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APPLICANTS	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended** **AND IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, R.S.A. 2000, c. B-9** **AND IN THE MATTER OF LEGACY COMMUNITIES INC., AIRDRIE CAPITAL CORPORATION and AIRDRIE COUNTRY ESTATES INC., RAILSIDE CAPITAL INC., RAILSIDE INDUSTRIAL PARK INC., FOUNDATION PLACE CAPITAL INC. and FOUNDATION PLACE INC.**	
DOCUMENT	**BRIEF and AUTHORITIES** **OF LEGACY COMMUNITIES INC., AIRDRIE CAPITAL CORPORATION and AIRDRIE COUNTRY ESTATES INC., RAILSIDE CAPITAL INC., RAILSIDE INDUSTRIAL PARK INC., FOUNDATION PLACE CAPITAL INC. and FOUNDATION PLACE INC.**	

For the Special Application to be heard before Madam Justice B.E.C. Romaine
May 10, 2012 at 2:00 PM

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INTRODUCTION

1. The Unsecured Creditors Committee ("UCC") seeks a change in management and the appointment of a Chief Restructuring Officer ("CRO") at a very late stage in these CCAA proceedings, in particular with respect to Legacy Communities Inc. ("Legacy"), Airdrie Capital Corporation and Airdrie Country Estates Inc. (collectively, "Airdrie").

2. All factors weigh against the appointment of a CRO at this late stage of the proceedings.

    a) First, there is significant opposition to a CRO among the economic stakeholders, being primarily the investors in Legacy, Airdrie, Railside Capital Inc., Railside Industrial Park (collectively, "Railside"), Foundation Place Capital Inc. and Foundation Place Inc. (collectively, "Foundation Place") for such an appointment.

    b) Second, the UCC is not properly constituted and as such has no mandate to make this application on behalf of the totality of investors. In particular:

        i) a seat remains unfilled on the UCC respecting Legacy;

        ii) there is no representation on the UCC respecting either Railside or Foundation Place and yet the UCC seeks a CRO in connection with these entities;

        iii) the UCC consists of unelected charter members whose agenda has focused on the appointment of a CRO for several weeks notwithstanding opposition by a significant body of investors;

        iv) the process of filling seats on the UCC has been unfair and has lacked transparency, in that, a significant investor has been improperly denied a seat on the UCC; and

        v) The UCC denied investors access to balanced information and the opportunity to hear all sides prior to soliciting proxy forms in favour of a CRO.

c) Third, timing and cost concerns militate against the appointment of a CRO. In particular, Legacy and Airdrie are within 3 to 4 weeks of presenting plans of compromise or arrangement to their creditors. The appointment of a CRO in these circumstances can only increase professional costs, already significant, cause potential material delays and thereby diminish recoveries for the investors.

d) Fourth, the candidate chosen by the UCC is unsuitable as he has no prior experience acting as a CRO in an insolvency proceeding, and there is at least the appearance of a "conflict" based on such individual's previous inquiries to purchase the assets of the Applicants on a discounted basis.

3. The Applicants submit that in circumstances where their primary focus has been on the development of restructuring plans and all matters incidental thereto in order to maximize recoveries for the benefit of the stakeholders, they have at the same time been making significant efforts to satisfy the ongoing requests of the UCC for information and have even adopted several other more accommodating means to engage the UCC in its restructuring endeavours.

4. As part of its application the UCC seeks to effectively displace current management, in particular Ronald Aitkens, with a CRO. In fact, the restructuring plans being prepared by the Applicants contemplate a new board of directors selected by the stakeholders which would, as part of the implementation of the plan, replace current management. Further, Ronald Aitkens, who the UCC has objected to in a management role, has expressly stated he does not intend to seek a management position post CCAA. As such, the current application of the UCC and the substantial costs associated therewith, is unnecessary. The UCC with all of the avenues for input into the restructuring plan that they currently have available, should allow the Applicants to exit CCAA according to the proposed schedule.

5. The UCC Application should be denied in its entirety.

FACTS

6. On December 21, 2011, Legacy and Airdrie obtained protection from their creditors under the *Companies' Creditors Arrangement Act* (the "CCAA") pursuant to an order of this Honourable Court.

7. On March 21, 2012, under these same proceedings, Railside and Foundation Place were also granted protection pursuant the CCAA (both, the "Initial Orders").[1] Legacy, Airdrie, Railside and Foundation Place are herein collectively referred to as the "Applicants."

8. Ernst & Young Inc. was appointed monitor of the Applicants pursuant to the Initial Orders (the "Monitor").

9. This Honourable Court further granted an Order on March 21, 2012 appointing Ernst & Young Inc. as inspector (the "Inspector") of certain related entities, being 1252064 Alberta Ltd. ("125"), 1330075 Alberta Ltd. ("133") and Harvest Capital Management Inc. ("HCMI"). Ronald Aitkens is a director of each of 125, 133 and HCMI. The Inspector now has full access to review the books and records of these entities as required.[2] Ronald Aitkens is also the sole director of Airdrie and a director of Legacy, and has been a director of these corporations since their inception in 2005 and 2006. He is also the sole director of each of Railside and Foundation Place and has been a director of these corporations since their inception in 2007 and 2008.[3]

10. This Honourable Court granted an Order on January 19, 2012, as amended, (the "UCC Orders") creating an UCC in these proceedings.[4] The UCC now seeks the removal of Ronald Aitkens as a director of the Applicants and the appointment of a CRO, some 3 to 4 weeks prior to the anticipated presentation of formal plans of arrangement or compromise to the Legacy and Airdrie creditors.

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[1] R.S.C. 1985 c. C-36, as amended; Third Report of The Monitor, filed April 16, 2012, paras. 1 and 2 ("Monitor's Third Report").
[2] Monitor's Third Report, paras. 2 and 6.
[3] Affidavit of Ronald Aitkens, sworn April 16, 2012, para. 2 (the "April 16 Aitkens Affidavit").
[4] Monitor's Third Report, para. 5.

ISSUES

11. The issue in the UCC's Application is whether it is appropriate in the circumstances to appoint a CRO in these CCAA proceedings and remove Ronald Aitkens who has been a director since the inception of the Applicants, and as such has the requisite knowledge and understanding of the business affairs to assist in facilitating in the restructuring plans.

ARGUMENT

A. All Factors Weigh Against the Appointment of a CRO

12. The UCC admits in the Brown Affidavit[5] that at all 3 meetings held by the UCC, through the UCC website and by e-mail, the investors have queried the rationale for, and expressed concerns about, the appointment of a CRO. As admitted by the UCC in the Brown Affidavit, these concerns relate to the extra cost, the identity, role and duties of the CRO, the transparency of the process for selecting the CRO, wishes to hear from the debtors before signing UCC's proxy forms, and the concern relating to displacing current management given its experience with the debtors' assets. Given these concerns, it is apparent that there is no clear mandate from investors for the appointment of a CRO.

(a) Significant Opposition among Investors for CRO

13. The UCC alleges that it has overwhelming support of investors for the appointment of a CRO. The Applicants submit that the evidence presented by both the UCC and the Applicants strongly demonstrates that there is limited support among the totality of investors. In fact, a large number of the investors representing significant investment dollars have expressed their opposition, in writing, to the appointment of a CRO. Although the Applicants' efforts have been primarily focussed on a restructuring plan with all that entails, nonetheless, in the limited time available, they have received the

[5] Affidavit of Kyle Brown, sworn April 11, 2012, para. 31 (the "April 11 Brown Affidavit").

significant opposition to a CRO referred to in the affidavit of Ronald Aitkens sworn May 7, 2012 (the "May 7 Aitkens Affidavit")[6].

14. In terms of the number of investors and the relative dollar value of investment, the evidence presented in the Affidavit of Kyle Brown sworn April 11, 2012 (the "April 11 Brown Affidavit") misrepresents the extent of investor support for a CRO[7] when compared with the total number of investors and the total amount of investment in all of Legacy, Airdrie, Railside and Foundation Place.[8] The proxies presented by the UCC as evidence of investor support for a CRO in fact relate to a relatively small sample group[9] and Mr. Brown on behalf of the UCC admits this fact under cross examination.[10] Even with the more recent solicitation efforts undertaken by the UCC since that cross-examination, investor support remains a relatively small sample of the total investors.

15. The Supplemental Affidavit of May 7 Aitkens Affidavit provides evidence in Table 1 at paragraph 6, that 27.6% of investment dollars in these projects are opposed to a CRO. This is in contrast to the 22.4% of investment dollars in these projects which have indicated support for a CRO as indicated in Exhibit "A" to the Affidavit of Kyle Brown sworn May 7, 2012 (the "May 7 Brown Affidavit").

16. Having regard to the sheer magnitude of investor opposition to a CRO, namely, 280 investors representing over \$8.6 million of investment in Legacy, 148 investors representing over \$3.7 million in Airdrie, 332 investors representing over \$10.2 million of investment in Railside and 103 investors representing over \$2.9 million of investment in Foundation Place, it is submitted that it is not appropriate in these circumstances for the Court to disregard the express wishes of such a significant body of investors.[11]

17. In addition, another 23 investors out of those purported by the UCC to be in favour of a CRO, have in writing, rescinded that support upon receiving more fulsome information.[12]

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[6] May 7 Aitkens Affidavit, para. 6.
[7] April 11 Brown Affidavit, para. 35.
[8] April 16 Aitkens Affidavit, para. 8.
[9] April 16 Aitkens Affidavit, para. 16.
[10] Transcript of Oral Questioning of Kyle Brown on Affidavit sworn April 11, 2012, dated April 23, 2012 ("Brown Cross Examination") Page 9, lines 24 to 27, Page 10, lines 1 to 27; Page 11; Page 12; and Page 13, Line 1 to 10.
[11] May 7 Aitkens Affidavit, para. 6.
[12] May 7 Aitkens Affidavit, para. 8.

This would effectively reduce the support suggested by the UCC in the May 7 Brown Affidavit.

18. These numbers of opposition are significant considering that this information was accumulated over a very short period of time, in contrast to the UCC which admitted on April 23, 2012 that it, at that time, had been actively soliciting investor support for the appointment of a CRO for a period exceeding 5 weeks.[13]

19. The UCC has admitted the very limited investors' support for a CRO under cross examination in the following excerpt of the Brown Cross Examination.

> A. We -- the UCC really feels the appointment of a CRO is the best thing for all the investors.
>
> Q. So is it just that you're a particularly smart person or do you recognize that these other investors have an interest in the questions that affect these two projects?
>
> A. Of course they have an interest.
>
> Q. So if they're not interested in the appointment of a CRO we talked earlier, that's a legitimate point of view, isn't it?
>
> A. Absolutely.
>
> Q. And in the totality of investors, sir, you don't have very many of the total number of investors that support a CRO, do you?
>
> A. Nope, we don't.
>
> Q. And you're aware that a number of those that did support the appointment of a CRO at one time have since rescinded that support, correct?
>
> A. Twenty.

[13] Brown Cross Examination, Page 16, lines 9 to 15; Page 30, lines 10 to 20.

Q. Well, I don't know. Well, that's how many we know. Maybe it's more. You haven't asked, have you?

A. Nope, I haven't.

Q. Because you told me it doesn't matter, as far as you're concerned; is that right?

A. No, I never -- I said it matters. It's disappointing I said, I think, were my exact words.

Q. It's disappointing to your view of whether a CRO is necessary, is that it?

A. No, it's disappointing that, I don't know, people have rescinded their -- their proxy for a CRO.

Q. Well, it would be an indication that they don't want a CRO, correct?

A. Yes.[14]

...

Q. And the number that support a CRO is extremely limited. It's not overwhelming, correct? Yes or no?

A. Yes.

Q. All right. Thank you. So when you're seeking a CRO, sir, and when you're aware of the opposition to a CRO that's greater in number, you're really acting contrary to the interests of those investors that don't want a CRO, aren't you?

A. Yes.[15]

[14] Brown Cross Examination, Page 34, lines 11 to 27; Page 35, lines 1 to 20.
[15] Brown Cross Examination, Page 36, lines 6 to 27; Page 37, lines 1 to 3.

20. The Applicants respectfully submit that given the magnitude of investor opposition, both in number and in investment value, the Court should not exercise its discretion to appoint a CRO in these circumstances.

(b) Application to Appoint a CRO is *Ultra Vires* a Partially Constituted and Unelected UCC

21. The purpose and intent of the UCC is to fairly and transparently represent the interests of all unsecured creditors, which in the present circumstances is primarily the investors. The UCC concedes that the current membership includes 3 unelected charter members who may or may not represent the wishes of the general body of investors. Further, the UCC concedes that one seat designated for Legacy remains vacant following a resignation.[16] More significantly, Mr. Brown acknowledges on cross-examination that the UCC contains no investors from either Railside or Foundation Place.

22. Although the UCC has in the past day made an application to fill these vacant seats, it has despite the vacancies, brought forward an application initially filed several weeks ago, to appoint a CRO in respect of Railside and Foundation Place. The UCC, as currently constituted, clearly does not represent the interests of the investors of Railside and Foundation Place. The UCC admits under cross examination that no current member of the UCC has any interest in Railside and Foundation Place.[17] Without a Court order appointing UCC members in respect of Railside or Foundation Place, there is no way in which a constituted committee could meet and properly consider whether a CRO is appropriate in the circumstances. Accordingly, it is completely *ultra vires* the UCC to impose a CRO on Railside and Foundation Place without representation of those investors on the Committee and without their input or the input of their majority interest in such decision.[18] Put simply, the UCC has no mandate whatsoever to seek a CRO respecting Railside and Foundation Place.

23. The Monitor raised this concern in its Third Report[19] where it stated that, "the UCC is making an application for a CRO of Railside and Foundation Place without any input

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[16] April 11 Brown Affidavit, para.
[17] April 11 Brown Affidavit, para. 4; Brown Cross Examination, Page 4, lines 16 to 27; Page 5; Page 6, lines 1 to 19.
[18] Brown Cross Examination, Page 7, lines 12 to 27; Page 8, lines 1 to 20.
[19] Monitor's Third Report, paras. 73, 74 and 76.

from the respective representatives from those two entities." The Monitor, in order to address this concern, suggested in January 2012 that UCC members who did not have economic interests in certain projects should not be allowed to have any vote on decisions regarding those projects. In *AbitibiBowater Inc., (Re)*,[20] Gascon J.C.S rejected the objection of the *Ad hoc* unsecured noteholders committee (the "Bondholders") as well as the Official Committee of Unsecured Creditors set up in the corresponding U.S. proceedings, in part because these creditors had no economic interest in the assets and resulting proceeds sought to be distributed.

24. The Applicants submit that the public interest mandate of the CCAA demands that the UCC cannot advance the personal views of its members or a particular group of investors and simply ignore the views of a significant group of opposing investors. To do so evidences a lack of good faith, and does not portray a transparent and even-handed UCC.

25. Moreover, as indicated in the May 7 Aitkens Affidavit, the UCC has been unfairly selective in its membership process based on whether an investor supports the UCC's pre-disposed views, in particular vis a vis the appointment of a CRO. Paragraphs 13 to 16 of the May 7 Aitkens Affidavit refers to Eric Everitt, an individual who clearly qualifies for a seat on the UCC as the largest investor of Railside and a significant investor in Airdrie and Foundation Place. The Applicants submit that Mr. Everitt was denied membership on the UCC because he opposed the appointment of a CRO.

26. The UCC has stated that it has refused Mr. Everitt's membership on the UCC due to the fact that he is non-arm's length by virtue of having been a sales agent for Foundation Capital Inc. ("Foundation"). It is respectfully submitted that this is disingenuous, having regard to the fact that Nicole Shurko, one of the unelected charter members on the UCC, was similarly a sales agent for Foundation.

27. It is submitted that the UCC has been neither fair nor transparent in considering the interests of all investors with respect to the issue of a CRO. It is important to bear in mind that the initiative to appoint a CRO dates back several weeks. In the meantime, despite the fact that the UCC did not have full representation from Legacy, had three unelected charter members, and had no representation whatsoever from Railside or

[20] 2009 QCCS 6461at paras. 73 to 74.

Foundation Place investors, and despite the fact that the UCC had become increasingly aware of significant investor opposition, it remained steadfast in its earlier established agenda and has refused to compromise on the question of a CRO.

(c) Proximity to Plans of Arrangement: Delays and Costs

28. Subsequent to obtaining the Initial Orders, the Applicants in their restructuring efforts, engaged the services of real estate professionals, David Murphy and Noel Winter (the "Consultants") who continue to assist the Applicants in formulating sale and development strategies for the properties with a view to maximizing value for all stakeholders.[21] The Applicants submit that they have all the professionals needed to achieve the objective of the CCAA and complete a viable restructuring. The UCC admits that these are very experienced restructuring professionals.[22]

29. The Applicants, in consultation with all counsel, the Monitor and the UCC, have developed a proposed timeline for the exit of Legacy and Airdrie from CCAA. The details are set out in the April 13 Aitkens Legacy and Airdrie Affidavit[23] and contemplate restructuring plans going to creditors of Legacy and Airdrie with an exit from CCAA within approximately 4 weeks. As evidenced by the Monitor's Report, any change in management would require a detailed transition plan that would need to be agreed to by both sides to allow for an orderly and efficient change over.[24] Needless to say, such transition plan will require additional time to prepare and be agreed upon before a CRO can even get to work. Realistically, the timeline cannot be met.

30. Further, it is clear that mounting costs, particularly professional fees, are a significant concern to all parties including the investors. The reality is that it is near impossible for a newly installed CRO with limited or no knowledge of the business affairs of the Applicants to be able to meet the established Legacy and Airdrie exit timelines. If the

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[21] Affidavit of Ronald Aitkens, sworn April 13, 2012, para. 3 (the "April 13 Aitkens Railside and Foundation Affidavit") and Affidavit of Ronald Aitkens, sworn April 13, 2012, para. 3 (the "April 13 Aitkens Legacy and Airdrie Affidavit").

[22] Transcript of Oral Questioning of Ronald Aitkens on Affidavit sworn April 16, 2012, dated April 24, 2012 ("Aitkens Cross Examination") Page 62, lines 3 to 9.

[23] April 13 Aitkens Legacy and Airdrie Affidavit, para. 26.

[24] Monitor's Third Report, para. 75.

proceeding is further extended, the cost of professional fees would be prohibitive.[25] Professional fees by a wide margin represent the most significant operating cost currently challenging Legacy and Airdrie.[26] These mounting costs can only come from one source and effectively reduce recoveries for investors.

31. With Legacy and Airdrie so close to presenting a plan to the creditors, the Applicants submit that there is no value in appointing a CRO at this late stage in the proceeding. Rather, such an appointment would only result in additional delay and cost that the Applicants can ill afford.[27] Current management is doing all in its power to facilitate the completion of a cost effective and reasonable plan of arrangement and compromise that is in the best interests of all of the investors and not just those represented by the UCC.

(d) Unsuitable Candidate for CRO

32. The UCC admits under cross examination that the candidate it has chosen as CRO has no experience as a CRO at all and no experience in CCAA or other insolvency proceedings.[28] Further, the proposed CRO candidate has limited or no knowledge of the history of the Applicants and the intricacies of their business affairs leading up to the plans of arrangement currently being finalized for presentation to creditors within the next month.[29]

33. Further, the Applicants have concerns about the objectivity of the proposed CRO who had previously contacted the Applicants and attended at the Applicants' offices completely outside the context of a potential CRO position and rather, for the stated purpose of attempting to acquire properties of the Applicants at advantageous prices in view of the financial challenges facing the Applicants.[30]

34. A cornerstone of the CCAA is fairness and transparency. The UCC acknowledges in its own brief at paragraph 73 the fundamental requirement that a CRO be independent,

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[25] Aitkens Cross Examination, Page 57, lines 1 to 18; Page 60, lines 7 to 27.
[26] April 16 Aitkens Affidavit, para. 5.
[27] April 16 Aitkens Affidavit, para. 5.
[28] Brown Cross Examination, Pages 61 to 63.
[29] April 16 Aitkens Affidavit, para. 36.
[30] April 16 Aitkens Affidavit, para. 37; Aitkens Cross Examination, Page 37, lines 8 to 18.

impartial and unfettered without any conflicts of influence. With respect, the CRO candidate proposed does not meet this test.

(e) UCC's Process Respecting CRO Flawed

35. The Applicants submit that the process adopted by the UCC in the decision to appoint a CRO is fatally flawed and lacks transparency. The UCC denied the Applicants' requests to attend various investor meetings the purpose of which was to solicit support by the UCC for a CRO.[31] Further, the UCC threatened to apply for an injunction to prevent the Applicants from holding their own investor meetings, to prohibit the Applicants from providing the investors a more balanced view of events, the status the CCAA proceeding and the proposed restructuring plans.[32]

36. The UCC denied a majority of the investors adequate opportunity to obtain fulsome information and to review the current state of the entity in which they have an interest so as to enable them to make informed decisions on the appointment of a CRO. By contrast, the UCC was invited and allowed to freely engage in discussions with the investors in each of the investor meetings hosted by management,.[33] Approximately 23 investors rescinded their previous support for a CRO after attending management held investor meetings, in which the investors obtained full information and had an opportunity to more carefully consider what was in their own interest.[34]

37. It is respectfully submitted that the unbalanced process undertaken by the UCC or certain of its members was designed to promote their personal views regarding the necessity of a CRO rather than to canvass the interests of the majority of investors.[35] The pursuit by the current UCC of this agenda is further evidenced by its refusal to accept Eric Everitt as a member of the UCC, given his opposition to a CRO, despite his significant investment.

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[31] April 11 Brown Affidavit, paras. 23 and 24; Brown Cross Examination, Page 20, lines 21 to 27, Page 21, lines 1 to 4; Page 23, lines 11 to 27, Pages 24 and 25; Aitkens Cross Examination, Page 7, lines 13 to 16.
[32] April 16 Aitkens Affidavit, para.23; Aitkens Cross Examination, Page 8, lines 17 to 27.
[33] April 16 Aitkens Affidavit, para. 11; Brown Cross Examination, Page 26, lines 8 to 23.
[34] April 16 Aitkens Affidavit, para.18.
[35] April 16 Aitkens Affidavit, para.30.

The Applicants submit that such process is inconsistent with the guiding principles of fairness that are fundamental to CCAA proceedings.[36]

(f) Court's Scrutiny of Creditor Committees

38. In considering the appropriate exercise of power by a creditors' committee, it is submitted that the Court should bear in mind that there is no statutory basis under the CCAA and the BIA for a creditors committee. Thus, when a Court does conclude that a creditors committee is appropriate, it must carefully scrutinize its actions in order to ensure that they fairly represent the interests of its constituents. For example, even under U.S. Bankruptcy Code, where creditors' committees are authorized pursuant to the statutory regime, U.S. Courts have recognized the need to ensure that creditors' committees act in the interests of all the unsecured creditors they represent.[37] This concern is made greater by the fact that creditors committees with attendant professionals add significant costs which are borne directly by these same constituents.

39. In the present circumstances, with the magnitude of opposition apparent on the evidence, and the question as to the fairness of the process undertaken by this UCC to solicit CRO support, it is submitted that the Court should exercise its discretion to decline the current UCC its application for a CRO and its attempt effectively seize control of the CCAA proceedings when a plan is imminent.

40. The Applicants submit that these factors weighed together tilt the scale against the appointment of a CRO at this late stage of this CCAA proceeding.

B. Reasonable Information Requests of the UCC Have Been Met

41. The UCC alleges, as one of its grounds for a CRO, that management is unresponsive to information requests of the UCC in a timely fashion. The Applicants acknowledge that providing information to the stakeholders is a necessary part of the CCAA proceedings and submit that they have endeavoured to respond to all reasonable requests in a timely fashion. However, it must at the same time be recognized that the primary focus of the Applicants has been on the preparation, and more recently the finalization of a

[36] *Ivaco Inc. (Re)*, [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (Ont. S.C.J.).
[37] *Re Bohack Corp*, 607 F (2d) 258 at 262 (USCA 2d Cir 1979).

restructuring plan which seeks to maximize recoveries for the totality of its creditors. This is an intense and time consuming process and therefore it is necessary for the Applicants to balance the ongoing information requests with its focus on the restructuring plan.

42. Notwithstanding the focus on finalizing the restructuring plans, the Applicants have every intention to satisfy reasonable requests for information from the UCC.[38] Accordingly, although the Applicants have been extremely busy and under a tight schedule trying to finalize development strategies for Airdrie and Legacy, consulting with professionals and the Monitor, assembling information, examining exit financing options, meeting with and addressing the concerns of investors, considering an appropriate claims procedure under the circumstances, all with a view to presenting plans to creditors of Legacy and Airdrie within the next few weeks,[39] the Applicants have attempted to provide the information requested, and have indeed met most of the requests of the UCC.

43. Further, with much of their effort focused on advancing the restructuring plans, the Applicants have been doing their best, in the circumstances, to keep the UCC apprised of all material developments through even more accommodating means. The UCC admits this fact under cross examination.[40] For example, the Applicants have been holding weekly meetings with the Monitor to which the UCC have been invited and have been attending.[41] The Applicants have held a number of other meetings with the Monitor and the UCC including those of March 28, 2012, April 5, 2012, April 10, 2012 and April 13, 2012 during which the UCC was apprised of all key developments regarding the restructuring. The Applicants have given the UCC and its counsel direct opportunities to provide input on various details relative to the proposed restructuring plans, and direct involvement in drafting a claims procedure with respect to Legacy and Airdrie. The Applicants have given the UCC several invitations to attend investor meetings conducted by management for which the most up to date information available was provided to the UCC, including the proposed presentations, prior to those meetings.[42] Current

[38] April 16 Aitkens Affidavit, para. 20(b) and 21.
[39] April 16 Aitkens Affidavit, para. 20.
[40] Brown Cross Examination, Page 51, lines 15 to 27; Page 52, lines 1 to 7.
[41] Monitor's Third Report, para. 26.
[42] April 16 Aitkens Affidavit, para. 20(a) to (f); Brown Cross Examination, Page 54, lines 13 to 27; Page 55, lines 1 to 13.

management had also reached out to a member of the UCC by phone and e-mail since January 2012 inviting the UCC to the Applicants' regular meetings and development meetings.[43]

44. In addition, the Applicants had, going back to February, 2012, invited the UCC to attend a data room to enable the UCC to review and obtain all pertinent information that it could reasonably require. The UCC chose not to attend at such data room until the past week.

45. One of the complaints of the UCC has been that the Applicants have not provided the UCC with email addresses of all investors. The UCC has been repeatedly advised that, as a result of privacy concerns expressed by investors, the Applicants would require consents of the investors to provide such email addresses. Further, the Monitor has offered to contact on behalf of the UCC all investors to seek such consents. To the Applicants' knowledge, as of April 23, 2012, the UCC has not asked the Monitor to seek the required consents.[44]

46. The Applicants submit that they have been working, and continue to work, transparently, in good faith with their advisor and consultants, in cooperation with the Monitor and the UCC, to restructure their affairs in a manner which will maximize value for all stakeholders. In the midst of this, they have done, and continue to do, their best to accommodate all reasonable information requests of the UCC.

C. Rationale for CRO and Removal of Director

47. There is no law directly on point with respect to the test that should be applied in considering an application by a UCC or other interested party to appoint a CRO.

48. The CCAA, however, does prescribe a test for the removal of a director in a CCAA proceeding in section 11.5 of the Act. That section requires the Court to be satisfied that the director to be removed is "unreasonably impairing or is likely to unreasonably impair the possibility of a viable compromise or arrangement being made in respect of the company or is likely to act inappropriately as a director in the circumstances."[45]

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[43] Aitkens Cross Examination, Page 48, lines 11 to 15; Page 49, lines 9 to 16.
[44] Brown Cross Examination, Page 56, lines 11 to 27; Page 57, line 1.
[45] *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, section 11.5.

49. It is submitted that analogies can be drawn between the test outlined in section 11.5 of the Act and the onus that must be met by the UCC in seeking a CRO. First of all, it is clear that the onus in this application is on the UCC. Secondly, it is submitted that the evidence does not meet the test described above.

50. Further, Courts have appointed CROs in circumstances where there exists evidence of unfairness or perceptions of bias in favour of certain creditors in the restructuring efforts.[46] Again, there is no evidence of unfairness or bias in the present circumstances.

51. Despite the UCC's complaints about management and Mr. Aitkens in particular, many of which are focussed on proceedings unrelated to the CCAA and rely on unsworn allegations in past proceedings since resolved, there is no suggestion that these parties are in any way impairing the completion of the restructuring plans or are acting in an unfair or biased manner. Quite the contrary, the evidence in Mr. Aitkens' affidavits speaks to the efforts to maximize recoveries for all investors in a timely fashion, and in fact specifically projects that plans will be presented to investors in the immediate future.

52. At its heart, the CCAA is focussed on facilitating the completion of restructuring plans that are to the benefit of the stakeholders. It is essential in these proceedings that management act in a manner which promotes that result. The preponderance of the evidence demonstrates that that is precisely what management is doing in the present circumstances.

53. Given its temporary nature, tight timelines and main objectives, the CCAA proceeding is not the proper forum to initiate a change in management resulting from alleged past conducts in unrelated proceedings. It is submitted that this Court should allow the Applicants to complete the current restructuring plans and exit CCAA. Mr. Aitkens has expressly stated that he does not intend to take a management role in any of the Applicants following the implementation of the plans of arrangement.[47] As noted in the April 13 Aitkens Affidavit with respect to Legacy and Airdrie,[48] one of the structural changes proposed for each of the Applicants as part of the plan of arrangement is to make

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[46] *843504 Alberta Ltd. (Re)* 2003 ABQB 1015, 30 Alta. L.R. (4th) 91, 351 A.R. 222 paras. 18-20; *Ivaco Inc. (Re)*, *supra* note 36.

[47] April 16 Aitkens Affidavit, para. 32.

[48] April 13 Aitkens Legacy and Airdrie Affidavit, para. 19.

governance more direct and transparent and to allow the creditors (who will also be the shareholders) of each Applicant to elect their own board of directors.[49]

54. It is worth noting that some or all of the allegations are made by the UCC to discredit Mr. Aitkens and/or to ground the pursuit of the personal views of UCC members against the views of majority of investors opposed to a CRO.[50] For example, contrary to its allegations, Mr. Brown of the UCC admitted under cross examination that there was no "lift" and no increased purchase price with respect to the Legacy property.[51] For the other Applicants, the UCC admits that the original purchase prices and the purchase prices paid by the investment entities were fully disclosed to investors in the Offering Memoranda prior to their individual investments.[52] Contrary to its allegations, the UCC also admits via Mr. Brown that it repeated unsworn allegations regarding the Neo Exploration Inc. claim (the "Neo Claim"), without any investigation as to their merit and without any consideration of the fact that the Neo Claim a response to a lawsuit already commenced by Foundation Resources Partnership as a result of Neo's breach of a farmout agreement. Mr. Brown further conceded that neither he nor the UCC had any knowledge that the Neo Claim had been settled. In any event, and most fundamentally, it was admitted that the Neo Claim had no relevance to the CCAA proceedings.[53]

55. With respect to funds owed to Legacy by 125, as the UCC is well aware, current management has retained its own counsel and has been working diligently with both its counsel and the Monitor to put in place an acceptable repayment plan as part of the plan of arrangement.

56. The Monitor attests in its Third Report that the Applicants and current management are acting in good faith and with due diligence in the CCAA proceedings.[54] This conclusion by the Monitor is in direct contradiction to the onus that the UCC must meet to succeed, that is that (a) management is "unreasonably impairing" the possibility of a compromise, and (b) management is acting in a biased or unfair manner towards certain creditors. The

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[49] April 13 Aitkens Legacy and Airdrie Affidavit, para. 19 (a) to (c).
[50] Brown Cross Examination, Page 46; Page 47, lines 1 to 10; April 16 Aitkens Affidavit, paras. 28 and 30.
[51] Brown Cross Examination, Page 38, lines 7 to 12.
[52] Brown Cross Examination, Page 38, lines 13 to 27; Page 39, lines 1 to 22; April 16 Aitkens Affidavit, para. 27.
[53] Brown Cross Examination, Page 39, lines 23 to 27; Page 41, lines 11 to 27; and Pages 42 to 45; April 16 Aitkens Affidavit, para. 29.
[54] Monitor's Third Report, para. 103.

Applicants submit that the present circumstances do not warrant the appointment of a CRO and the UCC's request for a CRO at this very late stage of the proceedings should be denied.

RELIEF SOUGHT

57. For these reasons, the Applicants respectfully request that this Honourable Court dismiss the Application of the UCC appointing NAVIS Solutions Inc. and its president, Keith Prosser, as CRO of the Applicants and removing Ron Aitkens as a director of the Applicants.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 7th day of May, 2012.

BORDEN LADNER GERVAIS LLP

Per: ______________________

For: Patrick T. McCarthy, Q.C.
John L. Ircandia, Q.C.
Counsel for the Applicants

LIST OF AUTHORITIES

Case Name:
AbitibiBowater inc. (Arrangement relatif à)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF: ABITIBIBOWATER INC.
and
ABITIBI-CONSOLIDATED INC., BOWATER CANADIAN HOLDINGS INC., The other Petitioners listed on Schedules "A", "B" and "C",
Petitioners
and
ERNST & YOUNG INC., Monitor

[2009] Q.J. No. 19125

2009 QCCS 6461

No.: 500-11-036133-094

Quebec Superior Court
District of Montreal

The Honourable Clément Gascon, J.S.C.

Heard: November 9, 2009.
Judgment: November 16, 2009.

(109 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act -- Compromises and arrangements -- Sanction by court -- Motion for the approval of a second DIP financing and for distribution of certain proceeds of the sale of Manicouagan Power Company to the Senior Secured Noteholders -- The compromise negotiated in this respect, albeit imperfect, remained the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners -- Motion granted.

Motion for the approval of a second DIP financing and for distribution of certain proceeds of the sale of Manicouagan Power Company (MPCo) to the Senior Secured Noteholders (SSNs)-- The only two secured creditor groups of the Abitibi Petitioners did not contest the motion -- However, while not contesting the request for approval of the second DIP financing, the Bondholders contended that the CDN$200 million immediate proposed distribution to the SSNs was inappropriate and uncalled for at this time -- The MPCo sale transaction was central to the orders sought in the DIP Motion -- HELD: Motion granted -- The second DIP financing should be approved on the amended terms agreed upon by the numerous parties involved -- Based on the compromise reached with the Term Lenders, access to the funds was to be progressive and subject to control -- As well, the use of the funds was subject to considerable safeguards as to the interests of all stakeholders -- The Court was satisfied that, in requesting the approval of the DIP Facility, management was doing so with a broad measure of support and the confidence of its major creditor constituencies -- Similarly to the IP Facility, the proposed distribution should be authorized -- The access to additional liquidity was possible because of the corresponding distribution to the SSNs -- The compromise negotiated in this respect, albeit imperfect, remained the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners -- It was fair to say that the SSNs were not depriving the Abitibi Petitioners of liquidity -- Further, the Bondholders had no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.2, s. 11.2(4)

Counsel:

Me Sean Dunphy, Me Joseph Reynaud, Attorneys for Petitioners.

Me Robert Thornton, Attorney for the Monitor.

Me Jason Dolman, Attorney for the Monitor.

Me Alain Riendeau, Attorney for Wells Fargo Bank, N.A., Administrative Agent under the Credit and Guarantee Agreement Dated April 1, 2008.

Me Marc Duchesne, Attorney for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders.

Me Frederick L. Myers, Co-Counsel for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates.

[Editor's note: A Corrected Judgment was released by the Court on November 23, 2009. The corrections have been made to the text and the text of the Corrected Judgment is appended to this document].

JUDGMENT

ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING AND FOR DISTRIBUTION OF

CERTAIN PROCEEDS OF THE MPCo SALE TRANSACTION TO THE TRUSTEE FOR THE SENIOR SECURED NOTES (#312)

INTRODUCTION

1 [1] In the context of their *CCAA*[1] restructuring, the Abitibi Petitioners[2] present a Motion[3] for 1) the approval of a second DIP financing and 2) the distribution of certain proceeds of the Manicouagan Power Company (**MPCo**) sale transaction to the Senior Secured Noteholders **("SSNs")**.

2 [2] More particularly, the Abitibi Petitioners seek:

> [1] Orders authorizing Abitibi Consolidated Inc. (**ACI**) and Abitibi Consolidated Company of Canada Inc. (**ACCC**) to enter into a Loan Agreement (the **ULC DIP Agreement**) with 3239432 Nova Scotia Company (**ULC**), as lender, providing for a <u>CDN$230 million super-priority secured debtor in possession credit facility</u> (the **ULC DIP Facility**).
>
> The ULC DIP Facility is to be funded from the ULC reserve of approximately CDN$282.3 million (the **ULC Reserve**), with terms that will be substantially in the form of the term sheet (the **ULC DIP Term Sheet**) attached to the ULC DIP Motion;
>
> [2] Orders authorizing the distribution to the SSNs <u>of up to CDN$200 million</u> upon completion of the sale of ACCC's 60% interest in MPCo and Court approval of the ULC DIP Agreement.
>
> The distribution is to be paid from the net proceeds of the MPCo sale transaction after the payments, holdbacks, reserves and deductions provided for in the Implementation Agreement agreed upon in regard to that transaction; and
>
> [3] Orders amending the Second Amended Initial Order to increase the super priority charge set out in paragraph 61.3 (the **ACI DIP Charge**) in respect of the ACI DIP Facility by an amount of CDN$230 million in favour of ULC for all amounts owing in connection with the ULC DIP Facility.
>
> This increase in the ACI DIP Charge is to still be subordinated to any and all subrogated rights in favour of the SSNs, the lenders under the ACCC Term Loan (the **Term Lenders**) and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (the **Lien Holders**) arising

under paragraph 61.10 of the Second Amended Initial Order.

3 [3] The SSNs and the Term Lenders, the only two secured creditor groups of the Abitibi Petitioners, do not, in the end, contest the ULC DIP Motion. Pursuant to intense negotiations and following concessions made by everyone, an acceptable wording to the orders sought was finally agreed upon on the eve of the hearing. The efforts of all parties and Counsel involved are worth mentioning; the help and guidance of the Monitor and its Counsel as well.

4 [4] Of the unsecured creditors and other stakeholders, only the Ad Hoc Unsecured Noteholders Committee (the **"Bondholders"**) opposes the ULC DIP Motion, and even there, just in part. At hearing, Counsel for the Official Committee of Unsecured Creditors set up in the corresponding U.S. proceedings pending in the State of Delaware also voiced that his client shared some of the Bondholders' concerns.

5 [5] In short, while not contesting the request for approval of the second DIP financing, the Bondholders contend that the CDN$200 million immediate proposed distribution to the SSNs is inappropriate and uncalled for at this time.

6 [6] Before analyzing the various orders sought, an overview of the MPCo sale transaction and of the ULC DIP Facility that are the subject of the debate is necessary.

THE MPCo SALE TRANSACTION

7 [7] The MPCo sale transaction is central to the orders sought in the ULC DIP Motion.

8 [8] Under the terms of an Implementation Agreement signed in that regard, Hydro-Québec **("HQ")** agreed to pay ACCC CDN$615 million (the **Purchase Price**) for ACCC's 60% interest in MPCo.

9 [9] Of this amount, it is expected that (i) CDN$25 million will be paid at closing to Alcoa, the owner of the other 40% interest in MPCo, for tax liabilities; (ii) approximately CDN$31 million will be held by HQ for two years to secure various indemnifications (the **HQ Holdback**); (iii) certain inter-party accounts will be settled; (iv) the CDN$282.3 million ULC Reserve, set up primarily to guarantee potential contingent pension liabilities and taxes resulting from the Proposed Transactions, will be held by the Monitor in trust for the ULC pending further Order of the Court; and (v) the ACI DIP Facility will be repaid.

10 [10] That said, until the sale, ACCC's 60% interest in MPCo remains subject to the SSN's first ranking security. This first ranking security interest has never been contested by any party. In fact, after their review of same, the Monitor's Counsel concluded that it is valid and enforceable[4].

11 [11] Accordingly, the proceeds of the sale less adjustments, holdbacks and reserve would normally be paid to the SSNs as holders of valid first ranking security over this asset.

12 [12] To that end, the SSNs' claim of US$477,545,769.53 (US$413 million in principal and US$64,545,769.53 in interest as at October 1st, 2009) is not really contested except for a 0.5% to 2% additional default interest over the 13.75% original loan rate.

13 [13] In that context, on September 29, 2009, the Court issued an Order approving the sale of ACCC's 60% interest in MPCo on certain conditions. Amongst others, the Court:

a) Approved the terms and conditions of the Implementation Agreement;
b) Authorized and directed ACI and ACCC to implement and complete the Proposed Transactions with such non-material alterations or amendments as the parties may agree to with the consent of the Monitor;
c) Declared that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of the ULC, shall constitute and be treated as proceeds of the disposition of ACCC's MPCo shares (collectively, the **MPCo Share Proceeds**);
d) Declared that the MPCo Share Proceeds extend to and include (a) ACCC's interest in the HQ Holdback and (b) ACCC's interest in claims arising from the satisfaction of related-party claims;
e) Declared that the MPCo Share Proceeds will be subject to a replacement charge (the **MPCo Noteholder Charge**) in favour of the SSNs with the same rank and priority as the security held in respect of the ACCC's MPCo shares;
f) Declared that the ULC Reserve is subject to a charge in favour of the SSNs which is subordinate to a charge in favour of Alcoa (the **ULC Reserve Charge**); and
g) Ordered that the cash component of the MPCo Share Proceeds and the ULC Reserve be paid to and held by the Monitor in an interest bearing account or investment grade marketable securities pending further Order of the Court.

14 [14] The Proposed Transactions are not expected to close until the latter part of November or early December 2009. ACI has requested and obtained an extension from Investissement Quebec **(IQ)** to December 15, 2009 for the repayment of the ACI DIP Facility that matured on November 1st, 2009.

15 [15] Based on the amounts of the significant payments, holdbacks, reserves and deductions from the Purchase Price, and considering that the amount drawn under the ACI DIP Facility presently stands at CDN$54.8 million, the Net Available Proceeds after payment of the ACI DIP Facility would be approximately CDN$173.9 million.

THE ULC DIP FACILITY

16 [16] Pursuant to the Implementation Agreement, ULC is required to maintain the ULC Reserve. On the closing of the Proposed Transactions, ULC will hold the ULC Reserve in the amount of approximately CDN$282.3 million.

17 [17] This amount may be used for a limited number of purposes (the **Permitted**

Investments) that are described in the Implementation Agreement. Such Permitted Investments include making a DIP loan to either ACI or ACCC.

18 [18] Based on that, the ULC DIP Term Sheet provides that the ACI Group will borrow CDN$230 million from the ULC Reserve as a Permitted Investment.

19 [19] According to the Monitor[5], the significant terms of the ULC DIP Term Sheet are as follows:

> **i) Manner of Borrowing** - Initially, the ULC DIP Facility was to be available by way of an immediate draw of CDN$230 million. After negotiations with the Term Lenders, it was rather agreed that (i) a first draw of CDN$130 million will be advanced at closing, (ii) subsequent draws for a maximum total amount of CDN$50 million in increments of up to CDN$25 million will be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order, and (iii) the balance of CDN$50 million shall become available upon further order of the Court.
>
> **ii) Interest Payments** - no interest will be payable on the ULC DIP Facility;
>
> **iii) Fees** -No fees are payable in respect of the ULC DIP Facility;
>
> **iv) Expenses** - The borrowers will pay all reasonable expenses incurred by ULC and Alcoa in connection with the ULC DIP Facility;
>
> **v) Reporting** - Reporting will be similar to that provided under the ACI DIP Facility and copies of all financial information will be placed in the data room. Reporting will include notice of events of default or maturing events of default;
>
> **vi) Use of Proceeds**- The ULC DIP Facility will be used for general corporate purposes in material compliance with the 13-week cash flow forecasts to be provided no less frequently than the first Friday of each month (the **Budget**);
>
> **vii) Events of Default** - The events of default include the following:

(a) Substantial non-compliance with the Budget;

(b) Termination of the *CCAA* Stay of Proceedings;
(c) Failure to file a *CCAA* Plan with the Court by September 30, 2010; and
(d) Withdrawal of the existing Securitization Program unless replaced with a reasonably similar facility;

viii) Rights of Alcoa - Alcoa will receive all reporting noted above and notices of events of default. Alcoa's consent is required for any amendments or waivers;

ix) Rights of Senior Secured Noteholders - The Senior Secured Noteholders' rights consist of:

(a) Receiving all reporting noted above and any notice of an Event of Default;
(b) Consent of Senior Secured Noteholders holding a majority of the principal amount of the Senior Secured Notes is required for any amendments to the maximum amount of the ULC DIP Facility or any change to the Outside Maturity Date or the interest rate;
(c) Upon an Event of Default, there is no right to accelerate payment or maturity, subject to the right to apply to Court for the termination of the ULC DIP Facility, which right is without prejudice to the right of ACI, ACCC, the ULC or Alcoa to oppose such application;
(d) Entitlement to review draft of documents, but final approval of such documents is in Alcoa's sole discretion; and
(e) Entitlement to request the approval of the Court to amend any monthly cash flow budget which has been filed;

x) Security - Security is similar to the existing ACI DIP Facility and ranking immediately after the existing ACI DIP Charge. There are no charges on the assets of the Chapter 11 Debtors (as defined in the existing ACI DIP Facility).

20 [20] The Monitor notes that the ULC DIP Facility will provide the ACI Group with additional net liquidity (after the retirement of the ACI DIP Facility and after the payment of the proposed distribution to the SSNs) in the amount of some CDN$167 million.

THE QUESTIONS AT ISSUE

21 [21] In light of this background, the Court must answer the following questions:

[1] Should the ULC DIP Facility of CDN$230 million be approved?

[2] Should the proposed distribution of CDN$200 million to the SSNs be

authorized?

[3] Is the wording of the orders sought appropriate, notably with regard to the additions proposed by the Bondholders in terms of the future steps to be taken by the Abitibi Petitioners?

ANALYSIS AND DISCUSSION

1) THE APPROVAL OF THE DIP FINANCING

22 [22] In the Court's opinion, the second DIP financing, that is, the ULC DIP Facility of CDN$230 million, should be approved on the amended terms agreed upon by the numerous parties involved.

23 [23] In this restructuring, the Court has already approved DIP financing in respect of both the Abitibi Petitioners and the Bowater Petitioners.

24 [24] On April 22, 2009, it issued a Recognition Order (U.S. Interim DIP Order) recognizing an Interim Order of the U.S. Bankruptcy Court for a DIP loan of up to US$206 million to the Bowater Petitioners. On May 6, 2009, it approved the ACI DIP Facility, a US$100 million loan to the Abitibi Petitioners by Bank of Montreal (**"BMO"**), guaranteed by IQ.

25 [25] The jurisdiction of the Court to approve DIP financing and the requirement of the Abitibi Petitioners for such were canvassed at length in the May 6 Judgment. The requirements of the Abitibi Petitioners for liquidity and the authority of the Court to approve agreements to satisfy those requirements have already been reviewed and ruled upon.

26 [26] There have been no circumstances intervening since the approval of the ACI DIP Facility that can fairly be characterized as negating the requirement of the Abitibi Petitioners for DIP financing.

27 [27] The only issue here is whether this particular ULC DIP Facility proposal, replacing as it does the prior ACI DIP Facility, is one that the Court ought to approve. As indicated earlier, the answer is yes.

28 [28] At this stage in the proceedings where the phase of business stabilization is largely complete, the Court is not required to approach the subject of DIP financing from the perspective of excessive caution or parsimony.

29 [29] On the one hand, as highlighted notably by the Monitor[6], the Abitibi Petitioners have presented substantial reasons to support their need for liquidity by way of a DIP loan. Suffice it to note to that end that:

a) Without an adequate cushion, in view of potential adverse exchange rate fluctuations and further adverse price declines in the market, the Abitibi

Petitioners' liquidity could easily be insufficient to meet the requirements of its Securitization Program (Monitor's 19th Report at paragraphs 49, 50 and chart at paragraph 61);

b) Absent a DIP loan, there is, in fact, a high risk of default under the Securitization Program (Monitor's 19th Report at paragraph 32);

c) Despite Abitibi Petitioners' best efforts at forecasting, weekly cash flow forecasts have varied by as much as US$26 million. Weekly disbursements have varied by 100%. Each 14 variation in the foreign exchange rate as against the US dollar could produce a US$17 million negative cash flow variation. The ultimate cash flow requirements will be highly dependent on variables that the Abitibi Petitioners' cannot control (Monitor's 19th Report at paragraphs 54, 60 and 61);

d) The market decline has eroded the Abitibi Petitioners' liquidity, while foreign exchange fluctuations are placing further strain on this liquidity. Even if prices increase, the resulting need for additional working capital to increase production will paradoxically put yet further strain on this liquidity;

e) Without the ULC DIP Facility, the Abitibi Petitioners would lack access to sufficient operating credit to maintain normal operations. They would be significantly impaired in their ability to operate in the ordinary course and they would face an increase in the risk of unexpected interruptions; and

f) The Abitibi Petitioners have yet to complete their business plan and it is premature to predict the length of the proceedings (Monitor's 19th Report at paragraphs 47 and 48).

30 [30] In fact, based upon its sensitivity analysis, the inter-month variability of the cash flows, the minimum liquidity requirements under the Securitization Program, and the requirement to repay the ACI DIP Facility, the Monitor is of the view that the Abitibi Petitioners need the new ULC DIP Facility to ensure that ACI has sufficient liquidity to complete its restructuring.

31 [31] On the other hand, the reasonableness of the amount of the ULC DIP Facility is supported by the following facts:

(a) Only about CDN$168 million of incremental liquidity is being provided and post-transaction, the Abitibi Petitioners will have, at best, about CDN$335 million of liquidity (Monitor's 19th Report at paragraph 68);

(b) The Bowater Petitioners, a group of the same approximate size as the Abitibi Petitioners, enjoy liquidity of approximately US$400 million (Monitor's 19th Report at paragraph 69) and a DIP facility of approximately US$200 million;

(c) Even with the ULC DIP Facility, the Abitibi Petitioners will be at the low end of average relative to their peers in terms of available liquidity relative to their size;

(d) The cash flow of the Abitibi Petitioners is subject to significant intra-month variations and has risks associated with pricing and currency fluctuations which are larger the longer the period examined; and

(e) The Abitibi Petitioners are required by the Securitization Facility to maintain liquidity on a rolling basis above US$100 million.

32 [32] In addition, the Court and the stakeholders have all the means necessary at their disposal to monitor the use of liquidity without, at the same time, having to ration its access at a level far below that enjoyed by the peers with whom the Abitibi Petitioners compete.

33 [33] In this regard, it is important to emphasize that the ULC DIP Facility includes, after all, particularly interesting conditions in terms of interest payments and associated fees. Because ULC is the lender, none are payable.

34 [34] Finally, the provisions of section 11.2 of the amended *CCAA*, and in particular the factors for review listed in subsection 11.2(4), are instructive guidelines to the exercise of the Court's discretion to approve the ULC DIP Facility.

35 [35] Pursuant to subsection 11.2(4) of the amended *CCAA*, for restructurings undertaken after September 18, 2009, the judge is now directed to consider the following factors in determining whether to exercise his or her discretion to make an order such as this one:

(a) The period during which the company is expected to be subject to *CCAA* proceedings;
(b) How the company's business and financial affairs are to be managed during the proceedings;
(c) Whether the company's management has the confidence of its major creditors;
(d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made;
(e) The nature and value of the company's property;
(f) Whether any creditor would be materially prejudiced as a result of the security or charge; and
(g) The Monitor's report.

36 [36] Applying these criteria to this case, it is, first, premature to speculate how long the Abitibi Petitioners will remain subject to proceedings under the *CCAA*.

37 [37] The Monitor's 19th Report has considered cash flow forecasts until December 2010. The Abitibi Petitioners are hopeful of progressing to a plan outline by year-end with a view to emergence in the first or second quarter of 2010.

38 [38] In considering a DIP financing proposal, the Court can take note of the fact that the time and energies ought, at this stage in the proceedings, to be more usefully and profitably devoted to completing the business restructuring, raising the necessary exit financing and negotiating an appropriate restructuring plan with the stakeholders.

39 [39] Second, even if the ULC DIP Facility of CDN$230 million is a high, albeit reasonable, figure under the circumstances, access to the funds and use of the funds remain closely monitored.

40 [40] Based on the compromise reached with the Term Lenders, access to the funds will be progressive and subject to control. The initial draw is limited to CDN$130 million. Subsequent additional draws up to CDN$50 million will be in maximum increments of CDN$25 million and subject to prior notice. The final CDN$50 million will only be available with the Court's approval.

41 [41] As well, the use of the funds is subject to considerable safeguards as to the interests of all stakeholders. These include the following:

(a) The Monitor is on site monitoring and reviewing cash flow sources and uses in real time with full access to senior management, stakeholders and the Court;
(b) Stakeholders have very close to real time access to financial information regarding sources and use of cash flow by reason of the weekly cash flow forecasts provided to their financial advisors and the weekly calls with such financial advisors, participated in by senior management;
(c) The Monitor provides regular reporting to the Court including as to the tracking of variances in cash use relative to forecast and as to evolution of the business environment in which the Abitibi Petitioners are operating; and
(d) All stakeholders have full access to this Court to bring such motions as they see fit should a material adverse change in the business or affairs intervene.

42 [42] Third, there has been no suggestion that the management of the Abitibi Petitioners has lost the confidence of its major creditors. To the contrary:

a) Management has successfully negotiated a settlement of very complex and thorny issues with both the Term Lenders and the SSNs, which has enabled this ULC DIP Motion to be brought forward with their support;
b) While management does not agree with all positions taken by the Bondholders at all times, it has by and large enjoyed the support of that group throughout these proceedings;
c) Management has been attentive to the suggestions and guidance of the Monitor with the result that there have been few if any instances where the Monitor has been publicly obliged to oppose or take issue with steps

taken;

d) Management has been proactive in hiring a Chief Restructuring Officer who has provided management with additional depth and strength in navigating through difficult circumstances; and

e) The Abitibi Petitioners' management conducts regular meetings with the financial advisors of their major stakeholders, in addition to having an "open door" policy.

43 [43] The Court is satisfied that, in requesting the approval of the ULC DIP Facility, management is doing so with a broad measure of support and the confidence of its major creditor constituencies.

44 [44] Fourth, with an adequate level of liquidity, the Abitibi Petitioners will be able to run their business as a going concern on as normal a basis as possible, with a view to enhancing and preserving its value while the restructuring process proceeds.

45 [45] By facilitating a level of financial support that is reasonable and adequate and of sufficient duration to enable them to complete the restructuring on most reasonable assumptions, the Abitibi Petitioners will have the benefit of an umbrella of stability around their core business operations.

46 [46] In the Court's opinion, this can only facilitate the prospects of a viable compromise or arrangement being found.

47 [47] Fifth, there are only two secured creditor groups of the Abitibi Petitioners: the SSNs and the Term Lenders. After long and difficult negotiations, they finally agreed to an acceptable wording to the orders sought. no one argues any longer that it is prejudiced in any way by the proposed security or charge.

48 [48] Lastly, sixth, the Monitor has carefully considered the positions of all of the stakeholders as well as the reasonableness of the Abitibi Petitioners' requirements for the proposed ULC DIP Facility. Having reviewed both the impact of the proposed ULC DIP Facility on stakeholders and its beneficial impact upon the Abitibi Petitioners, the Monitor recommends approval of the ULC DIP Facility.

49 [49] On the whole, in approving this ULC DIP Facility, the Court supports the very large consensus reached and the fine balance achieved between the interests of all stakeholders involved.

2) THE DISTRIBUTION TO THE SSNs

50 [50] The approval of the terms of the ULC DIP Facility by the SSNs is intertwined with the Abitibi Petitioners' agreement to support a distribution in their favor in the amount of CDN$200 million.

51 [51] The Abitibi Petitioners and the SSNs consider that since the MPCo proceeds were and are subject to the security of the SSNs, this arrangement or compromise is a reasonable one under the circumstances.

52 [52] They submit that the proposed distribution will be of substantial benefit to the Abitibi Petitioners. Savings of at least CDN$27.4 million per year in accruing interest costs on the CDN$200 million to be distributed will be realized based on the 13.75% interest rate payable to the SSNs.

53 [53] Needless to say, they maintain that the costs saved will add to the potential surplus value of SSNs' collateral that could be utilized to compensate any creditor whose security may be impaired in the future in repaying the ULC DIP Facility.

54 [54] The Bondholders oppose the CDN$200 million distribution to the SSNs.

55 [55] In their view, given the Abitibi Petitioners' need for liquidity, the proposed payment of substantial proceeds to one group of creditors raises important issues of both propriety and timing. It also brings into focus the need for the *CCAA* process to move forward efficiently and effectively towards the goal of the timely negotiation and implementation of a plan of arrangement.

56 [56] The Bondholders claim that the proposed distribution violates the *CCAA*. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

57 [57] By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.

58 [58] Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

59 [59] In the interim, they suggest that the Abitibi Petitioners should provide a business plan to their legal and financial advisors by no later than 5:00 p.m. on November 27, 2009. They submit that a restructuring and recapitalization term sheet on terms acceptable to them and their legal and financial advisors should also be provided by no later than 5:00 p.m. on December 11, 2009.

60 [60] With all due respect for the views expressed by the Bondholders, the Court considers that, similarly to the ULC DIP Facility, the proposed distribution should be authorized.

61 [61] To begin with, the position of the Bondholders is, under the circumstances, untenable. While they support the CDN$230 million ULC DIP Facility, they still contest the

CDN$200 million proposed distribution that is directly linked to the latter.

62 [62] The Court does not have the luxury of picking and choosing here. What is being submitted for approval is a global solution. The compromise reached must be considered as a whole. The access to additional liquidity is possible because of the corresponding distribution to the SSNs. The amounts available for both the ULC DIP Facility and the proposed distribution come from the same MPCo sale transaction.

63 [63] The compromise negotiated in this respect, albeit imperfect, remains the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners. It follows a process and negotiations where the views and interests of most interested parties have been canvassed and considered.

64 [64] To get such diverse interest groups as the Abitibi Petitioners, the SSNs, the Term Lenders, BMO and IQ, and ULC and Alcoa to agree on an acceptable outcome is certainly not an easy task to achieve. Without surprise, it comes with certain concessions.

65 [65] It would be very dangerous, if not reckless, for the Court to put in jeopardy the ULC DIP Facility agreed upon by most stakeholders on the basis that, perhaps, a better arrangement could eventually be reached in terms of distribution of proceeds that, on their face, appear to belong to the SSNs.

66 [66] The Court is satisfied that both aspects of the ULC DIP Motion are closely connected and should be approved together. To conclude otherwise would potentially put everything at risk, at a time where stability is most required.

67 [67] Secondly, it remains that ACCC's interest in MPCo is subject to the SSNs' security. As such, all proceeds of the sale less adjustments, holdbacks and reserves should normally be paid to the SSNs. Despite this, provided they receive the CDN$200 million proposed distribution, the SSNs have consented to the sale proceeds being used by the Abitibi Petitioners to pay the existing ACI DIP Facility and to the ULC Reserve being used up to CDN$230M for the ULC DIP Facility funding.

68 [68] It is thus fair to say that the SSNs are not depriving the Abitibi Petitioners of liquidity; they are funding part of the restructuring with their collateral and, in the end, enhancing this liquidity.

69 [69] The net proceeds of the MPCo transaction after payment of the ACI DIP Facility are expected to be CDN$173.9 million. Accordingly, out of a CDN$200 million distribution to the SSNs, only CDN$26.1 million could technically be said to come from the ULC DIP Facility. Contrary to what the Bondholders alluded to, if minor aspects of the claims of the SSNs are disputed by the Abitibi Petitioners, they do not concern the CDN$200 million at issue.

70 [70] Thirdly, the ULC DIP Facility bears no interest and is not subject to drawdown fees, while a distribution of CDN$200 million to the SSNs will create at the same time interest savings of approximately CDN$27 million per year for the ACI Group. There is, as a result, a definite economic benefit to the contemplated distribution for the global restructuring process.

71 [71] Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a *CCAA* reorganization. Nothing in the *CCAA* prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada[7].

72 [72] While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present *CCAA* reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's approval has never been considered a breach of the stay.

73 [73] In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN$200 million.

74 [74] In *Windsor Machine & Stamping Ltd.* (Re)[8], Morawetz J. dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

> 13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold Court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

75 [75] Finally, even though the Monitor makes no recommendation in respect of the proposed distribution to the SSNs, this can hardly be viewed as an objection on its part. In the first place, this is not an issue upon which the Monitor is expected to opine. Besides, in its 19th report, the Monitor notes the following in that regard:

- a) According to its Counsel, the SSNs security on the ACCC's 60% interest in MPCo is valid and enforceable;
- b) The amounts owed to the SSNs far exceed the contemplated distribution while the SSNs' collateral is sufficient for the SSNs' claim to be most likely paid in full;
- c) The proposed distribution entails an economy of CDN$27 million per year in interest savings; and
- d) Even taking into consideration the CDN$200 million proposed distribution, the ULC DIP Facility provides the Abitibi Petitioners with the liquidity they require for most of the coming year.

76 [76] All things considered, the Court disagrees with the Bondholders' assertion that the proposed distribution is against the goals and objectives of the *CCAA*. For some, it may only be a small step. However, it is a definite step in the right direction.

77 [77] Securing the most needed liquidity at issue here and reducing substantially the extent of the liabilities towards a key secured creditor group no doubt enhances the chances of a successful restructuring while bringing stability to the on-going business.

78 [78] This benefits a large community of interests that goes beyond the sole SSNs.

79 [79] From that standpoint, the Court is satisfied that the restructuring is moving forward properly, with reasonable diligence and in accordance with the *CCAA* ultimate goals.

80 [80] Abitibi Petitioners' firm intention, reiterated at the hearing, to shortly provide their stakeholders with a business plan and a restructuring and recapitalization term sheet confirms it as well.

3) THE ORDERS SOUGHT

81 [81] In closing, the precise wording of the orders sought has been negotiated at length between Counsel. It is the result of a difficult compromise reached between many different parties, each trying to protect distinct interests.

82 [82] Nonetheless, despite their best efforts, this wording certainly appears quite convoluted in some cases, to say the least. The proposed amendment to the subrogation provision of the Second Amended Initial Order is a vivid example. Still, the mechanism agreed upon, however complicated it might appear to some, remains acceptable to all affected creditors.

83 [83] The delicate consensus reached in this respect must not be discarded lightly. In view of the role of the Court in *CCAA* proceedings, that is, one of judicial oversight, the orders sought will thus be granted as amended, save for limited exceptions. To avoid potential misunderstandings, the Court felt necessary to slightly correct the specific wording of some conclusions. The orders granted reflect this.

84 [84] Turning to the conclusions proposed by the Bondholders at paragraphs 8 to 11 of the draft amended order (now paragraphs 6 to 9 of this Order), the Court considers them useful and appropriate. They assist somehow in bringing into focus the need for this *CCAA* process to continue to move forward efficiently.

85 [85] Minor adjustments to some of the wording are, however, required in order to give the Abitibi Petitioners some flexibility in terms of compliance with the ULC DIP documents and cash flow forecast.

86 [86] For the expected upcoming filing by the Abitibi Petitioners of their business plan and restructuring and recapitalization term sheet, the Court concludes that simply giving act to their stated intention is sufficient at this stage. The deadlines indicated correspond to the date agreed upon by the parties for the business plan and to the expected renewal date of the Initial Order for the restructuring and recapitalization term sheet.

FOR THESE REASONS, THE COURT:

__ULC DIP Financing__

87 [1] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the **"ULC DIP Agreement"**) among ACI, as borrower, and 3239432 Nova Scotia Company, an unlimited liability company (**"ULC"**), as lender (the **"ULC DIP Lender"**), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **$230** million.

88 [2] **ORDERS** that the credit facility provided pursuant to the ULC DIP Agreement (the **"ULC DIP"**) will be subject to the following draw conditions:

(d) a first draw of $130 million to be advanced at closing;
(e) subsequent draws for a maximum total amount of $50 million in increments of up to $25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and
(f) the balance of $50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

89 [3] **ORDERS** the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the **"Draft ULC DIP Agreement"**) to the Monitor and to any party listed on the Service List which requests a copy of same (an **"Interested Party"**) no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

90 [4] **ORDERS** that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this

Order.

91 [5] **ORDERS** that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the **"ULC DIP Documents"**), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

92 [6] **ORDERS** that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

93 [7] **ORDERS** that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

94 [8] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

95 [9] **GIVES ACT** to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

96 [10] **ORDERS** that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the **"ULC DIP Expenses"**) under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

97 [11] **ORDERS** that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

98 [12] **ORDERS** that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

(c) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and

(d) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

99 [13] **ORDERS** that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

100 [14] **ORDERS** that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 *CCQ* concurrently with the written enforcement notice of a default mentioned above.

101 [15] **ORDERS** that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

102 [16] **ORDERS** that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

103 [17] **AMENDS** the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

> "**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners (other than the property of Abitibi Consolidated (U.K.) Inc.) in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. no order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC

DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately $40 million, being the aggregate of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

ACI DIP Agreement

104 [18] **ORDERS** that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

105 [19] **ORDERS** that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of $200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

106 [20] **ORDERS** that, subject to completion of the ULC DIP (including the initial draw of $130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of $130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

107 [21] **ORDERS** that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. no Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[21.1] **DECLARES** that for the purposes of paragraphs 1, 5, 10, 12, 13, 17 and 18 of the present Order, the term "Abitibi Petitioners" shall not include Abitibi-Consolidated (U.K.) Inc. added to the schedule of Abitibi Petitioners by Order of this Court on November 10, 2009;

108 [22] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

109 [23] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

* * * * *

SCHEDULE "A"

ABITIBI PETITIONERS

1. **ABITIBI-CONSOLIDATED INC.**
2. **ABITIBI-CONSOLIDATED COMPANY OF CANADA**
3. **3224112 NOVA SCOTIA LIMITED**
4. **MARKETING DONOHUE INC.**
5. **ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.**
6. **3834328 CANADA INC.**
7. **6169678 CANADA INC.**
8. **4042140 CANADA INC.**
9. **DONOHUE RECYCLING INC.**
10. **1508756 ONTARIO INC.**
11. **3217925 NOVA SCOTIA COMPANY**
12. **LA TUQUE FOREST PRODUCTS INC.**
13. **ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED**
14. **SAGUENAY FOREST PRODUCTS INC.**
15. **TERRA NOVA EXPLORATIONS LTD.**
16. **THE JONQUIERE PULP COMPANY**
17. **THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY**
18. **SCRAMBLE MINING LTD.**
19. **9150-3383 QUÉBEC INC.**

20. ABITIBI-CONSOLIDATED (U.K.) INC.

SCHEDULE "B"

BOWATER PETITIONERS

[1] BOWATER CANADIAN HOLDINGS INC.

[2] BOWATER CANADA FINANCE CORPORATION

[3] BOWATER CANADIAN LIMITED

[4] 3231378 NOVA SCOTIA COMPANY

[5] ABITIBIBOWATER CANADA INC.

[6] BOWATER CANADA TREASURY CORPORATION

[7] BOWATER CANADIAN FOREST PRODUCTS INC.

[8] BOWATER SHELBURNE CORPORATION

[9] BOWATER LAHAVE CORPORATION

[10] ST-MAURICE RIVER DRIVE COMPANY LIMITED

[11] BOWATER TREATED WOOD INC.

[12] CANEXEL HARDBOARD INC.

[13] 9068-9050 QUÉBEC INC.

[14] ALLIANCE FOREST PRODUCTS (2001) INC.

[15] BOWATER BELLEDUNE SAWMILL INC.

[16] BOWATER MARITIMES INC.

[17] BOWATER MITIS INC.

[18] BOWATER GUÉRETTE INC.

[19] BOWATER COUTURIER INC.

SCHEDULE "C"

18.6 CCAA PETITIONERS

[1] ABITIBIBOWATER INC.

[2] ABITIBIBOWATER US HOLDING 1 CORP.

[3] BOWATER VENTURES INC.

[4] BOWATER INCORPORATED

[5] BOWATER NUWAY INC.

[6] BOWATER NUWAY MID-STATES INC.

[7] CATAWBA PROPERTY HOLDINGS LLC

[8] BOWATER FINANCE COMPANY INC.

[9] BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED

[10] BOWATER AMERICA INC.

[11] LAKE SUPERIOR FOREST PRODUCTS INC.

[12] BOWATER NEWSPRINT SOUTH LLC

[13] BOWATER NEWSPRINT SOUTH OPERATIONS LLC

[14] BOWATER FINANCE II, LLC

[15] BOWATER ALABAMA LLC

[16] COOSA PINES GOLF CLUB HOLDINGS LLC

CORRECTED JUDGMENT

ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING AND FOR DISTRIBUTION OF CERTAIN PROCEEDS OF THE MPCo SALE TRANSACTION TO THE TRUSTEE FOR THE SENIOR SECURED NOTES (#312)

WHEREAS the Abitibi Petitioners and the Term Lenders have requested the Court to issue this Corrected Judgment so as to clarify that it does not apply to Abitibi-Consolidated (U.K.) Inc., a Petitioner that was added to the schedule of Abitibi Petitioners by Order of this Court rendered on November 10, 2009, namely after the ULC DIP Motion was argued but before the related Judgment of the Court was rendered on November 16, 2009;

WHEREAS the request is justified to avoid any misunderstanding as to the exact scope of this Court's Judgment;

WHEREAS a small correction to paragraph [17] of the conclusions and the addition of a new paragraph [21.1] are necessary to that end;

FOR THESE REASONS, THE COURT:

ULC DIP Financing

ORDERS that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the **"ULC DIP Agreement"**) among ACI, as borrower, and 3239432 Nova Scotia Company, an unlimited liability company (**"ULC"**), as lender (the **"ULC DIP Lender"**), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as **Exhibit R-1** in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding **$230** million.

ORDERS that the credit facility provided pursuant to the ULC DIP Agreement (the **"ULC DIP"**) will be subject to the following draw conditions:

(d) a first draw of $130 million to be advanced at closing;
(e) subsequent draws for a maximum total amount of $50 million in increments of up to $25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and
(f) the balance of $50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

ORDERS the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the **"Draft ULC DIP Agreement"**) to the Monitor and to any party listed on the Service List which requests a copy of same (an **"Interested Party"**) no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

ORDERS that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this

Order.

ORDERS that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the **"ULC DIP Documents"**), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

ORDERS that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

ORDERS that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

GIVES ACT to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

GIVES ACT to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

ORDERS that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the **"ULC DIP Expenses"**) under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

ORDERS that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

ORDERS that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

(c) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and

(d) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

ORDERS that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

ORDERS that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "**Notice Period**") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 *CCQ* concurrently with the written enforcement notice of a default mentioned above.

ORDERS that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

ORDERS that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

AMENDS the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

> "**ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of **$230** million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners (other than the property of Abitibi Consolidated (U.K.) Inc.) in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. no order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC

> DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately $40 million, being the aggregate of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor."

ACI DIP Agreement

ORDERS that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

ORDERS that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of $200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

ORDERS that, subject to completion of the ULC DIP (including the initial draw of $130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of $130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

ORDERS that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. no Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI

DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary."

[21.1] **DECLARES** that for the purposes of paragraphs 1, 5, 10, 12, 13, 17 and 18 of the present Order, the term "Abitibi Petitioners" shall not include Abitibi-Consolidated (U.K.) Inc. added to the schedule of Abitibi Petitioners by Order of this Court on November 10, 2009;

ORDERS the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

WITHOUT COSTS.

cp/e/qlspt/qlana

1 *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36 (the "***CCAA***").

2 In this Judgment, all capitalized terms not otherwise defined have the meaning ascribed thereto in either: 1) the *Second Amended Initial Order* issued by the Court on May 6, 2009; 2) the *Motion for the Distribution by the Monitor of Certain Proceeds of the MPCo Sale Transaction to U.S. Bank National Association, Indenture and Collateral Trustee for the Senior Secured Noteholders* (the "**Distribution Motion**") of the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes (respectively, the "**Committee**" and "**Trustee**", collectively the "**SSNs**") dated October 6, 2009; or 3) the Abitibi Petitioners' *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* (the "**ULC DIP Motion**") dated November 9, 2009.

3 *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* dated November 9, 2009 (the "**ULC DIP Motion**").

4 See Monitor's 19th Report dated October 27, 2009.

5 See Monitor's 19th Report dated October 27, 2009.

6 See Monitor's 19th Report dated October 27, 2009.

7 See *Re Windsor Machine & Stamping Ltd.*, [2009] O.J. No. 3195, 2009 CarswellOnt 4505 (Ont. Sup. Ct.); *Re Rol-Land Farms Limited* (October 5, 2009), Toronto 08-CL-7889 (Ont. Sup. Ct.); and *Re Pangeo Pharma Inc.*, (August 14, 2003), Montreal 500-11-021037-037 (Que. Sup. Ct.).

8 *Re Windsor Machine & Stamping Ltd.*, [2009] O.J. No. 3195, 2009 CarswellOnt 4505 (Ont. Sup. Ct.).

United States Court of Appeals,
Second Circuit.
In the Matter of The BOHACK CORPORATION,
Debtor-in-Possession,
SHAW & LEVINE and The Bohack Corporation,
Appellees,
v.
GULF & WESTERN INDUSTRIES, INC., Charles G. Bluhdorn, Don F. Gaston, Martin Davis, Lawrence Levinson, Simpson, Thacher & Bartlett and Nicholas Salgo, Appellants. [FN*]

FN* Editor's Note : The opinion of the United States Court of Appeals, Ninth Circuit in Servair, Inc. v. National Labor Relations Board, published in the advance sheets at this citation (607 F.2d 258), was withdrawn from the bound volume because rehearing is pending.

No. 190, Docket 79-5023.
Argued Oct. 18, 1979.
Decided Dec. 5, 1979.

Appeal was taken from order of the United States District Court for the Eastern District of New York, Jacob Mishler, Chief Judge, which reversed bankruptcy court order disqualifying special counsel for debtor in possession. The Court of Appeals, Mulligan, Circuit Judge, held that: (1) order was appealable; (2) creditors who complained of possible waste of assets as a result of pursuit of the state court action had standing to appeal; and (3) law firm whose senior partner had close business and personal relationship with chairman of the board of the debtor was disqualified from pursuing a state court action based on allegations that the board of directors had been improperly manipulated by the majority shareholder.

Reversed and remanded.

West Headnotes

[1] Bankruptcy 51 ⚷3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases
(Formerly 51k455)

If an order involves controversies arising in proceedings in bankruptcy, it is appealable only if it is final or is otherwise independently appealable. 28 U.S.C.A. § 1291.

[2] Bankruptcy 51 ⚷3768

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3768 k. Interlocutory Orders; Collateral Order Doctrine. Most Cited Cases
(Formerly 51k455)

Interlocutory order in a bankruptcy proceeding is appealable only if it finally disposes of some asserted right; order which is not a formal exercise of judicial power affecting the asserted rights of a party may not be appealed at the interlocutory stage. Bankr.Act, § 24(a), 11 U.S.C.A. § 47(a).

[3] Federal Courts 170B ⚷553

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)1 In General
170Bk553 k. Nature of Subject Matter and Character of Parties. Most Cited Cases

Orders granting or denying attorney disqualification motions, if shown to taint the underlying trial, are directly appealable.

[4] Bankruptcy 51 ⚷3833.1

51 Bankruptcy
51XIX Review

51XIX(D) Review of District Court
51k3833 Decisions Reviewable
51k3833.1 k. In General. Most Cited Cases
(Formerly 51k3833, 51k700.1)

Order of the district court which reversed a bankruptcy court order disqualifying law firm as special counsel for debtor in possession in prosecution of a state court action was appealable where, if the alleged conflict of interest did emerge, the state court action and the supervisory power of the bankruptcy court would be tainted.

[5] Bankruptcy 51 ⚿3835

51 Bankruptcy
51XIX Review
51XIX(D) Review of District Court
51k3835 k. Proceedings for Review. Most Cited Cases
(Formerly 51k701)

Creditors who alleged that their pecuniary interests would suffer through the depletion of estate assets in the form of fees paid for continued retention of law firm as special counsel to prosecute action in state court had standing to appeal from order of the district court reversing a bankruptcy court order disqualifying the law firm.

[6] Bankruptcy 51 ⚿3024

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3024 k. Creditors' and Equity Security Holders' Committees and Meetings. Most Cited Cases
(Formerly 51k698(3))

Creditors' committee owes a fiduciary duty to the creditors and must guide its actions so as to safeguard as much as possible the rights of minority as well as majority creditors.

[7] Attorney and Client 45 ⚿21.15

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k20 Representing Adverse Interests
45k21.15 k. Partners and Associates. Most Cited Cases

Attorney and Client 45 ⚿30

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k30 k. Partnership of Attorneys; Law Firms. Most Cited Cases

Law firm, one of whose partners was a close personal friend and business associate of person who had been chairman of the board of directors of the debtor at all relevant times, was disqualified from serving as special counsel to the debtor to pursue a state court action against the majority shareholder of the debtor who had allegedly manipulated the debtor where the complaint in the state court action alleged manipulation of the board of directors of the debtor yet did not name the chairman of that board as a defendant.

[8] Attorney and Client 45 ⚿21.5(6)

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k20 Representing Adverse Interests
45k21.5 Particular Cases and Problems
45k21.5(6) k. Bankruptcy. Most Cited Cases
(Formerly 45k20)

Where disqualification involved conflict of interest which went to the core of the pending state court action and where the conflict found by bankruptcy court affected not merely determination of the proper defendants in the state court action but whether the action should have been commenced in the first place, possible delay and additional expense caused by replacement of attorneys were outweighed by considerations of the integrity of the judicial process.

[9] Bankruptcy 51 ⚷3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases
(Formerly 51k697(7))

Attorneys who are appointed as special counsel to represent debtors in bankruptcy proceedings are officers of the court and fiduciaries. Rules Bankr.Proc. Rules 215(a), 11-22, 11 U.S.C.A.

[10] Bankruptcy 51 ⚷3030

51 Bankruptcy
51IX Administration
51IX(A) In General
51k3029 Employment of Professional Persons or Debtor's Officers
51k3030 k. Attorneys. Most Cited Cases
(Formerly 51k697(7), 51k698(3))

Where complaint filed in state court on behalf of debtor in possession alleged that several of the debtor's trade creditors improperly tightened credit to the debtor, thus contributing to its financial disaster, bankruptcy judge should independently select, as special counsel to prosecute that action, attorney who had no previous ties with the debtor, rather than having the creditors' committee recommend replacement counsel.

[11] Bankruptcy 51 ⚷3776.1

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3776 Effect of Transfer
51k3776.1 k. In General. Most Cited Cases
(Formerly 51k3776, 51k701.4)

Once notice of appeal was filed from order of the district court reversing bankruptcy court order disqualifying special counsel, neither the district court nor the bankruptcy court had jurisdiction to entertain motion seeking to authorize the debtor to compromise the state court action which the counsel had been prosecuting.

***259** J. Stanley Shaw, Garden City N.Y. (Shaw & Levine, Garden City, N. Y., Jesse I. Levine, William M. Rifkin, Garden City, N. Y., of counsel), for appellees.

Arthur L. Liman, New York City (Paul, Weiss, Rifkind, Wharton & Garrison, Max Gitter, David Elkind, Robert Abrahams, New York City, of counsel), for appellants Gulf & Western Industries, Inc., Charles G. Bluhdorn, Don F. Gaston, Martin Davis and Lawrence Levinson.

Arnold Bauman, New York City (Shearman & Sterling, John T. Klug, New York City, of counsel), for Appellant Simpson, Thacher & Bartlett.

Michael Sullivan, New York City (Moore, Berson, Lifflander & Mewhinney, Earle K. Moore, New York City, of counsel), for appellant Nicholas Salgo.

Harvey Goldstein, Finkel, Goldstein & Berzow, New York City, for Official Creditors Committee.

Otterbourg, Steindler, Houston & Rosen, New York City (Conrad B. Duberstein, New York City, of counsel), for Official Creditors Committee.

Before LUMBARD, SMITH and MULLIGAN, Circuit Judges.

MULLIGAN, Circuit Judge:

This is an appeal from an April 6, 1979 order of the United States District Court for the Eastern District of New York, Chief Judge Jacob Mishler. That order reversed ***260** two orders of the Bankruptcy Court, Parente, J., dated May 23, 1978 and October 27, 1978, which had revoked the authority of the appellee, the law firm of Shaw & Levine, to act as special counsel to the Bohack Corporation (Bohack), a debtor-in-possession under Chapter XI of the Bankruptcy Act, 11 U.S.C. ss 701-799 (1976), to prosecute an action in the New York Supreme Court, Queens County (The Bohack Corporation v. Gulf & Western Industries, Inc., et al., Index No. 159 52/77). Most of the appellants here are the defendants in the pending state action.[FN1] The order of the district court is hereby reversed.

FN1. The complaint in the state action commenced by Shaw & Levine on behalf of Bohack named the following as defendants: Gulf & Western, Inc.; Don Gaston, Martin Davis, and Lawrence Levinson, its directors; Charles G. Bluhdorn, a director of Gulf & Western and a controlling stockholder of Bohack; Roy T. Abbott, Jr., a former officer and director of Bohack; Joel Dolkart, a former director and general counsel of Bohack; Nicholas Salgo, a former director of Bohack; and Simpson, Thacher & Bartlett, general counsel for both Gulf & Western and Bohack. All except Dolkart and Abbott are appellants in this case.

I

On July 30, 1974 Bohack filed a petition for an arrangement under Chapter XI in the District Court for the Eastern District of New York. Bohack was a supermarket chain which at the time had inventory discrepancies and losses totaling some $22 million of its $32 million book inventory, massive delinquent obligations to its suppliers, as well as large unpaid tax obligations. On September 20, 1974, on the application of Franklin E. Knobel, Bohack's Chairman, and the affidavit of J. Stanley Shaw, a partner in Shaw & Levine, Bankruptcy Judge Parente authorized the debtor to retain Shaw & Levine as special counsel. J. Stanley Shaw's affidavit represented that he had previously acted as counsel for Bohack in numerous proceedings and pending lawsuits. A list of these matters was appended to his affidavit. The Knobel affidavit set forth Inter alia the deponent's belief that Shaw's retention would be in the best interests of the estate and creditors by reason of his experience in the debtor's affairs.

On February 24, 1977 Judge Parente modified his order of September 20, 1974 and authorized Shaw & Levine to "investigate, and, if appropriate," prosecute an action against Gulf & Western Industries, Charles Bluhdorn "and such other defendants as may be appropriate" for damages caused to Bohack as a result of the Gulf & Western tender for stock of the Great Atlantic & Pacific Tea Company (A&P). The affidavit of Knobel attached to the application for this modification recited that Shaw had conducted an extensive investigation into the overstatement of inventories of the debtor. That inquiry disclosed that events surrounding Gulf & Western's tender for A&P stock possibly caused a severe curtailment of Bohack's credit lines with merchandise suppliers, which placed Bohack in an extremely precarious financial position. Further investigation revealed that Charles G. Bluhdorn, Chairman of Gulf & Western and the major stockholder of Bohack, may have used his position to facilitate the takeover in a way that contributed substantially to Bohack's collapse. According to the Knobel affidavit, there was a "conceivable concerted plan, orchestrated by Bluhdorn to take over A&P which resulted in the detriment of Bohack's stockholders." On the basis of the modified order Shaw & Levine commenced the state court action on November 18, 1977, seeking damages of $86 million against Gulf & Western, Bluhdorn, and the appellants whom we have described in footnote 1.

On December 12, 1977 the appellants moved the Bankruptcy Court to reconsider its previous orders appointing the firm of Shaw & Levine as special counsel to Bohack on the ground, Inter alia, that a conflict of interest between Shaw and Bohack precluded the firm from representing the debtor-in-possession in any matter before the Bankruptcy Court. Judge Parente's opinion dated May 2, 1978 rejected the appellants' motion insofar as it sought revocation of the September 1974 order initially approving the appointment of Shaw & Levine ***261** as special counsel.[FN2] However, the court did grant the appellants' motion in part Judge Parente modified the February 24, 1977 order by revoking the authority of Shaw & Levine to represent Bohack in the state court action. The bankruptcy judge found it inconceivable that Bluhdorn could manipulate the Bohack board without the knowledge of its Chairman Franklin E. Knobel, who was not named as a defendant and who was also a close personal friend and business associate of Shaw. Accordingly, the bankruptcy judge directed the creditors' committee to recommend replacement counsel subject to review and approval of the court. The propriety of the reversal of that part of the order by Chief Judge Mishler is the sole issue on this appeal.

> FN2. The basis for this part of the motion was the alleged unprofessional conduct of Shaw in other matters which appellants urged should have been disclosed to the court on his application for appointment as special counsel. Judge Parente's denial of the motion with respect to this issue is not raised on this appeal but was in effect annointed by the Bankruptcy.

II

[1][2][3][4] A threshold question is presented by the appellees' motion to dismiss this appeal as interlocutory. Section 24(a) of the Bankruptcy Act, 11 U.S.C. s 47(a), vests the Courts of Appeals with jurisdiction to hear appeals from either final or interlocutory orders in "proceedings in bankruptcy," but if the order involves "controversies arising in proceedings in bankruptcy" it is appealable only if it is final within 28 U.S.C. s 1291 or is otherwise independently appealable. Lesser v. Migden, 328 F.2d 47, 48 (2d Cir. 1964); Hillcrest Lumber Co. v. Terminal Factors, 281 F.2d 323, 325 (2d Cir. 1962). [FN3] The distinction between a proceeding in bankruptcy and a controversy arising in a proceeding in bankruptcy is one which even Judge Friendly has found "obscure and indefensibly confusing." Chemical Bank v. Slaner, 591 F.2d 139, 144 (2d Cir. 1978). However we need not enter that thicket since we have held that orders granting or denying attorney disqualification motions, if shown to taint the underlying trial, are directly appealable. W. T. Grant Co. v. Haines, 531 F.2d 671, 678 (2d Cir. 1976); Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 496 F.2d 800 (2d Cir. 1974) (en banc). Appellee argues that any taint here involves a state court trial from which no appeal to this court will lie. The argument is self-defeating. If the bankruptcy judge's order is beyond ultimate appellate review here, that is all the more reason to consider it a final disposition appealable under section 24(a) of the Bankruptcy Act. Aside from this, Shaw & Levine was not simply appointed by the client/debtor-in-possession but was in effect appointed by the Bankruptcy Court as well. If as found here, a conflict of interest has emerged, then not only is the state court action tainted but the supervisory power of the Bankruptcy Court which authorized the action "if appropriate" is compromised. The resolution of this issue is therefore necessary at this juncture. The order in our view is clearly appealable.

> FN3. Despite the literal language of section 24(a), an interlocutory order in a "proceeding" is appealable only if it finally disposes of "some asserted right, and an order which is not 'a formal exercise of judicial power affecting the asserted rights of a party' " may not be appealed at that stage. Lesser v. Migden, supra, 328 F.2d at 48.

Appellees raise the related argument that the appellants have no standing to raise the disqualification question since their interests are not adversely affected by the state court litigation. At first blush this position has some plausibility. If the question were simply whether state court defendants might properly bring an action in a federal court to disqualify counsel for plaintiff in the state court action because he has failed to join as a co-defendant someone whom the defendants consider to be an indispensable or necessary party, there would be little difficulty in rendering an answer in the negative. But the question posed as appellees would have it does not raise the issue actually before the bankruptcy judge. Counsel for the plaintiff in the state court action was not simply nominated by the debtor but was confirmed by order of the Bankruptcy Court which authorized the state action if appropriate. The interest of ***262** the Bankruptcy Court does not terminate with the approval of counsel its supervision over the debtor's estate continues until the termination of the bankruptcy proceedings. That court has the inherent jurisdiction to reconsider its own orders. Feldman v. Trans-East Air, Inc., 497 F.2d 352, 355 (2d Cir. 1974). As Chief Judge Mishler pointed out, "(i)n the face of serious charges of improper conduct, the bankruptcy court had the obligation to inquire, Sua sponte, into the propriety of Shaw & Levine continuing in the role of special counsel."

[5][6] In any event, several appellants do have standing. As the bankruptcy judge noted, Gulf & Western Industries, Charles G. Bluhdorn, and Don F. Gaston are listed as creditors in Schedule A-3 filed by the debtor-in-possession. They allege that their pecuniary interests will suffer through the depletion of estate assets in the form of fees paid for the continued retention of Shaw & Levine as special counsel. Loss of assets is certainly an adverse effect upon the interests of creditors, and is unquestionably related to the bankruptcy proceeding. See Ceramco, Inc. v. Lee Pharmaceuticals, 510 F.2d 268, 271 (2d Cir. 1975). The fact that the creditors' committee opposes replacement of Shaw & Levine and even appeared on this appeal to urge that point cannot constitute a waiver of the rights of these individual creditors. [FN4] We conclude therefore that the order before us is appealable and that the standing argument raised by appellees is groundless. Accordingly, we come to the merits of the appeal.

> FN4. Although the creditors' committee represents the interests of all creditors, its main function is to advise the creditors of their rights and the proper course of action in the bankruptcy proceeding. Bankruptcy Rule 11-19(a); Rule of Bankruptcy Procedure 209(b); see 2A Collier on Bankruptcy P 44.21(4), at 1685 (14th ed. 1975) (hereinafter "Collier's"). Moreover, the committee owes a fiduciary duty to the creditors, and must guide its actions so as to safeguard as much as possible the rights of minority as well as majority creditors. Woods v. City National Bank & Trust Co., 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820 (1941); 2A Collier's, supra, P 44.06, at 1653-54 and n.2.

III

[7] The bankruptcy judge bottomed his removal of Shaw & Levine as special counsel in the Queens County action upon an analysis of the charges in the complaint. The gravamen of the state action is that the appellants engaged in a conspiracy to acquire control of A&P with the concomitant purpose and ultimate effect of accomplishing Bohack's financial demise. In essence the complaint charges that Bluhdorn manipulated the Bohack board of directors so that Bohack would become in effect a subsidiary of Gulf & Western and Bohack's management would replace A&P's managerial personnel. Joseph Binder, then Bohack's president, was further allegedly induced by Bluhdorn to attack A&P's marketing and pricing policies thus causing A&P, a large retail food chain, to retaliate by influencing Bohack's suppliers to tighten its credit lines. Moreover the complaint alleges that the defendants in the state court action compelled Bohack to issue convertible debentures for the purpose of calling in outstanding shares. The defendants' alleged intention in so doing was to take Bohack private, "thus hopefully escaping the scrutiny of the appropriate regulatory agencies with respect to conflicts and irregularities under the applicable securities and antimonopoly statutes of the Federal and State governments." Appellants urge that the charges in the Queens County action are frivolous, scandalous, illogical, and inconsistent. They may well be. But it

is not our function to decide the merits of the state court action. Our concern is whether the Shaw firm was the proper counsel to undertake the investigation of the alleged conspiracy and to decide whether litigation was justified. We are fully persuaded that the answer to that question is in the negative. This conclusion is almost compelled by an examination of the complaint. It alleges a manipulation of the Bohack board of directors, the chairman of which was at all relevant times Franklin E. Knobel. Yet he was not named as a defendant. In fact he verified the complaint. This rather glaring omission becomes suspect upon inquiry into Shaw's relationship with Bohack. ***263** Shaw and Knobel are admittedly close personal friends and business associates. Shaw represented Bohack prior to the filing of the Chapter XI petition, and is now special counsel to the debtor-in-possession. Pursuant to orders of the Bankruptcy Court, Shaw has taken over the management of a major real estate facility of Bohack, and has become a substantial secured creditor of the debtor. Finally, Shaw has been a director and assistant secretary of Bohack since late 1975. He and Knobel are the only remaining officers of the debtor. Even Shaw's law firm concedes that his personal ties with Knobel and financial stake in Bohack are "unusual."

Shaw nevertheless takes the position that in his professional judgment Knobel is not a proper party defendant and was innocent of any wrongdoing. That again may well be. The point, however, is that such a determination must be made by the counsel who is in a position to make an independent judgment. As the foregoing summary of Shaw's entanglement with Bohack and Knobel amply demonstrates, Shaw is obviously in no such position. The best interests of the debtor will undoubtedly be jeopardized unless impartial counsel makes the determination whether Knobel's involvement in the Machiavellian plot alleged in the complaint was innocent or sinister.

Shaw argues that at least an evidentiary hearing should have been held in order to determine whether any conflict exists. We cannot agree. The close relationship between Knobel and Shaw is admitted, and, as Judge Parente found, it is inconceivable that Knobel as chairman of Bohack's board could be unaware of the alleged conspiracy. The manipulation of his own board, the utilization of Bohack's president to attack A&P thus inviting the alleged retaliation, the proposed stripping of Bohack management personnel to replace A&P's, the substitution of bondholders for stockholders to avoid regulatory scrutiny all alleged by Shaw and verified by Knobel in the complaint could not possibly have taken place without Knobel's knowledge. Each asserted misdeed necessarily involved the issue of his participation. Given the failure to include Knobel as a defendant in the face of these charges as well as Shaw's intimate relation with both the chairman and the corporation, the Bankruptcy Court had ample evidentiary grounds upon which to base its finding of a conflict. Moreover, it is the potential manifestation of the conflict with which we are here concerned. As Judge Friendly noted in In re Ira Haupt & Co., 361 F.2d 164, 168 (2d Cir. 1966), "(t)he conduct of bankruptcy proceedings not only should be right but must seem right."

Although reversing the Bankruptcy Court, Chief Judge Mishler did not dispute the existence of the conflict of interest which emerges from the facts we have related. He instead relied primarily upon two opinions of this court Ceramco v. Lee Pharmaceuticals and W. T. Grant Co. v. Haines, supra which stand for the general proposition that disqualification of counsel is not an automatically appropriate sanction where professional misconduct is found to exist. We have indeed been loathe to separate a client from his chosen attorney where the alleged misconduct does not prejudice an opposing party and taint the litigation in which he is appearing. The delay and additional expense created by substitution of counsel is a factor to which we have attached considerable significance in these cases. See, e. g., Lefrak v. Arabian American Oil Co., 527 F.2d 1136, 1138-40 (2d Cir. 1975).

[8] However the disqualification here does involve a conflict of interest which goes to the core of the pending state action and which prejudices the defendants since it was authorized by the Bankruptcy Court only if appropriate. The conflict found by the Bankruptcy Court affects not merely a determination of the proper defendants in the action but whether it should have been commenced in the first place. Moreover, counsel here was not simply the choice of the client but was confirmed by the court. As such he is answerable not only to his client but to the Bankruptcy Court as well. Under these circumstances the possible delay and additional expense caused by replacement***264** are clearly outweighed by considerations of the integrity of the judicial process. We find therefore no abuse of discretion in Judge Parente's determination that Shaw & Levine be removed as special counsel in the state court action.

[9] The appointment and authorization of attorneys to debtors in bankruptcy proceedings is provided for by Rule of Bankruptcy Procedure 215(a) which is made applicable to Chapter XI proceedings by Rule 11-22.[FN5] Rule 215(a) requires the disclosure of all the attorney's connections with the debtor, and a determination must be made by the court that the employment will be in the best interests of the debtor. Attorneys who are so appointed are of course officers of the court and fiduciaries. We have had occasion recently to discuss at some length their responsibilities to the estate of the debtor, the creditors and the court in In re Arlan's Department Stores, Inc., --F.2d -- Dkt. Nos. 79-5017, 79-5018 (2d Cir. Nov. 5, 1979).

FN5. Rule 215(a) provides:

(a) Conditions of Employment of Attorneys and Accountants. No attorney or accountant for the trustee or receiver shall be employed except upon order of the court. The order shall be made only upon application of the trustee or receiver, stating the specific facts showing the necessity for such employment, the name of the attorney or accountant, the reasons for his selection, the professional services he is to render, and to the best of the applicant's knowledge all of the attorney's or accountant's connections with the bankrupt, the creditors or any other party in interest, and their respective attorneys and accountants. If the attorney or accountant represents or holds no interest adverse to the estate in the matters upon which he is to be engaged, and his employment is in the best interest of the estate, the court may authorize his employment. Notwithstanding the foregoing sentence, the court may authorize the employment of an attorney or accountant who has been employed by the bankrupt when such employment is in the best interest of the estate. The employment of any attorney or accountant shall be only for the purposes specified in the order, but the court may authorize a general retainer of an attorney when necessity therefor is shown.

Rule 11-22 provides:

Employment of Attorneys and Accountants. Bankruptcy Rule 215 applies in Chapter 11 cases to the employment of attorneys and accountants for a trustee, receiver, debtor in possession, or creditors' committee selected pursuant to Rule 11-27.

We have a continuing concern that such appointments not be made in a perfunctory, pro forma manner without full consideration by the court of its obligation to determine that the employment is in the best interest of the debtor. We were advised on this appeal that the appointment of prior counsel as counsel to the debtor in Chapter XI proceedings is customary and usual. In fact Rule 215(a) specifically permits this practice. Obviously the familiarity of counsel with the business of the debtor and his relationship with its officers and directors is advantageous and not normally a cause of concern. However, it should also be apparent that the close business and personal relationships which have developed prior to insolvency may well create conflicts which preclude counsel from acting in the best interest of the debtor, particularly when questions involving the stewardship of those officers and directors arise. This is surely such a case. The financial debacle which engulfed Bohack is now alleged to have been created at least in part by machinations of its own board and officers. An attorney who has been closely related by professional, business and personal ties to those whose conduct may now be suspect is evidently in no position to make any objective appraisal of the nature and extent of their involvement. The appointment of Shaw & Levine to make the investigation and to determine whether the state action should be undertaken was inappropriate when made and the order of the Bankruptcy Court of May 23, 1978 terminating that representation was proper.

[10][11] However, we do not agree that the creditors' committee, as was provided in the order, should recommend replacement counsel. Since the charges made are directed in part against the debtor's management, we agree that the debtor is not in a position to recommend counsel. See In re Mandell, 69 F.2d 830, 831 (2d Cir. 1934). ***265** However, the complaint also alleges that several of Bohack's trade creditors improperly tightened Bohack's credit at A&P's request, thus contributing to the financial disaster which overtook Bohack. Yet it does not appear that any creditors have been named defendants in the state court action. In fact the continued retention of Shaw & Levine was urged by the creditors before this court. Under these circumstances the bankruptcy judge should independently select an attorney who has had no previous ties with the debtor. Such independent counsel should make the investigation directed by the order of February 24, 1977 and report to the Bankruptcy Court as to whether the litigation is justified and whether it should be continued, broadened in scope, or terminated. Any application for fees by Shaw & Levine with respect to services rendered in the state proceedings should not be entertained until the Bankruptcy Court shall determine whether that action was properly commenced. [FN6]

FN6. After this appeal was argued and the opinion prepared but not yet filed, it was brought to our attention that Bankruptcy Judge Parente on November 30, 1979 on the motion of Shaw & Levine and without opposition authorized the debtor-in-possession to compromise the state court action subject to the entry of a final order of confirmation of the debtor's modified plan of arrangement. It is basic that once the notice of appeal was filed, neither the District Court nor the Bankruptcy Court had jurisdiction to entertain any motion with respect to the very issue Sub judice in this court. 16 Wright, Miller, Cooper & Grossman, Federal Practice and Procedure s 3949, at 358-59 (1977). We have determined that a conflict exists here and that the issues involve the integrity of the bankruptcy proceedings. The appearance of impropriety cannot be cured by any purported conditional settlement by the parties. The November 30, 1979 order of the Bankruptcy Court is hereby set aside as void.

Reversed and remanded.

C.A.N.Y., 1979.
Matter of Bohack Corp.
607 F.2d 258, 21 C.B.C. 749, 6 Bankr.Ct.Dec. 171, Bankr. L. Rep. P 67,310

END OF DOCUMENT

Case Name:
Ivaco Inc. (Re)

**IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Ivaco Inc. and the Applicants Listed in Schedule "A"**

[2004] O.J. No. 2483

[2004] O.T.C. 499

3 C.B.R. (5th) 33

131 A.C.W.S. (3d) 802

2004 CarswellOnt 2397

Court File No. 03-CL-5145

Ontario Superior Court of Justice
Commercial List

Cumming J.

Heard: June 9, 2004.
Judgment: June 10, 2004.

(22 paras.)

Counsel:

M.P. Gottlieb, for the applicants.

Michael E. Barrack and Geoff R. Hall, for QIT.

E. Lamek, for the National Bank of Canada.

Peter Howard, for the Monitor, Ernst & Young Inc.

D.V. MacDonald, for Bank of Nova Scotia.

J.T. Porter, for UBS.

Ken Rosenberg, for United Steel Workers of Canada.

ENDORSEMENT

CUMMING J. (endorsement):--

The Motion

1 The moving party Applicants, Ivaco Rolling Mills Limited Partnership, comprising some eight affiliated corporations ("IRM"), seek directions from the Court in respect of the sales process for its business under the Companies' Creditors Arrangement Act ("CCAA"). The motion raises an important issue relating to the respective roles of the Monitor and Chief Restructuring Officer in that process. The Court provided a decision at the conclusion of the hearing, with reasons to follow.

Background

2 IRM is engaged in the steel manufacturing and processing business in Canada. QIT-Fer Et Titane Inc. ("QIT") is a major supplier to IRM of steel billets pursuant to a long-standing supply agreement. QIT is also a major unsecured creditor of IRM, being owed some $62 million.

3 The Applicants obtained an Initial Order under the CCAA September 16, 2003. A Chief Restructuring Officer ("CRO") was appointed October 24, 2003.

4 On December 11, 2003 this Court authorized IRM to pursue a dual-track restructuring process: one track is a stand-alone restructuring plan; the second track is the pursuit of a sales process.

5 The Monitor, the CRO and the unsecured creditors of IRM have a concern that QIT seeks a way whereby it will be paid the monies owing to it by IRM outside the parameter of the CCAA proceeding. The record gives some force to this concern.

6 A Court Order dated March 22, 2004 authorized a limited number of prospective purchasers to submit offers for the assets of one or more of the Applicants. Some four bidders have now submitted proposals in this regard. Understandably, it is a condition of the proposals that the bidders be able to satisfy themselves as to the nature and status of the historical and existing relationship between QIT and IRM and the nature of any relationship for the future between a buyer of IRM's business and QIT.

7 The concern that has been raised by the Monitor, CRO and a number of IRM's creditors is that QIT may seek to enter into a relationship with a bidder whereby QIT could achieve some recovery of IRM's pre-filing debt of $62 million at the expense of other unsecured creditors.

8 Any purchaser of IRM requires a supply contract with QIT as there are no apparent competitors for its product sold to IRM. The concern is that QIT could insist upon a supply arrangement with the bidder at an unreasonably high price with the bidder offering an unreasonably low price for the assets of IRM. The creditors, Monitor, and the Applicants are concerned that QIT might enter into a supply arrangement with a bidder at the expense of IRM by virtue of the price for IRM's assets being lower than would otherwise be the case in a normal market transaction.

9 Meetings have been set up to take place between the bidders, the Applicants through the CRO, the Monitor and QIT with a view to determining whether any one or more bidder can achieve a supply agreement with QIT within a context of a satisfactory unconditional bid by that bidder for the assets of one or more of the Applicants.

The Issue

10 Several issues raised at the outset of the motion were settled by agreement as discussions progressed. It is not necessary to discuss these settled issues. The settled position provides that the Monitor can observe the negotiations to take place between QIT and each bidder. The settled position also provides that disclosure can be made to bidders of the existing supply agreement between IRM and QIT.

11 A single issue remained for determination by the Court at the conclusion of the hearing, being whether or not the CRO was to be part of the sales process. QIT took the position that the CRO should not be part of the process. The Applicants, the Monitor and the other major unsecured creditors all took the position that the CRO should be part of the sales process. Only QIT, supported by the United Steel Workers of Canada, took the contrary view.

12 The only support for QIT came from the United Steel Workers of Canada, being the Union representing the workers of IRM through a collective bargaining agreement. The position expressed by counsel for the Union was that the continuity of IRM's business is critical to the direct welfare of its employees and is of indirect benefit to the community at large. There is a clear public interest in the welfare of the workers. Undoubtedly, that is a correct, and important observation.

13 Thus, counsel for the Union argued further, the Court should accede to the position of QIT even though it might result in a failure to maximize the value of the IRM assets through the CCAA proceeding. In my view, the Union's quite proper concern for the welfare of the workers cannot justify trumping the concern of creditors that they be treated fairly. Nor would it ever be in the broader notion of the public interest to allow a sales process perceived to be unfair to go forward. The public policy underlying the CCAA and its objectives would be undermined. Indeed, it might well be that any proposed sale would not then garner the requisite support of creditors required for approval under the CCAA. It might be that the business of IRM is more likely to fail, to the ultimate disadvantage of its workers, through a compromise to the integrity of the sales process. In any event, the Court could not sanction a proposed plan of compromise that was the result of an unfair process.

14 QIT professes that if the CRO takes part in the negotiations between the bidders and QIT that this will necessarily inhibit the sales process. QIT claims this will be so because bidders will be reluctant to provide confidential information to QIT, and vice-versa, while recognizing that the CRO may then use that information to enhance an alternative stand-alone restructuring plan and consequentially advise against acceptance of the bidder's proposal.

Disposition

15 There are certain fundamentals to a CCAA proceeding relevant to a determination of the issue at hand. First, there cannot be a sales process whereby one unsecured creditor secures a secret benefit or advantage over the other unsecured creditors. Such a result would be the equivalent of providing a preference for that creditor. Fairness to all the creditors is a prerequisite to a satisfactory sales process. Second, the sales process must be seen to be fair. That is, there must be transparency.

16 Third, the sales process is to be determined by the Court after considering the advice of the Monitor and the position of the Applicants and their creditors. The sales process is not dictated by a supplier qua supplier. It may be the supplier does not wish to participate in the sales process given the nature of the process. That is for the supplier to determine in its own self-interest. In the situation at hand, QIT conceivably might say that it would rather lose its supplier relationship with IRM or a successor, to its apparent significant economic detriment, than proceed in the sales process.

17 The CRO's attendance and participation in the sales process is critical because he is the independent party who must understand all the various bids and weigh each against the possibility of a stand-alone restructuring. He must ultimately make recommendations that engender confidence as being advanced on the best information and advice possible. The CRO is an active part of the negotiations in the sales process. He is not involved as a relatively passive observer in the manner of the Monitor.

18 The sales process has been determined by the Applicants with the approval of the Court. The CRO represents the Applicants in that process. The intended sales process is one of trilateral negotiations. If QIT, IRM or any bidder wishes to discontinue such negotiations at any time that is, of course, that party's right. It is in the obvious self-interest of IRM, QIT, and any bidder to maintain the existing QIT to IRM (or successor) supply relationship. It would seem to be a win-win-win situation to come to a tripartite agreement. While no one can be ordered to enter into any new agreement every participant is required to engage in a sales process that is fair and is seen to be fair. The CRO is involved with the purpose of achieving the best result for the Applicants and a result which will be approved by the requisite number of creditors.

19 Turning to the instant situation, there are a number of Applicants with different unsecured creditors for different Applicants. It is necessary that any negotiated sale (or restructuring) take into account such complexities so that fairness is achieved for all the creditors (and is seen to be achieved.)

20 QIT proposed that the CRO would be excluded from the negotiations unless his presence was requested by either a bidder or by QIT. I disagree. In my view, the CRO has the right to attend and participate throughout the entirety of the negotiations in the sales process. In the event that a discrete issue arises in the context of a particular bidder's negotiations with QIT, such that there is disagreement as to whether the Monitor or CRO should be absent, then the further direction of the Court can be sought in the context of that specific issue. This will allow for QIT's expressed concerns for bidders in the negotiation process to be taken into account, should this be necessary. It is noted incidentally that no bidder has come forward in the hearing at hand to support QIT in respect of its expressed concerns about the sales process.

21 Absent some compelling, exceptional factor to the contrary (not seen here), in my view, the Court should accept an applicant's proposed sales process under the CCAA, when it has been recommended by the Monitor and is supported by the disinterested major creditors. The Court has the discretion to stipulate a variation to such a proposed sales process plan. However, the exercising of such discretion would seem appropriate in only very exceptional circumstances.

22 An Order will issue in the form attached hereto as Annex "A". [Editor's note: Annex "A" was not attached to the copy received from the Court and therefore is not included in the judgment.] There are no costs granted to any party.

CUMMING J.

cp/e/nc/qw/qlgkw

Case Name:
843504 Alberta Ltd. (Re)

IN THE MATTER of the Bankruptcy and Insolvency Act R.S.C. 1985, C. B-3, As Amended; and the Companies' Creditors Arrangement Act R.S.C. 1985, C. C-36, As Amended
AND IN THE MATTER of a Plan of Compromise or Arrangement of 843504 Alberta Ltd. (formerly known as Skyreach Equipment Ltd.)

[2003] A.J. No. 1549

2003 ABQB 1015

30 Alta. L.R. (4th) 91

351 A.R. 223

4 C.B.R. (5th) 306

127 A.C.W.S. (3d) 1135

2003 CarswellAlta 1786

Docket No. 0303 19663

Alberta Court of Queen's Bench
Judicial District of Edmonton

Topolniski J.

Heard: November 10, 2003.
Judgment: December 9, 2003.

(33 paras.)

Creditors and debtors -- Debtors' relief legislation -- Companies' creditors arrangement legislation -- Stay of proceedings against debtor -- Extension of time to file plan.

Application by EdgeStone Capital Mezzanine Fund II Limited, a creditor of 843504 Alberta Limited, and the Monitor, for an order extending a stay of proceedings. 843504 Alberta filed a notice of intention to make a proposal to its creditors under the Bankruptcy and Insolvency Act. EdgeStone then chose to apply for a stay of proceedings under the Companies' Creditors Arrangement Act. PriceWaterhouseCoopers was appointed as Monitor. The remaining creditors of 843504 argued that the proceedings were a receivership in disguise for EdgeStone's benefit.

HELD: Application allowed. The extension gave the Monitor a better opportunity to present a plan to the creditors.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(6), 11.7, 11.7(3), 11.8.

Counsel:

A. Robert Anderson,for EdgeStone Capital Mezzanine Fund II Nominee, Inc.
Emi R. Bossio, for Ingersoll-Rand Canada Inc.
Michael McCabe, for Proposal Trustee, PricewaterhouseCoopers LLP.
Kent Rowan, for GE Commercial Distribution Finance Canada Inc.
Michael Penny and Stuart Weatherill, for Unknown Purchaser; John Deere Credit Inc.
Darren Bieganek, for Transportation Lease Systems Inc.
David Stratton, for CNH Canada Ltd. (New Holland Construction) and New Holland (Canada) Credit Company.
Jerry Hockin, for JLG Industries Ltd. and CAFO Inc.
Rick Reeson, for Alberta Treasury Branches.
James MacLean, for Bancorp Financial Services Inc., Bancorp First Mortgage Fund Inc., Bancorp Investments (Fund 2) Ltd. et al.
Steven Livingstone, for Citicapital Commercial Corp. and Capital City.

MEMORANDUM OF CASE MANAGMENT DECISION

TOPOLNISKI J.:--

Introduction

1 EdgeStone Capital Mezzanine Fund II Ltd., (EdgeStone) a creditor of 84305 Alberta LTD., more commonly known as Skyreach Equipment, and the Monitor of Skyreach, appointed under an Initial Order pursuant to the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36 (CCAA), seek an extension of the stay of proceedings. With the exception of GE Commercial Distribution Finance Canada Inc. (GE), Skyreach's other creditors oppose the extension of the stay. These reasons further expand upon my oral

decision on the reasons given on November 10, 2003.

Facts

2 Skyreach Equipment, is a well-known name in Alberta. The company specializes in renting, servicing and selling industrial lifts and aerial work platforms to a variety of business sectors. The Skyreach name, up until a short time ago, graced the arena that is home to the Edmonton Oilers, and continues to be the name of another arena, home to the Kelowna Rockets. It has 142 employees, and operates 12 branches - 19 in Alberta and 3 in British Columbia.

3 Since this spring Skyreach has operated under the threat of enforcement proceedings by its two general secured creditors, G.E. and EdgeStone. It tried to negotiate a going concern sale.

4 On September 19 2003, days after making an arrangement with EdgeStone to seek protection under the CCAA, Skyreach filed a Notice of Intention to make a proposal to its creditors under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended (BIA). EdgeStone then chose to apply instead for the CCAA stay of proceedings, and after a contested motion on October 9, 2003, Skyreach was placed under the protective umbrella of the CCAA for 30 days (Initial Order). PriceWaterhouseCoopers was appointed Monitor, with power to operate the business.

5 EdgeStone and the Monitor apply to have the stay extended. The PIMSI and mortgage creditors oppose the extension application. It is common ground that the onus in applications of this nature is on the applicant to satisfy the test in section 11(6) of the CCAA that:

a) circumstances exist to make the extension order appropriate and
b) the applicant is acting in good faith and diligently.

The test is not whether the plan of arrangement is doomed to failure - That is the test for terminating, not extending, a stay of proceedings (Re Rio Nevada Energy Inc. (2000), 283 A.R. 146 (Q.B.).

6 The PIMSI and mortgage creditors argue that EdgeStone has not discharged the onus, asserting that the proceeding has been, and continues to be, an impermissible receivership under the guise of a CCAA restructuring. Further, they object to the Monitor's application on the basis that it is inappropriate for it to take a position in opposition to one of the parties.

7 EdgeStone and the Monitor rely on the Monitor's Third Report to the Court and an excerpt from an Information Circular. as the necessary evidence of good faith and due diligence in pursuing a plan of arrangement. EdgeStone's officer's affidavit says that, based upon his review of the Monitor's reports, the Monitor is acting diligently, in good faith, and that circumstances exist to warrant the extension.

1. The Initial Order

8 On October 9th, EdgeStone applied to vacate the Notice of Intention and to obtain a CCAA stay of proceedings. GE supported the application. Skyreach took no position. A number of creditors holding PIMSI and mortgage security opposed the initial application on the ground that the CCAA process would benefit only EdgeStone, and therefore was really a receivership for EdgeStone's benefit at the expense of others and an abuse of the CCAA.

9 Appreciating the PIMSI creditors' concerns, I granted the Initial Order with conditions designed to protect the interests of all stakeholders. It provided for the usual 30-day moratorium to permit the development of, at least, a germ of a plan of arrangement, and further required court approval of any sale of assets for more than $100,000 and, in the case of assets subject to PIMSI's, $20,000. It gave the power to carry on business and to solicit invitations from prospective purchasers to the Monitor, and created an expedited process for proving claims for creditors holding PIMSI and mortgage security.

10 The CCAA contemplates a monitor having powers beyond those required to fulfil the traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and the court. Section 11.7(3) of the CCAA leaves discretion in the court to authorize functions other then those specifically enumerated by Parliament. Further support for this proposition is the explicit recognition of a monitor carrying on the debtor's business in section 11.8. (Syndicat national de l'amiante d'Asbestos Inc. v. Jeffrey Mines Inc. (2003) 40 C.B.R. (4th) 95; [2003] R.J.Q. 420 (C.A.). The Monitor's ability to carry on business, at least during the Initial Order phase, was considered necessary given the undisputed evidence of corporate interference and allegations of conflict of interest by Skyreach's Director and CEO, and the imminent resignation of the debtor's directors.

2. Subsequent Motions

11 The minutes of the initial order were settled. In the course of that hearing the Monitor's powers were reviewed to ensure that it had the powers necessary to carry on the business and to establish a process for soliciting offers to purchase assets. The intention was to provide sufficient, but not overreaching powers, given the unusual situation of the Monitor, rather than the company, operating the business.

12 GE also sought an order amending an earlier order granted by another judge which permitted funding for Skyreach by GE on specific terms. Notice had not been given to most other creditors. The amending order was refused, with the ability to reapply on notice to affected parties.

3. This Application

13 The CCAA is intended to provide a structured, court supervised environment for the negotiation of compromises between a debtor and its creditors for the benefit of not only those parties, but also other stakeholders such as employees and shareholders. At the end of day, the objective is to enable the debtor to continue in business so that all stakeholders benefit (United Auto and Truck Parts Ltd. v. Aziz (2000), 135 B.C.A.C. 96, [2000] B.C.J. No. 409, 2000 BCCA 146 at paras. 10 and 11). The CCAA is to be interpreted in a broad and liberal fashion to facilitate that objective. That broad and liberal interpretation, however, must not permit the enhancement of one stakeholders position at the expense of others - there should be no confiscation of legal rights. This requires a balancing of interests, rights and prejudices to "see if rights are compromised ... and have the pain of the compromise equitably shared." (Sammi Atlas Inc. (Re), [1998] O.J. No. 1089 (Ont. Gen. Div.) citing Re Campeau Corp., [1992] O.J. No. 237, 10 C.B.R. (3d) 104 (Ont. Gen. Div.) at 109).

14 As acknowledged by LoVecchio J. in Blue Range Resources Corp., (1999) 245 A.R. 154, [1999] A.J. No. 788, 1999 ABQB 1038, reorganization of a company's affairs under the CCAA may take many forms. There is no one solution that will apply for every company. Solutions may vary from organizational and management restructuring, downsizing, refinancing, or debt to equity conversion - the solutions are generally limited only by the creativity of those structuring the plan of arrangement. That said, the solutions in Alberta generally expect the corporate entity to continue in some form or another and do not allow for a liquidation proposal unless exceptional circumstances exist to justify it, notwithstanding that the CCAA seems to allow it (Royal Bank of Canada v. Fracmaster Ltd. (1999), 244 A.R. 93, 11 C.B.R. (4th) 230 (C.A.)). Simply put, in this province the corporate entity is expected to continue in some form or another unless there are exceptional circumstances. Liquidation proceedings are typically reserved for receiverships, windings up or bankruptcy.

15 This is quite different than in Ontario where apparently debtors can use the benefits of the legislation when there is no prospect of corporate survival or no plan of arrangement is proposed: Anvil Range Mining Corp. (2002), 25 C.B.R. (4th) 1 (Ont. Sup. Ct. Just.), aff'd (2002) 34 C.B.R. (4th) 157 ; Re Lehndorff General Partner Ltd. (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div.) at p. 32; Re Olympia & York Developments (1995), 34 C.B.R. (3d) 93 (Ont. Gen. Div.) at p. 104; Re Canadian Red Cross Society (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div.) at para. 46.

EdgeStone's Application and Evidence

16 As noted previously, EdgeStone's affidavit is based upon the deponent's review of the Monitor's reports and merely asserts that the Monitor is acting diligently and in good faith, and that circumstances exist to warrant the extension. This offers nothing more than a conclusion about the very determinations that the court is required to make in deciding whether the test has been satisfied. It is of very little assistance, and this form of conclusory affidavit is not acceptable: Alberta (Human Rights Commission) v. Alberta Blue Cross Plan (1983), 48 A.R. 192 (C.A.) at para. 8; Allen v. Alberta, [2001] A.J. No. 863, 2001 ABCA 171 at para. 8; Hovsepian v. Westfair Foods Ltd., [2003] A.J. No. 1133, 2003 ABQB 641. I note that the Monitor's report is filed with the court for information purposes and is available to me.

17 GE supports EdgeStone's application, acknowledging that it expects to be paid out in full through an asset sale, and that it continues to be paid full interest at a rate of $15,000 per day on its loan under the terms of a funding order granted earlier by another judge.

The Monitor's Duties, Application, and Evidence

18 The appropriateness of the Monitor's application to extend the stay of proceedings was questioned on the basis that by its actions, the Monitor was favouring the debtor and EdgeStone.

19 As an officer of the court, the Monitor owes a duty to treat all creditors reasonably and fairly. Like a court-appointed receiver or liquidator, its duties are those of a fiduciary.

20 Because of the special circumstances that existed at the date of the Initial Hearing, the Monitor was given the power to carry on Skyreach's business. With that power comes a risk, be it perceived or real, of conflict of interest, and where the Monitor advocates a position or a plan of arrangement that risk may be exacerbated. In making its application for the extension the Monitor presumed that it was reasonable for it to do so since it was operating the business and there were no directors in place. Although motivated by good intentions this gave rise to a perception of conflict of interest, something that must be jealously guarded against. The appointment of a Chief Restructuring Officer or the appointment of new or returning directors can easily avoid perceptions of bias.

21 The Monitor relies on an affidavit that attaches its Third Report to the Court and two pages from an Information Circular. The report indicates that since the Initial Order, the Monitor has taken control of the business, working closely with management. The report indicates that the Monitor has identified excess equipment and undertaken an extensive process to solicit offers for:

a) all or part of the debtor's assets business and undertakings,
b) refinancing,
c) acquisition of the shares of Skyreach (subject to the approval of EdgeStone which holds and may exercise the shares under its security), or
d) any combination thereof.

22 The Monitor has advertised in newspapers, posted information on its national electronic bulletin board and web site, delivered some 300 Information Circulars to prospective purchasers, and set up a data room. Negotiations have begun with prospective purchasers, one of whom has expressed an interest in buying Skyreach's significant tax losses. Counsel for the Monitor, EdgeStone, and GE argued that only a sale of the tax losses will result in some payment to the unsecured creditors at the end of the day. Whether this is likely given voting structures under the CCAA is, of course, yet to be seen.

The proposed restructuring process

23 The Monitor proposes the following restructuring process and time line. The Monitor will:

1. will solicit offers until November 28;
2. report the results of the solicitations to the Court by December 19
3. close transactions after obtaining court approval by January 30 2004, and
4. finally, formulate a plan of arrangement for presentation to the creditors by February 28, 2004.

24 Clearly, this process contemplates the sale of Skyreach's assets, either hard assets or shares, well before a plan is developed and presented to the creditors.

25 The Monitor, EdgeStone and GE urge that this process will maximize recoveries for the stakeholders, contending that the marketplace can best determine value of the debtor's assets. EdgeStone relies on Re Consumers Packaging Inc. (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197 (Ont. CA) and Re Canadian Red Cross Society (1998), 72 O.T.C. 99, 5 C.B.R. (4th) 299 (Ont. Gen. Div.) in support of the proposition that this is an acceptable practice.

26 Once again, the opposing creditors say that this is simply more evidence that this proceeding is nothing more than a receivership in disguise for EdgeStone's benefit.

27 In Consumers Packaging the court approved a going concern sale before the plan of arrangement was presented because the sale would preserve the business, albeit under new ownership, and because of uncertainty over whether the debtor could continue operations given its financiers' demands.

28 In Canadian Red Cross Society provincial and territorial governments decided to transfer responsibility for the Canadian blood supply to a new national agency. The court held that the CCAA was flexible enough that it could be interpreted to convert the company's assets into a cash fund, crystalizing the highest value recovery pool possible. This was advantageous to unsecured creditors, but did not affect creditors with security interests. The Court ruled that it had jurisdiction to grant the order, noting that the proper question was whether the process was appropriate in all of the circumstances.

29 I accept that the need for flexibility in CCAA proceedings may, in the appropriate circumstances, warrant a sale of a significant portion of a debtors assets or undertaking before a plan of arrangement is put to the creditors. (Re PSI Net Ltd (2001), 28 C.B.R. (4th) 95, [2001] O.J. No. 3829 (Ont. S.C.J.), Canadian Red Cross and Consumer's Packaging). Obviously, each case must be assessed on its own unique facts, but in this case there is no evidence that it is either necessary or in the stakeholders' best interests. Accordingly, at this stage the proposed process is unacceptable. In deciding this, I make no finding as to EdgeStone's bona fides nor rule out the prospect of evidence being adduced to establish that it would be appropriate.

30 EdgeStone argues that there is Alberta authority for the sale of all or substantially all of the debtor's assets (Blue Range Resource Corp, Gauntlet Energy Corp action 0301-09612, Liberty Oil & Gas Ltd., [2002] A.J. No. 1302, action 0201-03299, and Mirant Canada Energy Marketing Ltd. action 0301-11094. Blue Range and Liberty Oil & Gas Ltd. obtained court sanctioning for liquidation-style plans. Gauntlet obtained creditor approval for a liquidation-type plan, but the sanctioning hearing has not yet been held. Mirant's creditors have not yet approved a liquidation-style plan, although a plan has been circulated to the creditors.

The Extension should be granted

31 Applying the three arms of the test in s. 11.7, I find that the Monitor has acted diligently in moving the process along towards the development of a plan. The fact that the on the evidence before me, I disagree with the proposed timing for steps in the restructuring to occur does not detract from that.

32 Although suspicions are raised by the opposing creditors' arguments, I cannot find on the materials before me that EdgeStone is acting in bad faith. The Monitor is certainly acting in good faith, but that is not an appropriate ingredient in applying the s. 11.7 test.

33 In considering whether circumstances exist for the extension, the following factors assist the applicant:

1. An extension gives the Monitor a better opportunity to formulate and present a plan to the creditors, meeting the purpose and intent of the legislation;
2. With sufficient controls in place, an extension will prevent creditors from maneuvering for a better position (Rio Nevada, and cases cited at para. 36)
3. There is no evidence about whether the anticipated costs of these proceedings will be similar to costs anticipated in a receivership. What is known is that Skyreach is expected to suffer a $337,000 deficit by the end of January 2004. PIMSI and mortgage creditors want EdgeStone to pay all of CCAA costs. However, it would be inappropriate to allocate costs now since there is no certainty about what benefits will accrue to any given party. That can be done later.
4. The extension Order is only until December 19th. At that time a further assessment of good faith, due diligence, and the appropriateness of the circumstances can be made.
5. I cannot conclude that a liquidation sale is inevitable or the most likely outcome at this stage of the proceedings. The Monitor is offering shares for sale.
6. The prospect of a tax loss sale may have value for unsecured creditors. A tax loss sale is apparently easier to facilitate in CCAA proceedings than other insolvency proceedings;

Order

1. The stay of proceedings under the CCAA is extended to December 19th
2. The Monitor is to hire and hand over possession and operational control of Skyreach to a Chief Restructuring Officer within 14 days;

3. The Monitor is to fulfil its traditional role of monitoring the debtor's business and financial affairs and preparing reports for creditors and court and play a supportive role in developing the plan and presenting it to the creditors;
4. The proposed sale of all or substantially all of the assets before a plan of arrangement is presented to the creditors is not approved.
5. A further stay extension should be supported by evidence demonstrating significant progress towards a plan of arrangement.
6. If the company is unable to present a viable plan of arrangement before a sale of all or substantially all of the assets, the sale documents should be prepared as though for a receivership sale. However, if the company or another applicant proposes a sale before the presentation of a plan, the appropriate application may be made.
7. Assets subject to PIMSI interests used in the company's daily operations are to be paid for in accordance with the terms of the governing agreement.
8. A cost allocation hearing is to be scheduled to follow an application to sanction the plan of arrangement.

TOPOLNISKI J.

cp/e/nc/qw/qlmmm/qlcas