critère objectif. Il y a lieu de faire une distinction entre une personne qui est de bonne foi et une personne qui agit*

selon les exigences de la bonne foi. En effet, « être de bonne foi », c'est avoir un comportement honnête. Être de bonne foi, c'est également avoir un comportement loyal. Alors que l'honnêteté est intrinsèquement reliée à l'intention de son auteur, la loyauté peut s'entendre des agissements, des normes, des standards requis dans une situation donnée."

115. The obligation to act in good faith exists at any stage of a contractual relationship:

- Article 1375 of CCQ

Art. 1375. *La bonne foi doit gouverner la conduite des parties, tant au moment de la naissance de l'obligation qu'à celui de son exécution ou de son extinction.*	**Art. 1375.** The parties shall conduct themselves in good faith both at the time the obligation is created and at the time it is performed or extinguished.

- Jean-Louis Baudouin et Pierre-Gabriel Jobin, *Les obligations*, 6ed., Cowansville, Yvon Blais, 2005, n° 99, at p.144.

116. The obligation of good faith implies the duty to cooperate with the other party in order to take into account the impact of a decision on his or her interests:

- Brigitte Lefebvre, *Obligations et responsabilité civile*, « Fascicule 5 – Bonne foi: principe et application », Jurisclasseur Québec, LexisNexis, n° 4.
- *Lefebvre, Brigitte* , Obligations et responsabilité civile, « Fascicule 5 – Bonne foi: principe et application », *Jurisclasseur Québec, LexisNexis, n° 4,* N[os] 36, 37 and 39.

"36. *Portée générale - La bonne foi commande également que les contractants posent des gestes afin de tenter de réaliser l'objectif contractuel. Cette obligation de coopération implique que le contractant doit faire preuve d'un réel esprit d'ouverture notamment en cas de difficultés d'exécution et fournisse l'assistance requise. Ici encore, ce devoir s'applique à tous les contrats sans qu'il soit nécessaire que le législateur le prévoit expressément.*

[…]

39. *Champ d'application-* […]- *Une fois le contrat valablement formé, cette obligation* [de renseignement] perdure. *En effet, un contractant doit fournir en cours de route l'information requise à son cocontractant, afin de lui permettre d'exécuter sa prestation et d'atteindre la finalité du contrat. Même si les contractants peuvent avoir des intérêts qui leurs sont propres, voire divergents, ils partagent toutefois le même but qui est la réalisation de l'objectif contractuel. Les contrats d'entreprise et les contrats bancaires sont propices à susciter une telle obligation.*"

117. The duty to cooperate serves two purposes: 1) facilitate the execution of the contract; 2) to watch over the interests of the contracting partner of the other parties.

> ➢ Lluelles & Moore, *Droit des obligations*, Montréal, Ed. Themis, 2006, N° 1997-1998 :

> ***1997.*** *Ce deuxième devoir général se décline, lui, sur un mode positif. Il impose, en effet, à chaque partie un comportement actif, destiné à assister le cocontractant, notamment « à [l']avertir [...] en cours de contrat, des événements qu'il a intérêt à connaître pour l'exécution du contrat ». L'obligation de bonne foi ne se cantonne donc pas à condamner l'attitude dolosive d'un contractant ni à exiger tel ou tel type de comportement. Plus exigeante encore, elle vise « une conduite globale (chez le créancier aussi bien que chez le débiteur) à apprécier selon la morale ». Cette conduite globale doit favoriser l'aventure commune, voire la « petite société » que représenterait la relation contractuelle. Cette « union d'intérêts» implique, selon l'heureuse formule du professeur Mazeaud, « un comportement altruiste minimum qui doit épouser les attentes légitimes de son partenaire ». Elle vise à faciliter l'exécution même du contrat. Fondé sur une idée de solidarité, de dialogue, voire de fraternité, le devoir de coopération constitue, au premier abord, une quadrature du cercle, puisque, « dans la pratique des affaires, chacun défend son propre intérêt ». Mais, à tout prendre, cette quadrature n'est qu'apparente. À la vérité, dans une perspective de long terme, la coopération est profitable à chacun des contractants.*

> ***1998.*** *Même si le législateur a spécifiquement prévu la nécessité de la collaboration pour certains contrats, comme la société (art. 2186, al. 1er) ou le mandat (art. 2149), ce devoir vaut pour tous les contrats, grâce au caractère supplétif des articles 6 et 1375. Le devoir de coopération regroupe, en fait, deux exigences : celle de faciliter l'exécution du contrat (paragraphe 1) et celle de veiller aux intérêts du cocontractant (paragraphe 2). »*

> ➢ See also : Jean-Louis Baudouin & Pierre Gabriel Jobin, *Les Obligations*, 6e éd., Cowansville, Yvon Blais, at apra. 129.

118. In *Beaudouin* c. *Université de Sherbrooke*, the Superior Court has recognized that despite the cession of rights, a university must consult with its "researchers" before modifying an agreement with a third party concerning the commercialization of an invention resulting from their works when their financial interests are in play:

> ➢ *Beaudouin v. Université de Sherbrooke*, EYB 2007-11976S, (S.C.Q.), at paras. 115-117 and 135-137.

> *« 115. C'est sans doute dans cet esprit que l'inventeur a, de fait, été consulté dans les démarches entre UNIVERSITÉ et ses licenciés. Le Tribunal est d'avis que ce souci d'aménagement équitable des*

deux droits dont font état les Règlements implique que l'inventeur soit consulté, puisqu'il est partie prenante. Il s'agit de l'obligation de bonne foi, de loyauté du droit civil dans l'exécution des engagements dont traite la Cour d'appel dans l'arrêt Provigo.

116. En première instance, la juge Marcelin fait valoir que l'article 1024 C.c.B.-C., repris à l'article 1434 C.c.Q., permet de pallier à l'absence de « l'obligation fiduciaire » de Common Law en droit civil, au moyen des notions d'abus de droit et de loyauté.

117. Le Tribunal conclut donc que lorsque BEAUDOIN/MARTIN ont cédé leurs droits à UNIVERSITÉ, par nécessité ou volontairement, c'est avec une anticipation légitime d'un traitement juste, conforme, et équitable, tel qu'énoncé dans les Règlements. Et en raison des obligations et engagements d'UNIVERSITÉ, ils étaient bien fondés dans leur attente d'être consultés, tout au moins en ce qui a trait à tout changement matériel susceptible d'affecter leurs intérêts.

[…]

135. Eu égard à l'article 2803 C.c.Q., et compte tenu de l'ensemble de la preuve, le Tribunal conclut, par prépondérance, qu'UNIVERSITÉ n'a pas rencontré son fardeau d'établir qu'il y a eu préalablement à l'Amendement,, une consultation adéquate avec les demandeurs, quant à la fixation d'un prix forfaitaire pour l'exercice NEPTUNE de son Option d'achat.

136. Il en découle qu'UNIVERSITÉ non seulement porte atteinte aux expectatives légitimes des demandeurs, en ne les consultant pas, mais elle manque aussi à son obligation d'agir équitablement à leur endroit. C'est le sens à donner à son obligation de bonne foi et de loyauté du droit civil dans l'exécution de ses engagements envers les demandeurs.

137. En agissant ainsi, UNIVERSITÉ omet par « aveuglement volontaire » d'agir équitablement à l'endroit des demandeurs, faisant fi des principes de justice naturelle et d'équité procédurale (« Duty to act fairly »).»

119. The obligation of good faith is of public order:

- *Syndicat de l'enseignement de la région de Québec v. Ménard*, SOQUIJ AZ-50310939 (Qc. C.A.) , paras. 48-49.
- *Trust la Laurentienne du Canada inc. v. Losier*, SOQUIJ AZ-50082274 (Qc. C.A.)., para. 40.

« […] *Il serait en effet contraire à l'ordre public (art. 9 C.c.Q.) de renoncer d'avance à la bonne foi de son cocontractant, pierre angulaire de la théorie générale de l'obligation de renseigner. Serait nécessairement invalide la clause contractuelle libérant un* *cocontractant de son obligation d'agir de bonne foi tant au moment de la formation, de l'exécution que de l'extinction du contrat. »*

120. A party cannot contravene a rule of public order:

- Article 9 of the CCQ *:*

Art. 9. *Dans l'exercice des droits civils, il peut être dérogé aux règles du présent code qui sont supplétives de volonté; il ne peut, cependant, être dérogé à celles qui intéressent l'ordre public.*	**Art. 9.** In the exercise of civil rights, derogations may be made from those rules of this Code which supplement intention, but not from those of public order.

121. An act committed in violation of such a rule cannot be legitimized *expost facto*.

122. One who fails to meet the requirements of the obligation to act in good faith could be ordered to pay damages but could also be opposed a "*fin de non recevoir*" to his claim:

- *Richter & Associés Inc. v. Merrill Lynch Canada inc.*, SOQUIJ AZ-50413850 (Qc. C.A.), at paras. 58-61

"[58] *De façon constante, la Cour a appliqué une fin de non-recevoir à la demande d'une partie dont le comportement était fautif et relié directement au préjudice subi.*

[59] *Il n'est pas de mon propos d'élaborer une théorie générale des fins de non-recevoir ou encore de procéder à une classification exhaustive de celles-ci. Dans la conception classique du terme, plusieurs fins de non-recevoir sont prévues au Code civil du Québec et sont recevables même en l'absence de toute faute. C'est d'ailleurs ce que rappelle à ce sujet le juge Beetz dans l'arrêt Banque Nationale c. Soucisse.*

[60] *En l'espèce, la fin de non-recevoir invoquée prend appui avant tout sur l'obligation de bonne foi qui doit caractériser la conduite de toute personne dans l'exercice de ses droits et notamment dans ses rapports contractuels (art. 6, 7 et 1375 C.c.Q.).*

[61] *La sanction qui s'attache à la fin de non-recevoir fait ressortir le caractère exceptionnel de la mesure:*

On peut comprendre que cette sanction dérogatoire qu'est la fin de non-recevoir soit d'application exceptionnelle et qu'elle ne puisse jouer que dans les cas de violation sérieuse des exigences de la bonne foi, comme un comportement particulièrement déloyal. S'agissant seulement du devoir de renseignement, il est naturel que des magistrats hésitent à la prononcer si la victime n'a subi nul préjudice.

123. For the reason mentioned above, we respecfully submit that the "fin de non recevoir" is the only viable sanction and that the court should therefore dismiss the Motion.

124. In addition, the *"fin de non recevoir"* is the only viable sanction to the Motion.

125. The civil law concept of *'fin de non-recevoir'* is very similar to the common law doctrine of clean hands, which demands that a person coming to the court with a lawsuit or a petition for a court order must be free from unfair conduct:

> ➢ Black's Law Dictionary, 8th ed.

> "The principle that a party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle, such as good faith"

126. The existence of the doctrine of *'fin de non-recevoir'* in our civil law is incontestable and allows a litigant to have an action or petition dismissed without discussion of its merit.

> ➢ *Banque Nationale v Soucisse et a*l., [1981] 2 R.C.S 339 at pp.359-360.

127. In the matter of *Fiducie Canadienne Italienne* v. *Folini*, ("F.C.I."), the Québec Court of appeal refused to give effect to the defendant's plea of fraud on the basis of her dealings with the bank, which the court characterized as misleading and contrary to the obligation of good faith:

> ➢ *Fiducie Canadienne Italienne v. Folini*, REJB 2001-23517 (C.A.), at para. 37.

> "*Le comportement de Tassone n'a pas été seulement silencieux, il a été trompeur, dolosif et contraire à l'obligation d'agir de bonne foi en toutes circonstances*"

128. The Secured Noteholders were led to believe by ACCC up until recently that the transaction would be a share sale. Therefore the Secured Noteholders relied on this information and believed prior to and throughout the current CCAA process that their security would not be adversely affected by this transaction.

129. Despite the fact that ACCC knew that the transaction would finally take the form of an asset sale, therefore completely negating the security on MPCo's shares, the Secured Noteholders were not informed of same in a timely fashion.

8. MPCO'S DUTY OF LOYALTY

130. During the whole process that led to the Proposed Transaction, the Abitibi Petitioners and MPCo, failed to consider the interests of the Senior Secured Noteholders, although the formers knew that the latter had a personal and direct interest in the Proposed Transaction.

131. In fact, they conducted the negotiations without attempting to balance the interests of the Senior Secured Noteholders with those of the other stakeholders.

132. The MPCo directors have an obligation of loyalty towards the Senior Secured Noteholders who are stakeholders of MPCo.

133. MPCo could not therefore claim that it is acting in good faith.

134. The Board of Directors of MPCo having failed to act in accordance with its duty at loyalty and its obligation of good faith, its decision to support the Proposed Transaction should be declared null and void.

A) Equity remedy available to stakeholders of Québec companies

135. The Superior Court has the power to remedy "*oppressive-type behaviour*" with respect to companies incorporated under the *Companies Act*:

> "[30] The doctrine and the case law have made much of late about the power of the Superior Court to render judgements to remedy oppressive-type behaviour in the context of companies created under the Companies Act. The current and, we feel, correct position is to the effect that our court has the power, through its legislated and inherent jurisdiction, to intervene in such situations."

- *Grant v. Dion*, 2007 CarswellQue 9799 (Qc. S.C.), at para. 30.

136. This power is based on articles 33 and 46 of the *Code of Civil Procedure* (the "**CCP**"):

> "[31] The jury is still out, however, as to how far that interventionary power extends, in particular, in comparison to the anti-oppression powers granted under the CBCA. Several decisions of our court wrestle with the issue, with judgements falling on both sides of the line.
>
> [32] This judge favours broad remedial powers. In adopting this position, we base ourselves on the wording and intent of article 46 of the Code of Civil Procedure. That remarkable provision essentially codifies the inherent jurisdiction of our court and challenges us to perform our duty fully. It reads:

Art. 46. *<u>Les tribunaux et les juges ont tous les pouvoirs nécessaires à l'exercice de leur compétence</u>.*

Ils peuvent, en tout temps et en toutes matières, tant en première instance qu'en appel, prononcer des ordonnances de sauvegarde des droits des parties, pour le temps et aux conditions qu'ils déterminent. De plus, ils peuvent, dans les affaires dont ils sont saisis, <u>prononcer, même d'office, des injonctions</u> ou des réprimandes, supprimer des écrits ou les déclarer calomnieux, et <u>rendre toutes ordonnances appropriées pour pourvoir aux cas où la loi n'a pas prévu de remède spécifique</u>. (Le Tribunal souligne.)

Art. 46. <u>The courts and judges have all the powers necessary for the exercise of their jurisdiction</u>.

They may, at any time, and in all matters, whether in first instance or in appeal, issue orders to safeguard the rights of the parties, for such time and on such conditions as they may determine. As well, they may, in the matters brought before them, even on their own initiative, <u>issue injunctions</u> or reprimands, suppress writings or declare them libellous, and <u>make such orders as are appropriate to deal with cases for which no specific remedy is provided by law.</u>" (The Court's underlining)

137. However, because the Québec legislator, unlike its federal and other provincial counterparts, has not enacted oppression remedy provisions in the *Companies Act* (Québec), the criteria for the intervention of the Superior Court in "*oppression-type behaviour*" in the context of a Québec company, have to be based on the duty to act in good faith and to correct abuses of rights.

138. As Justice Riordan in *Grant* v. *Dion* clearly stated, the oppression remedy under the CBCA is effect-based while the remedy for Québec corporations is fact-based:

> "[33] This is not to say, however, that the same criteria will apply as for the oppression remedy of the CBCA. Our powers here flow from another source. Mr. Justice Denis Lévesque, as he so often did on various topics, captured the sense and the spirit of Quebec law on this subject:
>
> > [19] Dans notre Code civil, les recours qui se rattachent à l'obligation de loyauté et de la bonne foi et à la répression de l'abus de droit que l'on retrouve aux articles 6, 7, 322, 324, 329, 1375, 2138 et 2218 suffisent à soulever une question sérieuse (in the context of a request for a Safeguard Order) …
> >
> > [20] Quand on envisage les remèdes qui peuvent être utilisés pour l'application des articles des droits

substantiels des articles du Code civil cités au paragraphe précédent par rapport au silence de la Loi (the Companies Act) elle-même sur l'action oblique ou dérivée, il est permis de recourir aux pouvoirs généraux des Cours supérieures au Canada dont l'article 33 du Code de procédure civile est en partie un rappel. Au plan purement processuel (sic), les articles 2, 20 et 46 en sont l'expression. (Our emphasis)

[34] Although article 46 C.C.P. enjoys wide respect and application in this era of Safeguard Orders, articles 2 and 20 of the Code of Civil Procedure are often seen as the poor cousins of Quebec procedure. This is because lawyers tend to reference them only in moments of judicial desperation, when there seems to be no other alternative. These provisions deserve more respect. In the present context, article 20 is particularly interesting. It reads:

Art. 20. *Si le moyen d'exercer un droit n'a pas été prévu par ce code, on peut y suppléer par toute procédure non incompatible avec les règles qu'il contient ou avec quelque autre disposition de la loi.*

Art. 20. Whenever this Code contains no provision for exercising any right, any proceeding may be adopted which is not inconsistent with the Code or with some other provision of law.

[35] Combined with article 46, this provides the Court with an impressive arsenal of tools to correct injustices – provided we have the jurisdiction.

[36] Part of that jurisdiction, as mentioned by Justice Lévesque, is codified in article 33 C.C.P., which sets out the Court's general superintending and reforming powers. Another part flows from the fact that the powers of the Superior Court of Quebec are the same in equity as those of the Court of Queen's Bench and the Chancery Court of the Common Law.

[37] But it is not necessary to look to historical sources to find our jurisdiction. The Civil Code resolves the issue quite clearly in articles 6, 7 and 1375, article 7 being particularly eloquent in this regard:

Art. 7. *Aucun droit ne peut être exercé en vue de nuire à autrui ou d'une manière excessive et déraisonnable, allant ainsi à l'encontre des exigences de bonne foi.*

Art. 7. No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirements of good faith.

[38] By imposing the requirements of good faith in the exercise of one's rights, these provisions give the Court the jurisdiction to intervene to correct abuses of rights or of power by the majority on the minority (or other stakeholders) within Quebec companies.

[39] That appears to bring us very much into the realm of the oppression remedy under the CBCA, but appearances can be deceiving. One is effect-based and the other is fault-based.

[40] The case law around the application of section 241 of the CBCA has taught us that one should approach that remedy largely from the perspective of the complainant. In that sense, even if the alleged oppressing party is acting in good faith, it is still open to find that there has been oppression of the complainant where the former's acts cause an unfair result to the latter. That is not the case under the Civil Code.

[41] The wording of the good faith rule set out in article 7 requires us to base our intervention first on the nature of and motivation for the actions of the alleged wrongdoer. Only where we find a contravention of that rule, in other words, a "fault", do we look to the effect on the other party.

[42] The requirement for a fault to exist in order for a Court to intervene is a basic tenet of Quebec law. Far from creating an exception to this principle, article 7 plants itself squarely upon it.

[43] Thus, in assessing the various claims made by Grant with respect to the situation existing within 9000 in the present case, we shall first determine if there has been a breach of the good faith rule, or any other standard imposed by law, by Dion and Boulay. Only where we find such a fault will we go on to analyze if there has been damage caused to Grant, with a causal link between the two."

139. Because the inherent power exercised by the Superior Courts under Articles 33 and 46 CCP are equity remedies, Québec courts have recognized the authority of common law cases:

- *Laurent v. Buanderie Villeray Ltée (2001)*, REJB 2001-28096 at para. 21 (Qc. S.C.).
- *Desautels v. Desautels*, (2005) EYB 2005-93281 at para. 18 (Qc. S.C.).

140. The Supreme Court of Canada has clearly stated that the interests of all the stakeholders of a corporation, including the creditors, have to be taken into account by the board of directors before making a decision that might prejudiced them:

- *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R., 560, 2008 SCC 69, at para. 82.

141. In the present case, as more fully demonstrated below, MPCo's Board of Directors has failed to act in accordance with its obligations.

B) Senior Secured Noteholders are stakeholders of MPCo

142. The Senior Secured Noteholders are one of the main stakeholder of MPCo as they were granted a hypothec of US$413 million on the 60% equity shares detained by ACCC.

143. The Secured Noteholders have the beneficial ownership of MPCo shares as attested by the Senior Secured Notes' Hypothec.

> ➢ The Principal Security Documents (including the Senior Secured Notes' Hypothec), Exhibit SN-4.

144. By analogy, under the CBCA, a noteholder who holds a security over shares of a company is considered a beneficial owner of securities

> ➢ *Cox v. Aspen Veterinary Services Professional Corporation*, 2007 CarswellSask 479 (Sask. Q.B.).

> "The holder of pledged shares provided as a take-back security is a complainant for purpose of the oppression remedy both as a beneficial owner of the security and as a person who, in the discretion of the court, is a proper person to bring an oppression action."

145. In our case, in addition to having obtained a pledge over MPCo's shares, the Senior Secured Noteholders were in fact the only party authorized to exercise the voting rights on ACCC registered shares since April 1, 2009.

146. Even a non-secured creditor is a stakeholder of a company and should be entitled protection:

> ➢ *1413910 Ontario Inc. (Bulls Eye Steakhouse Grill)*, 2009 CanLII 22544 (ON. S.C.D.C.), at para. 31.

> "[31] Section 248(2) of the OBCA gives recognition to the fact that there are a number of classes of persons who have a legitimate stake in the manner in which the affairs of a business corporation are conducted, creditors among them, and it prevents those having power and control over the affairs of a business corporation from exercising that power with impunity."

C) MPCo Directors' duty of royalty towards the Senior Secured Noteholders

147. Due to the status of the Senior Secured Noteholders, MPCo's directors should have taken into account the interests of the Senior Secured Noteholders before consenting to the Proposed Transaction.

148. Under the CCQ, directors of companies have a duty "*to act with honesty and loyalty in the interest of the legal person*":

- Article 322 of the CCQ.

149. The duty of loyalty is part of the obligation to act in good faith:

150. In the context of a director of a company, the duty of loyalty is similar to the concept of fiduciary duty in common law:

- Paul Martel, « Part VIII of the C.B.C.A. in the civil law context », in L'harmonisation de la Loi canadienne sur les sociétés par actions avec le droit civil québécois – Proposition de révision /Harmonization of the Canada Business Corporations Act with Quebec civil law – Revision Proposal (bilingual edition), La Revue Juridique Thémis, Volume 42, Nos. 1 and 2, Montréal, 2008, at page 83.

"2. Fiduciary duty and article 1309 C.C.Q.

Section 91(a) of the C.B.C.A. refers to what the common law calls a fiduciary duty and to an analogous concept used in the CCQ of Québec, namely the duty of loyalty.

Even before the Civil Code of Québec came into force, it had been noted that the high standard of conduct imposed by the civil law on certain persons in certain circumstances was similar to a fiduciary duty in the common law, particularly in the case of an employee's duty to loyalty to his or her employer. That duty of loyalty has been codified in various places in the Civil Code (art. 322 C.C.Q. – director of legal persons; art. 1309 C.C.Q. – administrator of the property of others; art. 2088 C.C.Q. – employee). It has been pointed out that this does not mean that common law case law and legal commentary concerning the fiduciary duty should be transposed directly into the civil law. The fact remains that the analogy between the two concepts is a real one, especially where the civil Code of Québec requires someone to act faithfully in the best interests of the person to whom the duty is owed, as under article 1309 C.C.Q. Thus, it has been noted that the solutions arrived at by the common law to the problems that exist in this area will be of interest in interpreting the duty of duty of loyalty in the civil law."

151. The directors of a Québec company are under similar obligations as that imposed by the fiduciary duty at common law:

- *Entreprises Rock Ltée (In re): Nozetz c. Habitations CJC Inc.*, 1986, SOQUIJ AZ-86021486 (Qc. S.C.).
- Paul Martel, « Part VIII of the C.B.C.A. in the civil law context », in L'harmonisation de la Loi canadienne sur les sociétés par actions avec le droit civil québécois – Proposition de révision /Harmonization of the Canada Business Corporations Act with Quebec civil law –

Revision Proposal (bilingual edition), La Revue Juridique Thémis, Volume 42, Nos. 1 and 2, Montréal, 2008, at page 83.

152. MPCo's directors not only knew about the Senior Secured Notes' Hypothec but expressly consented to the pledge granted on the shares:

> ➢ Officer's Certificate of Manicouagan Power Company, Exhibit SN-7.

153. During the whole process that led to the Proposed Transaction, the Abitibi Petitioners and MPCo, failed to consider the interests of the Senior Secured Noteholders, although the formers knew that the latter had a personal and direct interest in the object of the Proposed Transaction.

154. In fact, they conducted the negotiations without attempting to balance the interests of the Senior Secured Noteholders with those of the other stakeholders.

155. Due to the status of the Senior Secured Noteholders, MPCo's directors should have taken into account the interests of the Senior Secured Noteholders before consenting to the Proposed Transaction:

> ➢ *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R., 560, 2008 SCC 69, at paras. 44, 59, 81and 82.

"[44] A second remedy lies against the directors in a civil action for breach of duty of care. As noted, s. 122(1)(*b*) of the *CBCA* requires directors and officers of a corporation to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". This duty, unlike the s. 122(1)(*a*) fiduciary duty, is not owed solely to the corporation, and thus may be the basis for liability to other stakeholders in accordance with principles governing the law of tort and extracontractual liability: *Peoples Department Stores.* Section 122(1)(*b*) does not provide an independent foundation for claims. However, applying the principles of *The Queen in right of Canada v. Saskatchewan Wheat Pool*, 1996 CanLII 21 (S.C.C.), [1983] 1 S.C.R. 205, courts may take this statutory provision into account as to the standard of behaviour that should reasonably be expected.

[59] Second, like many equitable remedies, oppression is fact-specific. What is just and equitable is judged by the reasonable expectations of the stakeholders in the context and in regard to the relationships at play. Conduct that may be oppressive in one situation may not be in another.

[81] As discussed, conflicts may arise between the interests of corporate stakeholders *inter se* and between stakeholders and the corporation. Where the conflict involves the interests of the corporation, it falls to the directors of the corporation to resolve them

> in accordance with their fiduciary duty to act in the best interests of the corporation, viewed as a good corporate citizen.
>
> [82] The cases on oppression, taken as a whole, confirm that the duty of the directors to act in the best interests of the corporation comprehends a duty to treat individual stakeholders affected by corporate actions equitably and fairly. There are no absolute rules. In each case, the question is whether, in all the circumstances, the directors acted in the best interests of the corporation, having regard to all relevant considerations, including, but not confined to, the need to treat affected stakeholders in a fair manner, commensurate with the corporation's duties as a responsible corporate citizen.

156. Consequently, MPCo had the obligation to attempt to balance the interest of all stakeholders.

157. Having failed to take into account their interests, MPCo's directors could not therefore claim that they have acted in good faith or that they have fulfilled their duty of loyalty to the Senior Secured Noteholders.

158. Although members of the Board of Directors of MPCo signed the Implementation Agreement approving the Proposed Transaction, it seems that the Board never met to discuss the said Proposed Transaction as there is no resolution nor meeting minutes which will attest to the fact that MPCo's Board examined and deliberated on the Proposed Transaction before signing the Implementation Agreement:

159. The failure of MPCo's Board to meet to discuss the Proposed Transaction, constitutes, in and of itself, another breach of their duty, not only of loyalty but also of their duty of prudence and diligence:

- ➢ Article 322 of the CCQ, 1st para.
- ➢ *Fleury c. Vandal* (2004), SOQUIJ AZ-50215750 (Qc. S.C.).
- ➢ *Airmax Environnement inc. v. Auger* (2006), EYB 2006-107336 (Qc. S.C.).

160. In contravening their obligations MPCo directors have engaged their personal liability and could eventually be awarded damages against them.

161. MPCo directors are aware of that possibility and that would explain the inclusion of an indemnity clause in the Implementation Agreement in which ACCC and ACI agree to indemnify, *inter alia*, the directors of MPCO, for "*any claim by any person attacking the validity of all or part of the Proposed Transaction including under the Companies Act (Québec) and [...] the Civil Code of Québec*".

- ➢ Implementation Agreement, Exhibit R-1, clause 2.3.1.

162. Consequently, should the directors of MPCo be sued for personal liability, the Abitibi Petitioners who will have to support their costs and funds from the ULC

Reserve will be used to cover costs and successful claim against them further penalizing the Senior Secured Noteholders.

163. Therefore, we respectfully submit that this Court should use its inherent power to declare null and void the decision taken by the Board of Directors of MPCo to support the Proposed Transaction.

9. PROVISIONAL EXECUTION NOTWITHSTANDING APPEAL

164. The Abitibi Petitioners are seeking an order to authorize the provisional execution of the Orders they are seeking, notwithstanding any appeal and without the necessity of furnishing any security.

165. Article 497 of the *CCP* edicts that:

> "**497.** Saving the cases where provisional execution is ordered and where so provided by law, an appeal regularly brought suspends the execution of judgment.
>
> [...]"

166. Article 547 of the *CCP* identified the specific cases where an order will be executed notwithstanding appeal in all circumstances.

- Article 547, 1st para. of the CCP.

167. For all other cases, a leave may be granted at the discretion of the court, "*in case of exceptional urgency of for any other reason deemed sufficient in particular where the facts of bringing the case to appeal is likely to cause serious and irreparable injury, for the whole of for part only of a judgment*".

- Article 547, 2nd para. of the CCP.

168. Given the terms of article 547 of the CCP, the Abitibi Petitioners are not entitled to the provisional execution requested.

169. The requirements under the injunction remedy are similar to those under article 547 of the CCP.

- *Lebeuf v. Groupe SNC-Lavalin inc.*, EYB 1995-28991 (Qc. C.A.), at para. 7.

170. The Québec Court of Appeal has stated that the balance of inconveniences is at the heart of the determination that the Court must make with regard to the opportunity to suspend the execution notwithstanding appeal:

- *Lebeuf v. Groupe SNC-Lavalin inc.*, EYB 1995-28991 (Qc. C.A.), at para. 7.

171. It is the Plaintiff's burden to demonstrate the facts which would authorize a judge to exercise his/her discretionary power.

- *Lebeuf v. Groupe SNC-Lavalin inc.*, EYB 1995-28991 (Qc. C.A.), at para. 8.

172. This demonstration must go beyond broad, ambiguous and hypothetic allegations. In fact, the Plaintiff's argument must be sustained by precise, clear and concrete facts :

- *Lebeuf v. Groupe SNC-Lavalin inc.*, EYB 1995-28991 (Qc. CA.), at para 8.

173. In the event that the Plaintiff does not convince the court that the balance of inconveniences is in his/her favour, the court could dismiss the motion knowing that in the event of an appeal, the Plaintiff could make a similar request to the Court of Appeal:

- *Lapointe v. Compagnie Laurentienne/Impériale inc.*, REJB 1997-00201 (Qc. C.S.), at paras. 63-67.
- Article 550 of the CCP.

174. In the present case, the balance of inconveniences is clearly in favour of the Senior Secured Noteholders, for the following reasons:

a) The Abitibi Petitioners have not presented any precise and concrete evidence of a prejudice should the request of provisional execution be dismissed;

b) The Abitibi Petitioners have not formulated a general allegation of urgency to sustain their request for a provisional execution order;

c) The Abitibi Petitioners have alleged that they are in need of liquidity but they have not indicated for what purpose those funds would be used in a part of paying Alcoa and HQ for monies due to them in relation to MPCo;

d) The balance of inconveniences is in favour of the Senior Secured Noteholders because if the provisional execution is granted, the Proposed Transaction will be completed before a judgment is rendered by the Court of Appeal, which will make the appeal inconsequential because MPCo's assets will have already been liquidated;

175. For all the above reasons, we respectfully submit that the Abitibi Petitioners' request for a provisional execution order should be dismissed.

Montreal, September 24, 2009

Borden Ladner Gervais

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SUPERIOR COURT
(Commercial Division)
DISTRICT OF MONTRÉAL
No.: 500-11-036133-094

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"
and
The other Petitioners listed on Schedules "A", "B" and "C"

Petitioners

AND
ERNST & YOUNG INC.

Monitor

AND
The Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes

Respondents

ARGUMENT BRIEF

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