CANADA

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. : 500-11-036133-094

SUPERIOR COURT

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

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF: ABITIBIBOWATER INC.,

and

ABITIBI-CONSOLIDATED INC.,

and

BOWATER CANADIAN HOLDINGS INC.,

and

the other Petitioners listed herein

Petitioners

And

ERNST & YOUNG INC.,

Monitor

MEMORANDUM OF ARGUMENT
(Motion for Advice and Directions)

I. INTERPRETATION

1. Unless otherwise provided or the context indicates otherwise: (a) all capitalized terms in this Memorandum of Argument (the "**Argument**") shall have the respective meanings attributed to them in (i) the Motion for Advice and Directions (the "**Motion**") filed by the Petitioners (other than Bowater Canada Finance Corporation ("**BCFC**"), (ii) in the Initial Order issued by this Court (the "**CCAA Court**") on April 17, 2009, as amended and/or restated (the "**Initial Order**") or (iii) the Information Circular dated August 2, 2010; and (b) any reference to the "CCAA" shall refer to the *Companies' Creditors Arrangement Act* (R.S.C., c. C-36) as it applies to the present proceedings, being without giving effect to the amendments which came into force on September 18, 2009.

II. INTRODUCTION AND OVERVIEW

2. Over the Course of these CCAA Proceedings, Aurelius and Contrarian (collectively, the **"Objecting BCFC Noteholders")** have persistently argued and continue to argue that they suffer prejudice from the failure of BCFC to pursue certain indistinct Intercompany Claims that they allege exist against BCFPI and certain of its Canadian affiliates in connection with Intercompany Transactions, described in the Monitor's 49th Report and summarized in the Motion which took place between 2001 and 2007.

3. The CCAA Plan as recently approved by the overwhelming majority of the Petitioner's creditors (but narrowly defeated by BCFC's creditors) provides for the compromise and release of any and all claims against the Petitioners, including the alleged Intercompany Claims supposedly possessed by BCFC. The question of the alleged Intercompany Claims, which the Objecting BCFC Noteholders have raised but taken no steps to pursue for almost a year, has been extensively and expensively investigated at the expense of the Petitioners and nothing which was not effectively already on the public record for a number of years, still less anything warranting further action of any kind has been revealed. This motion has been brought to permit this Court to review the record and make determinations which will avoid the risk of the Sanction Hearing scheduled for September 20, 2010 being diverted into yet another quagmire of the Objecting BCFC Noteholders design.

4. The Contestation filed by the Objecting BCFC Noteholders' is conspicuous as much for what it says as what it fails to say. Despite having complained of allegedly unpursued Intercompany Claims since September, 2009, the Contestation contains not a single word describing in any detail what claim it is that BCFC is alleged to possess but failed to pursue. To the contrary, the Contestation lays bare the true nature of the Objecting BCFC Noteholders' intervention in this proceeding – hinder, defeat and delay the restructuring of the Petitioners. The CCAA is not so weak a statute as to require this Court to sit idly by while its process is hijacked to produce artificial leverage to extract private gain at the expense of the objects of the statute - a fair and orderly mechanism to restructure debts and preserve the enterprise. The creditors of the Petitioners have voted overwhelmingly to move on towards the future – the Objecting BCFC Noteholders' seek only to prolong to extort settlement values for chimerical allegations devoid of substance.

5. As this Court is well aware, the restructuring of the Petitioners is a complex and above-all time-sensitive matter. The CCAA Plan represents a delicate balancing of interests between employees, pensioners, suppliers and lenders of two principal operating companies (and their numerous subsidiaries and affiliates) operating an integrated cross-border business. The success of the transaction hinges on co-coordinating the approval of all of these necessary stakeholders, but also in obtaining the requisite approvals from regulators (in particular as regards pension matters), unions (as regards costs restructuring) and suppliers of new

credit (exit financing of approximately $1.3 billion being required to repay existing secured creditors and finance the emerging business on a stable basis).

6. While having allegedly raised the issue since September, 2009, the Objecting BCFC Noteholders has taken no steps to file any claims of their own (despite having the well-known capacity to do so under oppression or derivative remedies). They have declined to seek access to confidential information available to other stakeholders in the Data Room that would have enabled them to form their own views of the documents that the Monitor was investigating. They advised this Court on July 8[1] that they would be working "closely" with the Monitor to investigate their complaints and finalize the report and then did exactly nothing on that front in the ensuing two months. The transactions in the final 49th Monitor's Report – and there are only a handful of transactions, only two of which directly involve BCFC – are the same as those reviewed in the interim report. There has been no substantive change in the information – documentary gaps have been filled, ancillary questions answered, but the transactions are the same and neither then nor now are supportive of any kind of a claim in favour of BCFC.

7. Of course the Objecting BCFC Noteholders have always had the capacity as potential "complainants" under the oppression remedy to raise such issues on their own by filing a claim against any of the entities alleged to engaged in transactions that unfairly disregarded their interests. They could have filed such claims by the claims bar date in 2009 – they could have filed them later with permission of the Monitor and leave of the Court. Of course, had they done so, such claims would have long ago been heard and disposed of without impact upon the restructuring process. However, that would not have advanced their strategic goal – holding up the process to extract value – since the meritless allegations would have met the fate of all such meritless claims. The CCAA claims process, which they declined to employ, was established precisely for the purpose of resolving such matters efficiently and consistently.

8. Instead of actually pursuing substantive claims, they chose to pursue procedural ones: the Monitor is conflicted, the BCFC directors are conflicted, counsel is conflicted. At each appearance alleging that all they sought was an investigation[2]. The investigation they sought has been held and no claims have emerged to be pursued. The Objecting BCFC Noteholders cannot now turn to the Court and say "we demand another investigation".

9. The restructuring train is leaving the station and they have declined to get on board as is their right. They do not have the right to prevent the other passengers from doing so.

[1] Transcript of Proceedings, July 8, 2010, Exhibit N-9, p. 6, p. 56.
[2] Transcript of Proceedings, July 8, 2010, Exhibit N-9, p. 3-4, p. 57-59.

10. BCFC is special purpose vehicle which is a member of a large corporate group – Canadian courts have had long experience in handling complex restructurings of corporate groups without allowing hollow and baseless allegations to paralyse their progress. Large corporate groups transact with each other in the ordinary course of business. The Objecting BCFC Noteholders' attempts at hijacking the restructuring through BCFC are designed to avoid or hide their own failure to assert claims through the same process applicable to all other stakeholders through the CCAA claims process. In *Re Smurfit*[3] one of the Objecting BCFC Noteholders (Aurelius) attempted an almost identical strategy and this court should handle the matter in the same pragmatic manner.

11. As is amply revealed by the Monitor's 49th report, BCFC as an entity has engaged in almost no transactions whatsoever. It borrowed $600 million in a public offering which clearly indicated that BCFC intended to invest in Bowater Inc.'s Canadian business. From 2001 until the filing for CCAA protection in 2009, BCFC undertook no transactions beyond receiving money from its parent corporation from which it paid interest on the Notes semi-annually. The one transaction that BCFC was a party to after its initial investments in 2001 took place in 2007 when it exchanged equity in one Bowater Inc. partnership subsidiary for preferred equity in another Bowater Inc. subsidiary.

12. BCFC does not allege that it has a claim against anyone. BCFC has not filed a claim against any Petitioner in the United States or Canadian proceedings (apart from the recently filed and contested Contribution Claim against Bowater Inc. who is a s. 18.6 Petitioner in this proceeding only). BCFC has independent counsel now and has taken no steps to file a claim of any kind whatsoever nor indicated that it intends to. The CCAA Plan approved by the Petitioners' creditors (other than BCFC) provides explicitly for the compromise and release of intercompany claims.

13. The Objecting BCFC Noteholders have never attempted to articulate still less assert what such a claim might look like. Elementary legal analysis of the simple facts – and the facts themselves are simple – shows that BCFC is simply not the party who is in a position to raise claims about the transactions described in the Monitor's 49th Report. The Monitor has not recommended that such claims be pursued by any of the Petitioners to the Court (although obviously free to do so) nor has the Monitor recommended against approval of the CCAA Plan although such "claims" are compromised without attributed value. Although the Contestation seeks to imply to the contrary, it is important to note that *the*

---

[3] *Re Smurfit-Stone Container Canada*, (2009), 2009 CarswellOnt 6554, 61 C.B.R. (5th) 92 at par. 20-21 [Tab 1], *Re Smurfit-Stone Container Canada Inc.*, 2010 ONSC 50, January 28, 2010 [Tab 2], *Re Smurfit-Stone Container Canada Inc.*, 2010 ONSC 2606, May 13, 2010 [Tab 3], *Re Smurfit-Stone Container Canada Inc.*, Order dated June 3, 2010, [Tab 4], *Re Smurfit-Stone Container Canada Inc.*, Judgment from the Supreme Court of Canada rejecting the application for leave to appeal, June 10, 2010 [Tab 5].

Independent Officer and Independent Counsel of BCFC has also made no recommendation to advance any such claims either. The Independent Officer *did* cause a claim to be filed to protect the position vis-à-vis the Contribution Claim in the United States proceeding but has taken no such steps in regard to the "non-claims" which are the alleged Intercompany Claims.

14. Tellingly, Objecting BCFC Noteholders themselves have allowed the claims bar dates to come and go without seeking to preserve or advance any claim which they might have had it its own right as a creditor advancing an oppression or derivative claim - a claim which doubtless would have been contested and dealt with some time ago had they done so.

15. In the United States, the Objecting BCFC Noteholders resisted for two months the attempts to place the Independent Officer whose existence they now seek to hide behind on the basis that they were not independent enough. In Canada, they sought to replace the Monitor as compromised, while later using the Monitor's report when filed as their reason for withdrawing the motion of July 8. They advised the court at that time that they would pursue their questions regarding the intercompany claims with the Monitor but, needless to say, have taken no steps whatsoever to do so. Now they threaten to de-rail the Sanction Hearing with still another call to have yet another person "investigate" such non-claims. The Petitioners respectfully ask this Court to

III. ANALYSIS

<u>Intercompany Transactions to which BCFC was a party</u>

16. As mentioned above, the only Intercompany Transactions in which BCFC participated are i) the issuance of the BCFC Notes and the acquisition of BCFLP in 2001 (the "**2001 Transactions**") and ii) the conversion of equity interest in BCFLP and BCTC for preferred stock of BCHI (the "**2007 Conversion**"). Other than that, BCFC undertook no transactions other than receiving money from its parent corporation from which it paid interest on the BCFC Notes semi-annually.

17. The 2001 Transactions are clearly outside the applicable look-back periods under ss. 95 (3 months- 1 year) and 96 (1-5 years) of the BIA and the look-back period for preferences (60 days) under applicable provincial assignment and preference legislation (the "**Provincial Legislation**")[4]. In addition, they cannot be voided or set aside as fraudulent transfers under the Provincial Legislation given the clear and unambiguous absence of any intent to defeat, delay or prejudice the creditors of BCFC, a prerequisite under such legislation. These transactions form

[4] Given that all the entities who participated in the Intercompany Transactions were constituted under Nova Scotia or New Brunswick law, the following statutes could find application: *Assignment and Preferences Act* (Nova Scotia) [Tab 6], *Assignment and Preferences Act* (New Brunswick) [Tab 7] and the *Statute of Elizabeth* [Tab 8].

the very purpose of the issuance of the BCFC Notes, were contemplated in the Offering Circular and were disclosed in the financial disclosure documentation of BCFPI:

> *"We are an unlimited liability company organized under the laws of the Province of Nova Scotia, Canada and a wholly-owned subsidiary of Bowater. Bowater formed us for the purpose of providing financing to Bowater in Canada. We have no independent operations and prior to this offering, we had no material assets or liabilities, We will use the proceeds from the sale of the original notes to acquire 99% of Bowater Canada Finance Limited Partnership from Bowater and to capitalize our wholly-owned subsidiary, Bowater Canada Treasury Corporation, which will then acquire the remaining 1% of Bowater Canada Finance Limited Partnership from Bowater Ventures Inc., a wholly-owned subsidiary of Bowater.*
>
> **See: Offering Circular (Exhibit R-3), p.3;**
>
> **See also: Prospectus (Exhibit R-4) at par. 18.**

18. In any event, it may not be reasonably argued that any of the 2001 Transactions had the effect of creating a preference in favor of anyone or constituted a transfers at undervalue within the meaning of the BIA.

19. Similarly, the 2007 Transactions may not reasonably be voided or set aside under ss. 95 and 96 of the BIA or the Provincial Legislation as there is simply no grounds to assert the position that the value of the preferred shares in BCHI was conspicuously less than that of the equity interest in BCFLP and BCTC. In fact, after 2007 Transactions, the value of BCFC's indirect interest in BCFPI was increased by the acquisition of Mokpo, the Korean operations. This is recognized by the Monitor:

> *97. In addition, the value of BCFPI was increased through the Mokpo Transaction by the addition of Mokpo. According to the BCFPI quarterly financial statements for the three months ending March 31, 2007, Mokpo had a net book value (assets less liabilities) of approximately $200 million at the time of the Mokpo Transaction*
>
> **See: Monitor's 49th Report, par. 97.**

20. Furthermore, the 2007 Transactions involved transfers of *equity* interests in intermediate entities with no assets or operations of their own. To suggest that

claims may exist that could transform indirect equity claims in a now-insolvent BCFPI (for BCFPI is the only Canadian operating entity) into anything resembling a pari passu money claim ranking with ordinary unsecured creditors of BCFPI is absurd and, needless to say, cannot be supported under any articulated theory of law.

<u>Intercompany Transactions to which BCFC was not a party</u>

21. The Petitioners submit that any challenge of the loan to equity conversion which took place between BCFLP and BCFPI in 2005 (the "**2005 Transactions**") would serve no purpose whatsoever given the following conclusion of the Monitor:

> *103. In any event, it appears that if any such claim could be made against BCFPI as a result of the BCFLP Equity Conversion, it could only be brought by the creditors of BCFLP. BCFLP is currently owned by BCTC (1%) and BCFPI (99%). Based on the claims filed to date, there are no third party creditors of BCFLP. As such, 99% of any potential claim against BCFPI is owned by BCFPI, meaning that any potential claim and any potential recovery thereon effectively offset each other.*
>
> **See: Monitor's 49th Report, par. 103.**

22. Similarly, given the positive effect of the recapitalization transactions which took place at the BCFPI level in 2006 (the "**2006 Transactions**"), no valid grounds could conceivably be raised against to challenge these transactions. In this regard, the Monitor's conclusions are as follows:

> *81. The effect of these transactions was to strengthen BCFPI's balance sheet. For the year ended December 31, 2006, BCFPI had a net loss of $51 million (according to the audited financial statements) and a net book value (assets less liabilities) of approximately $1,477 million which was primarily due to the conversion of the $867.8 million owing to BCFLP and $564.8 million owing to BCHI (total debt of $1,432.6 million) into preferred shares as noted above.*
>
> **See: Monitor's 49th Report, par. 81.**

23. Finally, Given that ss. 95 and 96 of the BIA and the Provincial Legislation may only apply to transactions to which a bankrupt or a debtor was a party and that BCFC did not participate directly to the 2005 transactions and 2006 Transactions, the only theoretical remedy left available to the Objecting BCFC Noteholders against theses transactions would be a creditor sponsored oppression remedy under s. 5 of the Third Schedule of the *Companies Act* (Nova Scotia). This remedy is highly similar to that of Section 241 of the *Canada Business Corporations Act.*

Schedule "A" hereof provides a comparison of the two provisions. *The Objecting BCFC Noteholders have and had the standing to pursue such claims were there merit to them in their own right and have tellingly declined to do so.*

No grounds for Oppression

24. The Petitioners submit that an oppression application based on the Intercompany Transactions could only have been initiated by the holders of BCFC Notes (or the Indenture trustee), BCFC's only creditors. No other stakeholder would be in a position to allege any form of oppression resulting from the Intercompany Claims.

25. Neither the Objecting BCFC Noteholders nor the trustee under the Indenture have filed any proofs of claims against any of the Bowater Petitioners. If there were any valid claim for oppression to be advanced by creditors of BCFC, it should have been advanced by the Objecting BCFC Noteholders or the Indenture well before now pursuant to the claims process established under the CCAA. To the extent that they had any claim based on oppression against any of the other Bowater Petitioners, such claims are barred and extinguished as a result of the various orders rendered by this Court in connection with the CCAA claims process.

26. The Petitioners submit that to seek to hive off BCFC from the ABH Group restructuring in order to cause it to pursue ill-founded and barred claims which should have been made through normal channels is a subversion of the objectives of the CCAA as applied to the restructuring of corporate groups.

27. The oppression remedy, while difficult to define with precision is nevertheless not an open door to any claim of any party about anything. Reasonable expectations are the cornerstone of oppression remedy. In determining whether there is a reasonable expectation or interest to be considered, Courts look beyond legality to what is fair, given all of the interests at play. In the BCE Case, the SCC ruled as follows:

> *[56] In our view, the best approach to the interpretation of s. 241(2) is one that combines the two approaches developed in the cases. One should look first to the principles underlying the oppression remedy, and in particular the concept of reasonable expectations. If a breach of a reasonable expectation is established, one must go on to consider whether the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard" as set out in s. 241(2) of the CBCA.* "

> **See: *BCE Inc.* v. *1976 Debentureholders*, [2008] 3 S.C.R. 560, 2008 SCC 69 (the "BCE Case"), at par. 56, Petitioner's Book of Authorities, Tab 9;**

See also: ***Holders of Senior Unsecured Notes of Crystallex International Corporation* v. *Crystallex International Corporation,* 2010 ONCA 364 (Ont. CA.), Petitioner's Book of Authorities, Tab 10;**

28. On the determination of reasonable expectations, the SCC in the BCE Case ruled as follows:

> *[70] At the outset, the claimant must identify the expectations that he or she claims have been violated by the conduct at issue and establish that the expectations were reasonably held. As stated above, it may be readily inferred that a stakeholder has a reasonable expectation of fair treatment. However, oppression, as discussed, generally turns on particular expectations arising in particular situations. The question becomes whether the claimant stakeholder reasonably held the particular expectation. Evidence of an expectation may take many forms depending on the facts of the case.*
>
> *[71] It is impossible to catalogue exhaustively situations where a reasonable expectation may arise due to their fact-specific nature. A few generalizations, however, may be ventured. Actual unlawfulness is not required to invoke s. 241; the provision applies "where the impugned conduct is wrongful, even if it is not actually unlawful": [...] The remedy is focused on concepts of fairness and equity rather than on legal rights. In determining whether there is a reasonable expectation or interest to be considered, the court looks beyond legality to what is fair, given all of the interests at play: Re Keho Holdings Ltd. and Noble. It follows that not all conduct that is harmful to a stakeholder will give rise to a remedy for oppression as against the corporation.*

See: BCE Case, at par. 70, Petitioner's Book of Authorities, Tab 9;

29. Factors that emerge from the case law as useful in determining whether a reasonable expectation exists include: general commercial practice; the nature of the corporation; the relationship between the parties; past practice; steps the claimant could have taken to protect itself; representations and agreements; and the fair resolution of conflicting interests between corporate stakeholders.

See: BCE Case, at par. 72, Petitioner's Book of Authorities, Tab 9;

30. The Petitioners submit that the Objecting BCFC Noteholders, provided they even were holders of BCFC Notes at any relevant time between 2001 and 2007 time[5], can have had no reasonable expectations as to the conduct of the business and affairs of BCFC given that:

(a) There can have been no basis for reasonable expectations to have been formed with regard to BCFC itself, the size, nature and structure of which are all a function of its SPV status. BCFC is an unlimited liability company whose shareholder is guaranteeing its Note obligations. It is submitted that this must be taken into account not only in assessing the reasonable expectations of holders of BCFC Notes, who can look to the credit of BI as a source of repayment, but also in evaluating directors duties. The interests of BCFC are served and coincident with those of BI as an SPV;

(b) It is clear from the Offering Circular and the Prospectus that the Note issuance was made on the basis of BI's consolidated business and credit, not BCFC's. BCFC is not an operating company and carries on no trade. As stated in the Prospectus pursuant to which an exchange offer was made in December 2001 to holders of notes originally issued by BCFC;

See: Prospectus (Exhibit R-4) at par. 4.

See also: Offering Circular (Exhibit R-3) at par. 3.

(c) The 2001 structure and its subsequent unwind were consistent with commercial practices at the relevant times;

(d) Changes in an issuer group's corporate structure are neither unusual nor unforeseeable, just as an attempted leveraged buy-out was in BCE. The general commercial practice in connection with offerings of debt obligations in the nature of the BCFC Notes is for the rights and obligations of the parties to be set out in the four corners of their indenture. There are no covenants in the Indenture (Exhibit R-1) on BCFC restricting investments, dispositions or other actions in the nature complained of. Moreover, Section 704 provides for the filing by BI, not BCFC, of reports with the SEC of certain quarterly and annual financial information, and Article XIII provides that the Notes are fully and

[5] The Objecting BCFC Noteholders have proferred no evidence about when they acquired their notes or at what discount. Court records from the Smurfit and GM cases - each of which involved specialty finance vehicles incorporated in Nova Scotia - suggest that Aurelius has made something of a specialty in pursuing bond claims of Nova Scotia ULC finance vehicles in insolvency proceedings however. See: *Aurelius Capital Partners* v. *General Motors Corporation*, 2009 NSSC 100 [Tab 10].

unconditionally guaranteed by BI, and includes covenants on BI's business and affairs. The reasonable expectations of the parties to commercial agreements must be those reasonable expectation that find expression in the agreements negotiated by the parties;

> **See:** ***First Edmonton Place Ltd* v. *315888 Alberta Ltd.*, [1988], A.J. no. 511, appeal adjourned 1989 CanLII 222 (AB C.A.), Petitioner's Book of Authorities, Tab 11;**
> ***J.S.M. Corporation (Ontario) Ltd.* v. *The Brick Furniture Wharehouse Ltd.* 2008 ONCA 183 (Ont. CA), p. 14, Petitioner's Book of Authorities, Tab 12;**

(e) Nothing prevented that a stricter covenant package be provided for in the Indenture. In the absence thereof, holders of BCFC Notes may not reasonably allege to have had any expectations that BCFC or BI would adhere to additional restrictions to those provided for in the Indenture.

(f) The evidence before this Court confirms that the proceeds of the issuance of the BCFC Notes were used as set forth in the Offering Circular and Prospectus, namely to make investments in subsidiaries. BCFC would thus be dependent on the resources of such subsidiaries or upon BI (which guaranteed the Notes) to make payments upon the Notes. That is precisely what occurred; and

> **See: Offering Circular (Exhibit D-1) at par. 7.**
>
> **See also: Prospectus (Exhibit R-4) at par. 12 and 18.**
>
> **See also: Monitor's 49th Report, par. 101.**

(g) All of the transactions described above were in compliance with the Indenture, were entered into for *bona fide* commercial purposes on fair and reasonable terms for all of the parties thereto (none of which was insolvent at the relevant times), were in the interest of the parties thereto at the relevant times, and were consistent with the 2001 offering documents relating to the BCFC Notes. Throughout the period, BCFC relied entirely upon BI to provide the funding necessary to make payments of interest on the BCFC Notes, and the transactions strengthened BI's consolidated investments in Canada.

<u>Were reasonable expectations violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard"?</u>

31. In the BCE Case, the Court ruled as follows:

> *[91]The concepts of oppression, unfair prejudice and unfairly disregarding relevant interests are adjectival. They indicate the*

type of wrong or conduct that the oppression remedy of s. 241 of the CBCA is aimed at. However, they do not represent watertight compartments, and often overlap and intermingle.

[92]The original wrong recognized in the cases was described simply as oppression, and was generally associated with conduct that has variously been described as "burdensome, harsh and wrongful", "a visible departure from standards of fair dealing", and an "abuse of power" going to the probity of how the corporation's affairs are being conducted: see Koehnen, at p. 81. It is this wrong that gave the remedy its name, which now is generally used to cover all s. 241 claims. However, the term also operates to connote a particular type of injury within the modern rubric of oppression generally – a wrong of the most serious sort.

[93]The CBCA has added "unfair prejudice" and "unfair disregard" of interests to the original common law concept, making it clear that wrongs falling short of the harsh and abusive conduct connoted by "oppression" may fall within s. 241. "Unfair prejudice" is generally seen as involving conduct less offensive than "oppression". Examples include squeezing out a minority shareholder, failing to disclose related party transactions, changing corporate structure to drastically alter debt ratios, adopting a "poison pill" to prevent a takeover bid, paying dividends without a formal declaration, preferring some shareholders with management fees and paying directors' fees higher than the industry norm: see Koehnen, at pp. 82-83.

[94]"Unfair disregard" is viewed as the least serious of the three injuries, or wrongs, mentioned in s. 241. Examples include favouring a director by failing to properly prosecute claims, improperly reducing a shareholder's dividend, or failing to deliver property belonging to the claimant: see Koehnen, at pp. 83-84.

See: BCE Case, par. 91 and ss., Petitioner's Book of Authorities, Tab 9;

32. The Petitioners submit that even if the holders of BCFC Notes had expectations of some sort, the transactions would not result in unfair disregard, oppression or unfair prejudice. Each of them resulted in a fair and reasonable outcome, consistent with business realities and within a range of reasonableness.

WHEREFORE, MAY THIS COURT:

GRANT this *Motion for Advice and Directions* (the "**Motion**") as per its conclusions.

Montréal, September 15, 2010

Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP
Attorneys for Petitioners

SCHEDULE "A" COMPARATIVE TABLE

Companies Act (Nova Scotia)	*Canada Business Corporations Act*
5 (1) A complainant may apply to the court for an order under this Section.	*241. (1) A complainant may apply to a court for an order under this section.* *Grounds*
(2) If, upon an application under subsection (1) of this Section, the court is satisfied that in respect of a company or any of its affiliates	*(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates*
(a) any act or omission of the company or any of its affiliates effects a result;	*(a) any act or omission of the corporation or any of its affiliates effects a result,*
(b) the business or affairs of the company or any of its affiliates are or have been carried on or conducted in a manner; or	*(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or*
(c) the powers of the directors of the company or any of its affiliates are or have been exercised in a manner,	*(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner*
that it is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.	*that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.*
(3) In connection with an application under this Section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,	*(3) In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,*
(a) an order restraining the conduct complained of;	*(a) an order restraining the conduct complained of;*
(b) an order appointing a receiver or receiver-manager;	*(b) an order appointing a receiver or receiver-manager;*
(c) an order to regulate a company's affairs by amending the memorandum or articles;	*(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;*
(d) an order directing an issue or exchange of securities;	*(d) an order directing an issue or exchange of securities;*
(e) an order appointing directors in place of or in addition to all or any of the directors then in	

office;	*(e) an order appointing directors in place of or in addition to all or any of the directors then in office;*
(f) an order directing a company, subject to subsection (5) of this Section, or any other person, to purchase securities of a security holder;	*(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;*
(g) an order directing a company, subject to subsection (5) of this Section, or any other person, to pay a security holder any part of the moneys paid by him for securities;	*(g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;*
(h) an order varying or setting aside a transaction or contract to which a company is a party and compensating the company or any other party to the transaction or contract;	*(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;*
(i) an order requiring a company, within a time specified by the court, to produce to the court or an interested person financial statements in the form required under the Act or an accounting in such other form as the court may determine;	*(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;*
(j) an order compensating an aggrieved person;	*(j) an order compensating an aggrieved person;*
(k) an order directing rectification of the registers or other records of a company required under the Act;	*(k) an order directing rectification of the registers or other records of a corporation under section 243;*
(l) an order liquidating and dissolving the company;	*(l) an order liquidating and dissolving the corporation;*
(m) an order directing an investigation pursuant to Section 116 of the Act;	*(m) an order directing an investigation under Part XIX to be made; and*
(n) an order requiring the trial of any issue.	*(n) an order requiring the trial of any issue.*
(4) If an order made under this Section directs amendment of the memorandum or articles of a company, no other amendment to the memorandum or articles shall be made without the consent of the court, until a court otherwise orders.	*(4) If an order made under this section directs amendment of the articles or by-laws of a corporation,* *(a) the directors shall forthwith comply with subsection 191(4); and* *(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until a court otherwise orders.*
(5) A company shall not make a payment to a shareholder under clause (f) or (g) of subsection (3) of this Section if there are	

reasonable grounds for believing that *(a) a company is or would after that payment be unable to pay its liabilities as they become due; or* *(b) the realizable value of the company's assets would thereby be less than the aggregate of its liabilities.*	*(5) A shareholder is not entitled to dissent under section 190 if an amendment to the articles is effected under this section.* *(6) A corporation shall not make a payment to a shareholder under paragraph (3)(f) or (g) if there are reasonable grounds for believing that* *(a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or* *(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.* *(7) An applicant under this section may apply in the alternative for an order under section 214.*