Court File No. 03-CL-5145

ONTARIO
SUPERIOR COURT OF JUSTICE
Commercial List

B E T W E E N:

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 or Plans of Compromise or Arrangement of Ivaco Inc. and the Applicants listed in Schedule "A"

Applicants

NOTICE OF MOTION
(RETURNABLE MAY 26, 2006)

The Applicants, through the Monitor Ernst & Young LLP, will make a motion before the Honourable Mr. Justice Ground, on Friday, May 26, 2006, at 10:00 a.m. or as soon after that time as the motion can be heard at 393 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

(a) Interpretation of paragraph 3 of the Protocol approved by endorsement of the Honourable Mr. Justice Farley on November 16, 2005;

(b) A declaration that the Heico participants in the working capital dispute are obliged to provide an Affidavit of Hugh Blakely in accordance with paragraph 3 of the Protocol and to produce him for cross-examination thereafter at a date and time to be scheduled, also in accordance with the Protocol;

(c) Such further and other relief as to this Honourable Court seems just.

THE GROUNDS FOR THE MOTION ARE:

(a) The Purchasers (collectively, "Heico") entered into three asset purchase agreements in August, 2004 (the "Agreements") with the sellers/applicants (collectively, "Ivaco") subject to court approval. Court approval was obtained on or about August 18, 2004 and closing took place on December 1, 2004. Post-closing, as described by the Honourable Mr. Justice Farley, the current proceedings are a "liquidating CCAA";

(b) Each of the Agreements has terms dealing with the determination of and adjustments for working capital, including provisions for a mechanism for resolution should there be a dispute as to working capital;

(c) In early 2005, there was such a dispute and it became clear that (totalling the three Agreements), the parties were some $50,000,000 apart;

(d) Ivaco and Heico did not agree on the process to be followed under the Agreements and there were two applications commenced, material filed and numerous attendances before this Honourable Court. The Honourable Mr. Justice Farley delivered Reasons for Decision dated June 2, 2005 and August 4, 2005 respectively;

(e) The Protocol, a much debated and negotiated document, sets out a multi-stage process and was approved by this Honourable Court on November 16, 2005. The parties commenced the Protocol process by the delivery of Initial Submissions to the Expert on February 17, 2006. Pursuant to the Protocol, the next stage for the Expert is the investigation or interview stage which is underway at present;

(f) The Protocol expressly distinguishes between three categories of persons to be interviewed. With respect to two of the categories, only the Expert has the ability to require an interview and pose questions in an informal process;

(g) The Protocol also addresses a third category of person; those who were employed by Ivaco prior to the sale and were employed by Heico post-closing. With respect to that category of person only, although they start through an informal interview with the Expert (the "3(c) Interviewee"), the Protocol provides:

> *Unless otherwise agreed, up to two representatives from both parties shall have the right to be present at any interviews conducted. In the case of (c), in the event that matters become contentious, either of Heico or the Monitor shall be entitled to require that the individual provide evidence under oath with a sworn affidavit to be provided and both parties shall be entitled to question the employee. A transcript of the evidence shall be prepared. The party adverse on a particular issue shall be entitled to cross-examine and proffer additional evidence.* (Emphasis added)

(h) While it may not be strictly necessary to elaborate as the clause is clear, it is objectively apparent that one of the rationales for such a clause is to protect Ivaco's ability to ensure that the Expert receive a full and accurate picture of the facts where a former employee may have new loyalties and obligations to its current employer.

(i) The Expert is in the process of conducting the interviews and has to date interviewed over ten persons including seven 3(c) Interviewees

(j) The seven 3(c) Interviewees included two interviews of the former CFO of Ivaco, Hugh Blakely. To date, it is only for Mr. Blakely that through the Monitor, Ivaco has sought to invoke the right to have him provide an affidavit and be produced for cross-examination;

(k) Heico has refused to provide the affidavit or produce Mr. Blakely for cross-examination. The Heico position has been that Heico has to agree that Mr. Blakely has said something contentious in the interviews and it does not agree. Heico has also raised the fact that Mr. Blakely is named as a Respondent by the Bank of Nova Scotia in a separate proceeding in the Directors and Officers Claims Process (approved by this Honourable Court) for a pre-filing matter as a reason not to provide an affidavit or produce him;

(l) The Heico position is not in accord with a commercially reasonable interpretation of the Protocol. The Protocol says that either party has the right to require the provision of an affidavit if matters become contentious. That matters are contentious in a number of areas is manifestly clear from the Initial Submissions and has become even more apparent in the course of the interviews. Simply by way of example, Heico is alleging that seven items in dispute totalling approximately $17,000,000 were improper "top level" adjustments or manipulations by the Chief Restructuring Officer. In his interviews, Mr. Blakely, the former Chief Financial Officer, has sought to minimize or indicate he had little or no involvement in these matters. In his interview, the Chief Restructuring Officer provided a very different picture of both the process and Mr. Blakely's involvement. It is surely open to Ivaco to have Mr. Blakely address these and other areas to assist the Expert in getting a full and accurate picture. Indeed, if the Heico position were correct, simply by refusing to agree that something was contentious, Heico could frustrate the right provided to Ivaco under the Protocol;

(m) Although it is not obliged to do so under the Protocol, Ivaco has indicated to Heico a number of areas where, in its view, Mr. Blakely has not provided the Expert with an accurate or complete picture of the facts on issues totalling approximately $35,000,000;

(n) Section 97 of the *Courts of Justice Act* and Rules 14.05(3)(d) and 39 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended; and

(o) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(a) Affidavit of Brian Denega sworn May 12, 2006;

(b) Such further and other materials as counsel may advise and this Honourable Court may permit.

May 12, 2006

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Applicants

AFFIDAVIT OF BRIAN M. DENEGA

(Sworn May 12, 2006)

I, BRIAN M. DENEGA, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a Senior Vice-President of Ernst & Young Inc., the Monitor of the Applicants appointed by this Honourable Court by Order dated September 16, 2003 as amended from time to time. As such, I have personal knowledge of the matters set forth in this Affidavit. To the extent I do not have personal knowledge, I verily believe the matters set out to be true.

2. I provide this Affidavit in support of the Applicants' motion for an order interpreting section 3 in the KPMG protocol that was approved by this Honourable Court on November 16, 2005 (the "Protocol") and requiring Hugh Blakely to provide an affidavit and to attend for cross-examination thereafter as provided for in the Protocol.

KPMG Protocol

3. By order dated January 16, 2006 this Honourable Court approved an engagement letter appointing KPMG as an "Expert" in the working capital dispute between the Selling Parties (collectively "Ivaco") and the Purchaser (collectively "Heico"). Attached to the engagement letter is a protocol for the arbitration proceedings. The Protocol was approved by the Honourable Mr. Justice Farley by way of his endorsement dated November 16, 2005. The Order of this Honourable Court dated January 16, 2006 is appended as Exhibit "A" to this my Affidavit. The Protocol is appended as Exhibit "B" to this my Affidavit. Paragraph 3 of the Protocol is as follows:

> *Investigation*
>
> *Following receipt of the documentation set forth above, the Expert shall have 20 business days (or such greater amount of time as may be agreed by both parties or requested by the Expert, provided that such extension shall not exceed ten business days) to conduct any of the following interviews:*
>
> *(a) Interviews with representatives of and advisors to Heico (other than prior employees of Ivaco (including officers and management) now employed by Heico);*
>
> *(b) Interviews with current (and former, if available) representatives of and advisors to Ivaco and the Monitor; and*
>
> *(c) Interviews with prior employees of Ivaco now employed by Heico in the presence of counsel to both Heico and the Monitor.*
>
> *Unless otherwise agreed, up to two representatives from both parties shall have the right to be present at any interviews conducted. <u>In the case of (c), in the event that matters become contentious, either of Heico or the Monitor shall be entitled to require that the individual provide evidence under oath with a sworn affidavit to be provided and both parties shall be entitled to question the employee. A transcript of the evidence shall be prepared. The party adverse on a particular issue shall be entitled to cross-examine and proffer additional evidence.</u>*

4. The Protocol was settled after two court proceedings with respect to disputes as to the methodology for proceeding with the working capital dispute as provided for in the purchase agreements. The reasons for decision of the Honourable Mr. Justice Farley dated June 2, 2005 and August 4, 2005 respectively are appended as Exhibits "C" and "D" to this my Affidavit.

5. To date KPMG has conducted one interview of a section 3(a) individual (Jon Hicks of Heico) and seeks to schedule one or two more.

6. To date KPMG has conducted three interviews of section 3(b) individuals (Michel Marleau of E&Y, Randy Benson the former Chief Restructuring Officer of Ivaco and Andy Kramer of UBS – financial advisors to Ivaco) and may schedule one or two more.

7. To date KPMG has interviewed seven section 3(c) individuals (prior employees of Ivaco now employed by Heico).

8. Under the Protocol for reasons that will be developed in argument the 3(c) individuals are in a separate and special situation.

9. At the conclusion of only one of the seven interviews under section 3(c); (that of Hugh Blakely the former CFO of Ivaco and now employed by Heico) the Monitor advised that it was invoking the rider to section 3(c) and requiring an affidavit from Mr. Blakely and to cross examine him.

10. I was present when Peter Howard, counsel for the Monitor offered to Bruce Leonard, counsel for Heico, to simply have Mr. Blakely agree to treat the transcripts of his interviews as his affidavit if he believed the contents to be true. The transcripts of the interviews of Hugh Blakely on April 19, 2006 and on April 24, 2006 are appended as Exhibit "E" to this my Affidavit. On both occasions Mr. Leonard reserved his position as to the offer as well as to providing an affidavit and producing Mr. Blakely for cross-examination under the Protocol saying that

he, counsel to Heico, was of the view that nothing contentious had arisen in the interviews. The Monitor will address the merits or otherwise of this interpretation of the Protocol as a matter of argument.

11. I am appending as Exhibit "F" to this my Affidavit a copy of an letter from Peter Howard to Bruce Leonard dated April 27, 2006 seeking his position on producing Mr. Blakely and offering to discuss the issues or areas on which of Mr. Blakely's interviews related to differences between the two contending parties (Ivaco and Heico) if there was really any uncertainty on the point. In part the letter said:

> *This situation is unfortunate. The Protocol was negotiated over many months with the knowledge and indeed expectation premised on the material in the earlier court applications that it might come to this. There have been at least six category 3(c) interviews and we have not sought to abuse the opportunity to require that there be evidence under oath as it is only in Mr. Blakely's case that we have required, as we are expressly entitled to, that the evidence be under oath and we have the ability to examine him under oath. As we have said to you and repeat, Mr. Blakely has been incomplete and in some instances incorrect in his answers to date on, inter alia, the financial statements process, the Exhibit B preparation, the QIT issues and in a number of other areas. It may simply be that he has forgotten or not reviewed certain files or matters before his interviews and we are in a position to bring those to his attention to allow him to correct or amplify his answers. This is the opportunity that was specifically preserved in the Protocol.*

12. Mr. Leonard's response dated May 1, 2006 is appended as Exhibit "G" to this my Affidavit. In this response Mr. Leonard addresses two subjects. On the first part the Monitor will address the interpretation of the Protocol in argument in its factum. As to the second point Mr. Leonard stated:

> *We also understand that there is certain litigation outstanding between creditors of the Estate and various of the Directors of Old Ivaco. We are not involved with or familiar with that litigation and it only recently came to our attention. It would not seem appropriate or correct for the creditors of the Ivaco Estates to attempt to expose Mr. Blakely to cross-examination*

> *on issues that would be of assistance to them in the other litigation. Clearly the existence of this other litigation and the terms of the protocol make it impossible for Heico to agree that a cross-examination of Mr. Blakely is in accordance with the terms of the protocol. If you wish to proceed, it would be helpful to the Court if the Court were aware of the nature and extent of other litigation being pursued by the creditors of the Estate against Mr. Blakely and others.*

13. I am advised and verily believe that counsel for the Monitor advised counsel for Heico that while they are irrelevant, the Monitor would indeed put before this Honourable Court the facts requested by Mr. Leonard. In that regard I am attaching as Exhibit "H" to this my Affidavit the two claims made by the Bank of Nova Scotia (the "Bank") against Mr. Blakely and others in the Directors and Officers Claims Process.

14. In summary, the Bank alleges that financial statements of the Applicants were prepared in a manner that the persons preparing them knew or ought to have known was inaccurate in order to show compliance with covenants in favour of the Bank (when the actual situation was that the Applicants were not in compliance) in periods before the filing of the Applicants in September 2003.

15. The Monitor is unclear why Mr. Leonard considers the claim by the Bank to be pertinent to the working capital dispute which focuses on events in the summer and fall of 2004 however the information is provided as requested.

16. In order to assist in the argument as to the interpretation of the Protocol and to provide an understanding of some of the issues in the working capital dispute between Heico and Ivaco the Monitor is also attaching as Exhibits "I", "J", "K" and "L" respectively to this my Affidavit the Initial Submissions of Ivaco, Heico in the working capital dispute and the transcripts of the interviews of Randy Benson, the former Chief Restructuring Officer of the Applicants and Jon Hicks of Heico.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 12th day of May , 2006	)))))))	BRIAN M. DENEGA
Commissioner for taking Affidavits, etc Timothy M. Banks.		