Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD.

BOOK OF AUTHORITIES OF ROSEWAY CAPITAL S.À.R.L.

November 26, 2013

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TAB 1

Case Name:

2811472 Canada Inc. (c.o.b. Acorn Partners) v. Royal Bank of Canada

Between
2811472 Canada Inc. c.o.b. Acorn Partners, Applicant,
and
Royal Bank of Canada and BDO Dunwoody Limited as Trustee in Bankruptcy of Molnar Industrial Maintenance Ltd. and not in its Personal Capacity, Respondents
And between
Royal Bank of Canada, Applicant, and
2811472 Canada Inc. c.o.b. Acorn Partners, Respondent

[2006] O.J. No. 2790

81 O.R. (3d) 721

23 C.B.R. (5th) 124

10 P.P.S.A.C. (3d) 41

150 A.C.W.S. (3d) 228

[2006] O.T.C. 646

2006 CarswellOnt 4200

Court File Nos. 04-CV-028051 and 05-CV-30609

Ontario Superior Court of Justice

J.A. Forget J.

Heard: May 23, 2006.
Judgment: July 11, 2006.

(29 paras.)

Creditors and debtors law -- Security -- Priorities -- Application by a bank and a company to determine the priority of their respective security interests in the bankrupt's accounts receivable allowed -- The Bank loaned the bankrupt money under a general security agreement -- Subsequently, the company and the bankrupt entered into several factoring agreements without a subordination agreement from the Bank -- The Court found that the Bank's interest took priority

as a validly registered and perfected security interest -- Acorn's interest did not constitute a purchase money security interest because the bankrupt did not use the proceeds to purchase an identifiable asset -- Personal Property Security Act, s. 1(1).

Insolvency law -- Creditors -- Secured creditors -- Application by a bank and a company to determine the priority of their respective security interests in the bankrupt's accounts receivable allowed -- The Bank loaned the bankrupt money under a general security agreement -- Subsequently, the company and the bankrupt entered into several factoring agreements without a subordination agreement from the Bank -- The Court found that the Bank's interest took priority as a validly registered and perfected security interest -- Acorn's interest did not constitute a purchase money security interest because the bankrupt did not use the proceeds to purchase an identifiable asset -- Personal Property Security Act, s. 1(1).

Application by Acorn Partners and the Royal Bank of Canada to determine priority of their respective security interests in the assets of the bankrupt, Molnar Industrial Maintenance -- The Bank loaned money to Molnar under a general security agreement -- After the Bank had issued demand on its loans, and prior to its bankruptcy, Molnar entered into several factoring agreements with Acorn -- The agreements purported to make a general assignment of various accounts receivable to Acorn -- Neither party obtained an agreement from the Bank for subordinate its security interest to that of Acorn -- HELD: Application allowed in favour of the Royal Bank -- The factoring agreements did not fall within the definition of a purchase money security interest because the funds obtained from Acorn for the transfer of the receivables were not used for the purchase of an identifiable asset -- In addition, the assignment agreement between Molnar and Acorn warranted that the accounts in question were not otherwise encumbered despite the registration and perfection of the Bank's general security agreement over all of Molnar's accounts and book debts -- Had Acorn conducted a registry search, the Bank's interests would have been discovered -- As Molnar did not have the right to assign its accounts, any priority Acorn may have had was defeated due to the invalidity of the transaction -- Therefore, the Bank held priority of its security interest to the accounts receivable of Molnar -- Acorn was ordered to pay the Bank any amounts collected thus far.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 38.04

Personal Property Security Act, s. 1(1), s. 1(1), s. 2, s. 4(1), s. 28(3), s. 33(2), s. 39, s. 67(1)(c)

Counsel:

Keith A. MacLaren, for the Applicant/Respondent, 2811472 Canada Inc. c.o.b. Acorn Partners

J. Ross Macfarlane, for the Respondents, Royal Bank of Canada
and BDO Dunwoody Limited as Trustee in Bankruptcy of Molnar
Industrial Maintenance Ltd. and not in its Personal Capacity
and for the Applicant Royal Bank of Canada

DECISION

1 **J.A. FORGET J.**:-- The above applications are brought pursuant to section 67(1)(c) of the *Personal Property Security Act* and concerns a priority dispute between Royal Bank of Canada (the "Bank") and 2811472 Canada Inc. c.o.b. as Acorn Partners ("Acorn"). The dispute concerns Molnar Industrial Maintenance Ltd. ("Molnar"), a bankrupt company that was a customer of the Bank. The Bank loaned money to Molnar, and held as security a properly perfected General Security Agreement (the "G.S.A."). Shortly before its bankruptcy, and after the Bank had demanded upon its loans, Molnar entered into several "factoring" agreements with Acorn, under which it purported to assign various accounts receivable to Acorn. Neither Acorn nor Molnar ever sought or obtained an agreement from the Bank to subordinate its security interest to that of Acorn. The Bank claims priority under its G.S.A.

2 Three issues are raised by the applications, namely

1) Is a factoring agreement a security interest such that it would be subject to the provisions of the *Personal Property Security Act* [*PPSA*]?
2) Can Acorn's argument with respect to Purchase-Money Security Interests [PMSI] be considered?
3) If the answer to #2 is yes, did Acorn hold a PMSI?

Discussion

3 The Supreme Court of Canada discussed factoring arrangements and the assignment of book debts in *Alberta (Treasury Branches) v. Canada (Minister of National Revenue - M.N.R.) et al.*, [1996] 1 S.C.R. 963 [*Alberta*]. Although the issue was addressed in the context of taxation legislation rather than priorities under the *PPSA*, the Court emphasized the importance of the distinction between absolute and conditional assignments of book debts and explained what is meant by the business of factoring. The Court described it in its general sense at paragraph 30 as follows:

> For the resolution of these appeals, it is essential that there be a clear recognition of the fundamental difference between an absolute and a conditional assignment of book debts. In an absolute assignment, all interests are transferred and no property remains in the hands of the assignor. It is, simply, a sale of the book debts of the company. This is the basis of the business of factoring. Factoring is described in R. Burgess, Corporate Finance Law (2nd ed. 1992), at p. 100, in this manner:
>
> > "Factoring is a legal relationship between a financial institution (the factor) and a business concern (the client) selling goods or providing services to trade customers (the customers) whereby the factor purchases the client's book debts either with or without recourse to the client and administers the client's sales ledger."
>
> From this definition it is apparent that factoring arrangements involve:
>
> (1) the purchase of the client's book debts;
> (2) the taking over and administration of the client's sales ledger and credit control functions; and
> (3) the provision to the client of finance which will be a specified percentage of the nominal value of the debts.
>
> The author goes on (at p. 101) to consider the requirements for an assignment of book debts under English law and observes that to be effective the assignment must be absolute. The text defines "absolute", in these terms:
>
> > The ordinary legal meaning of "absolute" is unconditional, so, for an assignment to be absolute, it must not be conditional in any way; specifically, it must not purport to be by way of charge only.

4 At paragraph 31, the Court stated that factoring constitutes an absolute assignment of accounts receivable:

> A factoring of accounts receivable is based upon an absolute assignment of them. It is in effect a sale by a company of its accounts receivable at a discounted value to the factoring company for immediate consideration. In my view, s. 224 ITA does protect those engaged in the factoring business and those lending institutions that have succeeded in perfecting their security interest prior to any intervention by the MNR. However, I cannot accept the submission that Parliament, by this section, intended to create an interest which was both conditional as a security interest and at the same time unconditional as an absolute assignment. There cannot have been an intent to combine such incompatible concepts.

5 At paragraph 32, the Court further stated that a factoring arrangement "... requires an absolute transfer of the proprietary interest of the assignor in the book debts."

6 The Court summarized its position at paragraph 35 as follows:

> In summary, an assignment cannot be both absolute and yet leave an equity of redemption in the form of the right to redeem with the assignor. The retention of an equity of redemption is consistent with a security interest and not with an absolute assignment. A GABD simply cannot constitute an absolute transfer of property.

7 Therefore, a general assignment of book debts (GABD) cannot constitute an absolute transfer of property, whereas a factoring agreement *must* require an absolute transfer. If there is a right of redemption, then the assignment cannot be absolute. An assignment must be absolute or conditional; it cannot be both. Therefore, it cannot be both a security interest and an absolute assignment: *Alberta, supra,* at paragraph 41.

8 *First Vancouver Finance v. Canada*, [2002] 2 S.C.R. 720, is another Supreme Court of Canada case, which decided taxation issues arising out of a factoring agreement. Despite the fact that the question in that case did not concern *PPSA* priorities, at paragraph 39, the Court did suggest that since the factoring company was a third party purchaser of book debts rather than a secured creditor, the issue of priorities would not arise. This could be an indication of the Court's recognition that a factoring company, as a third party purchaser, would not be subject to the priority rules under the *PPSA*.

9 The problem with this line of thinking is that those holding general security agreements are left unprotected. Furthermore, the conclusions in these cases are in conflict with the provisions of the *PPSA*. While the above noted cases spoke to factoring agreements in a general way, the circumstances arose in the context of the *Income Tax Act*. A consideration of priorities under the *PPSA* did not arise. The issues before me must be determined within the confines of the *PPSA* because the transaction falls within the definition of a security interest in the *PPSA*.

10 "Security interest" is defined in section 1(1) of the *PPSA* as follows:

> an interest in personal property that secures payment or performance of an obligation, and includes, **whether or not the interest secures payment or performance of an obligation**, the interest of a transferee of an account or chattel paper [emphasis added].

11 Furthermore, section 2 defines the scope of the *PPSA* as follows:

> Subject to subsection 4(1), this Act applies to,
>
> (a) every transaction without regard to its form and without regard to the person who has title to the collateral that in substance creates a security interest including, without limiting the foregoing,
>
> (i) a chattel mortgage, conditional sale, equipment trust, debenture, floating charge, pledge, trust indenture or trust receipt, and
> (ii) an assignment, lease or consignment that secures payment or performance of an obligation; and
>
> (b) **a transfer of an account** or chattel paper **even though the transfer may not secure payment or performance of an obligation** [emphasis added].

12 RBC is also protected by section 39 of the *PPSA*, which reads as follows:

> The rights of a debtor in collateral may be transferred voluntarily or involuntarily despite a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but no transfer prejudices the rights of the secured party under the security agreement or otherwise.

13 Based on these provisions, at page 1-34.1 of *Secured Transactions in Personal Property in Canada* (Toronto: Carswell, 2006) ["*Secured Transactions*"], Richard H. McLaren concludes that "all transfers of an account or chattel paper are within the scope of the Act." None of the exclusions found in subsection 4(1) apply. As such, the assignment of accounts in this case, while termed an "absolute assignment", constitutes a security interest. In the *2006 Annotated Ontario Personal Property Security Act* (Toronto: Carswell, 2005) at 19, McLaren discusses the scope of the *PPSA* as follows:

> Section 2(a) focuses on the substance of a transaction and not the form, in determining whether the Act applies ... The facts of each case will determine the nature of the transaction. The intention of the parties will be a relevant factor in objectively determining the substance of the transaction. This provision precludes parties from escaping the application of the Act based on the form of the transaction. Irrespective of what the parties call the transaction, if in its substance the transaction creates a security interest it will fall under the scope of the Act.

14 McLaren discusses the inclusion, in the scope of the *PPSA*, of transfers of accounts that do not secure payment as follows at page 1-34.1 of *Secured Transactions, supra*:

> The primary purpose of including non-security transfers was to ensure that all major methods of inventory and receivables financing would be brought within the same Act. Thus, whether the parties find one particular procedure for financing more convenient than another, all conflicting interests in the same collateral can be resolved by a single set of priority rules.

15 The assignment of the right to receive commissions has been held to be an account subject to the provisions of the *PPSA*: *TCE Capital Corp. v. Kolenc (Trustee of)*, [1999] O.J. No. 1226 (Div. Ct.); *Agent's Equity Inc. v. Hope Estate* (1996), 30 O.R. (3d) 557 (Gen. Div.). Compare a real estate agent's right to receive commissions to Molnar's right to receive payment under its accounts.

16 RBC submits that Acorn referred to section 28(3) of the *PPSA* in its submissions. However, this section is applicable to chattel paper. I agree with RBC that this section is irrelevant since chattel paper and accounts are mutually exclusive.

17 In any event, it is unnecessary to answer the question of whether the transaction created a security interest because Acorn has acknowledged that the transaction constituted a security interest in its supplementary position that the transaction created a PMSI. RBC submits that the court should draw an adverse inference from Acorn's failure to claim any PMSI priority in its Notice of Application. I will now discuss whether Acorn's failure to claim any PMSI priority is cause to be skeptical of its argument.

18 Rule 38.04 of the *Rules of Civil Procedure* reads as follows:

> Every notice of application (Form 14E, 68A, 73A, 74.44 or 75.5) shall state,
>
> (a) the precise relief sought;
> (b) the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and
> (c) the documentary evidence to be used at the hearing of the application.

19 It is a well-established principle that judges should not decide matters in respect of which the parties have not had an opportunity to make submissions. For example, in *Rodaro v. Royal Bank of Canada*, [2002] O.J. No. 1365 at paras. 60-62, the Court of Appeal stated that:

> It is fundamental to the litigation process that lawsuits be decided within the boundaries of the pleadings. As Labrosse J.A. said in *460635 Ontario Limited v. 1002953 Ontario Inc.*, [1999] O.J. No. 4071 at para. 9 (C.A.) (QL):
>
> > ... The parties to a legal suit are entitled to have a resolution of their differences on the basis of the issues joined in the pleadings. A finding of liability and resulting damages against the defendant on a basis that was not pleaded in the statement of claim cannot stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial.
> >
> > ...
> >
> > By stepping outside of the pleadings and the case as developed by the parties to find liability, Spence J. denied RBC and Barbican the right to know the case they had to meet and the right to a fair opportunity to meet that case. The injection of a novel theory of lia-

> bility into the case via the reasons for judgment was fundamentally unfair to RBC and Barbican.
>
> In addition to fairness concerns which standing alone would warrant appellate intervention, the introduction of a new theory of liability in the reasons for judgment also raises concerns about the reliability of that theory. We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties. A theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of the adversarial process. We simply do not know how Spence J.'s lost opportunity theory would have held up had it been subject to the rigours of the adversarial process.

20 It is the element of surprise, and the resulting prejudice, which are offensive. Once the parties have addressed the issues, it is generally open to a court to adjudicate a matter even though it may not be specifically pleaded. It should be noted that in *Eckland v. Eckland*, [1973] 3 O.R. 472 (H.C.J.), Lerner J. determined that where there is a request in the pleadings for such further and other relief as is deemed just, a court may grant relief that is not specifically pleaded. Despite the fact that the PMSI argument was not initially pleaded and the fact that it is contradictory to Acorn's position that there was no security interest in the factoring of the accounts receivables, I will address the issue of the PMSI, as RBC has had an opportunity to address it and has made submissions in respect thereof.

21 A PMSI is defined in subsection 1(1) of the *PPSA* as follows:

> (a) a security interest taken or reserved in collateral to secure payment of all or part of its price, or
> (b) a security interest taken by a person who gives value for the purpose of enabling the debtor to acquire rights in or to collateral to the extent that the value is applied to acquire the rights,
>
> but does not include a transaction of sale by and lease back to the seller.

22 Subsection 33(2) of the *PPSA* reads as follows:

> Except where the collateral or its proceeds is inventory or its proceeds, a purchase-money security interest in collateral or its proceeds has priority over any other security interest in the same collateral given by the same debtor if the purchase-money security interest,
>
> (a) in the case of collateral, other than an intangible, was perfected before or within ten days after,
>
> (i) the debtor obtained possession of the collateral as a debtor, or
> (ii) a third party, at the request of the debtor, obtained or held possession of the collateral, whichever is earlier; or
>
> (b) in the case of an intangible, was perfected before or within ten days after the attachment of the purchase-money security interest in the intangible.

23 The American courts have held that "the definition of purchase money security interest ... contemplates that the loaned funds must be intended, and actually used, for the purchase of an identifiable asset [which may be tangible or intangible, but PMSIs are rarely founds in intangibles]." Neither performance of a contract nor financial well-being constitute an identifiable asset: *Northwestern National Bank S.W. v. Lectro System, Inc.*, 262 N.W. 2d 678, 22 UCC Rep. 199 (1977). The Supreme Court of Minnesota went on in that case to reason that to interpret the performance of a contract as an identifiable asset would be to consider practically any secured loans as creating PMSIs. Ziegel and Denomme cite with approval this and other American cases, which have adopted this approach: *The Ontario Personal Property Security Act Commentary and Analysis*, 2nd ed. (Toronto: Butterworths, 2000) at 31.

24 Molnar factored its accounts to enable the completion of the contract. Acorn submits that Molnar entered into the factoring arrangement in order to pay for labour and material expenses. While it may be said that the funds obtained from Acorn were intended to be used for the purchase of raw materials, the true intent was to enable Molnar to perform the contract. As such, the transaction does not fall within the definition of a PMSI. Given the fact that Acorn did not initially present its position that the factoring agreements were PMSIs, I am even more convinced that the agreements

do not constitute PMSIs. If the intent of the parties was to create a PMSI, this would have and should have been argued from the beginning.

25 In any event, pursuant to the Assignment of Account entered into between Molnar and Acorn, Molnar warranted and guaranteed that "the Account has not been pledged, assigned, or otherwise encumbered, nor its face value diminished by the Assignor", despite the fact that RBC held a perfected General Security Agreement over "all Accounts and book debts ..." of Molnar. RBC registered its financing statement as required by section 45 of the *PPSA*. As such, Acorn would have discovered this upon conducting a *PPSA* search. Having failed to do so, Acorn entered into the factoring agreement at its own risk. As Molnar did not have the right to assign its accounts, the transaction cannot be effective. Any priority Acorn may have had is defeated due to the invalid transaction.

26 For all of the above reasons application in court file No. 04-CV-028051 by 2811472 Canada Inc. c.o.b. Acorn Partners is dismissed and application in court file No. 05-CV-30609 by Royal Bank of Canada is granted.

27 Royal Bank of Canada holds priority of its security interest to accounts receivable of Molnar Industrial Maintenance Ltd.

28 A declaration shall issue that Royal Bank of Canada has priority over 2811472 Canada Inc. c.o.b. Acorn Partners with respect to all accounts receivable for Molnar Industrial Maintenance Ltd. and ordering the said 2811472 Canada Inc. c.o.b. Acorn Partners to pay forthwith to Royal Bank of Canada all amounts collected by it with respect to the accounts receivable of Molnar Industrial Maintenance Limited.

29 If counsel cannot agree as to costs of these applications within 15 days of receipt of the decision, I may be spoken to in order to fix costs. Counsel shall prepare their written submissions and forward these to each other and to me on or before August 1st next.

J.A. FORGET J.

cp/e/qw/qlmxf/qlcem/qlgpr

TAB 2

Case Name:

General Motors Acceptance Corp. of Canada v. Alex Williamson Motor Sales Ltd.

RE: General Motors Acceptance Corporation of Canada, Limited, (Plaintiff), and Alex Williamson Motor Sales Limited, (Defendant)

[2009] O.J. No. 3189

179 A.C.W.S. (3d) 456

15 P.P.S.A.C. (3d) 180

2009 CarswellOnt 4503

Court File No. CV-09-379796

Ontario Superior Court of Justice

P.A. Cumming J.

Heard: July 7, 2009.
Judgment: July 28, 2009.

(31 paras.)

Bankruptcy and insolvency law -- Creditors and claims -- Claims -- Priorities -- Secured claims -- Motion by plaintiff for determination of priority of vehicle and proceeds allowed -- Defendant was dealer of plaintiff and purchased vehicle, then sold it to another dealer of plaintiff -- Purchaser financed vehicle through plaintiff, who had security interest in it -- Purchaser took possession of vehicle, then made assignment into bankruptcy and stopped payment on cheque to defendant - Contract of sale was completed to defendant had transferred all its interest in vehicle to purchaser, whereas plaintiff maintained security interest -- Plaintiff never consented to defendant taking vehicle back, nor did it waive it rights under security agreement.

Motion by the plaintiff for a determination that it had priority in the vehicle and its proceeds of sale. The vehicle had been purchased by the defendant, a dealer of the plaintiff, and sold to the purchaser, another dealer of the plaintiff. The contract of sale was completed and the vehicle was delivered to the purchaser. The purchase was financed by the plaintiff, the inventory financer. The plaintiff secured the financing with various security agreements. The purchaser then made an assignment into bankruptcy and stopped payment on a cheque it had paid to the defendant. The defendant took back to vehicle and sold it to someone else.

HELD: Motion allowed. The defendant had transferred all his rights in the vehicle to the purchaser when the sale was completed. The fact that the defendant did not receive his payment did not result in the purchaser losing his rights, because the contract for sale had been completed and the vehicle delivered. The purchaser had the vehicle in his inventory

with the defendant's consent once the plaintiff financed it. The plaintiff maintained a security interest in the vehicle, which it never waived, and did not consent to the defendant taking back the vehicle. The plaintiff had been entitled to repossess the vehicle once the purchaser defaulted on the financing agreement by making his assignment into bankruptcy. The plaintiff was entitled to priority to the vehicle and proceeds of sale.

Statutes, Regulations and Rules Cited:

Personal Property Security Act, R.S.O. 1990, c. P.10, s. 11(2), s. 28(1), s. 33(1), s. 67(1)

Counsel:

Edward M. Hyer, for the Plaintiff.

Douglas Turner Q.C., for the Defendant.

ENDORSEMENT

P.A. CUMMING J.:--

The Issue

1 The plaintiff moves under s. 67(1) of the *Personal Property Security Act* ("*PPSA*") to determine a question of priority in GMC Sierra motor vehicle bearing VIN #3GTEK133X9G159970 (the "Vehicle") and its proceeds.

The Evidence

2 The Vehicle was purchased by Alex Williamson Motors Limited ("Williamson"), a General Motors ("GM") dealer in Uxbridge, Ontario, April 7, 2009. Williamson sold the Vehicle to a second GM motor vehicle dealer, Bruce Bissell Buick Pontiac Limited ("Bissell"), in Ajax, Ontario on April 24, 2009.

3 GM dealers can only sell GM vehicles. GM dealers commonly change their inventories with purchases from both GM and with purchases from, and sales to, other GM dealers. Until a vehicle is ultimately sold to the retail customer, every vehicle manufactured by GM is treated as being in dealer inventory. Indeed, the program of GM's central computer called "Global Connect" reportedly shows every GM dealer the current location in Canadian GM dealerships of every new and unsold GM vehicle.

4 The Vehicle was delivered by Williamson to Bissell, together with the Vehicle's "New Vehicle Information Statement" ("NVIS") and paid for by Bissell's cheque in Williamson's favour for $45,839.85 dated April 24, 2009. The NVIS is the document a dealer uses to obtain registration of a new vehicle in the name of its ultimate retail purchaser. Bissell added the Vehicle to its inventory.

5 Bissell financed its purchase of the Vehicle with its inventory financier, the plaintiff, General Motors Acceptance Corporation of Canada, Limited ("GMAC") in the amount of $45,612.00. April 29, 2009.

6 This financing was secured by various security agreements. There is common ground that these security agreements were duly registered under the *PPSA*.

7 Bissell's inventory financing by GMAC is secured by a General Security Agreement ("GSA").

8 More significantly for our purposes, the inventory financing is also secured by the "Security Agreement-For Floorplan Financing Under GMAC iCash and SmartAuction Accommodations" ("iCash security agreement"). This latter security agreement deals specifically with vehicles in respect of which wholesale floorplan funding transactions were processed through an internet-based cash management system, known as "iCash". The evidence establishes Bissell received the $45,612.00 from GMAC through the iCash system April 29, 2009 (Tab "B" to Affidavit of GMAC's affiant, Scott Thompson, dated June 5, 2009).

9 Payment on the cheque provided by Bissell to Williamson was stopped April 30, 2009. On May 1, 2009, Bissell made an assignment in bankruptcy. Thus, the case at hand involves a contest between two innocent parties, Williamson and GMAC, due to a loss that must fall upon one of them because of the default and bankruptcy of Bissell.

10 There was nothing put into evidence which would suggest any reservation of rights in the Vehicle by Williamson at the time of sale to Bissell. Williamson asserts that the Vehicle still belonged to Williamson because of "the failure of consideration" due to the stoppage of the cheque. Williamson made a registration under the *PPSA* April 30, 2009 to protect its claimed interest in the Vehicle.

11 In my view, and I so find, Williamson had transferred all its rights and interest in the Vehicle to Bissell as of April 29, 2009 (at the latest). There was contractual consideration for the sale (the promise of Bissell and obligation to pay the stated price). The fact that Williamson did not receive payment from Bissell as contractually promised by Bissell did not result in Bissell losing its rights to the Vehicle as conveyed under the completed contract of sale. The completed sale transaction gave Bissell rights in the Vehicle and the security interest of GMAC, perfected by registration of the requisite security agreements, attached to the Vehicle upon its giving value by the advance of the financing to Bissell April 29, 2009: s. 11(2) *PPSA*.

12 In any event, irrespective of the issue of a possible reservation of rights to the Vehicle with Williamson, the evidence establishes that Williamson sold the vehicle to Bissell as a purchase for its inventory and therefore, Bissell had rights in the Vehicle. At the least, Bissell had the Vehicle as part of its inventory for the purpose of sale with Williamson's consent at the point in time of the financing by GMAC.

13 There is no evidence of any operative security agreement by Bissell in favour of Williamson. The sale of the Vehicle by Williamson to Bissell April 24, 2009 conveyed to Bissell all of the rights of Williamson to the Vehicle.

14 In my view, and I so find, Bissell indeed had all of the bundle of rights to the Vehicle which had prior thereto been with Williamson, as it was clearly intended by the completed transfer of the Vehicle to Bissel, together with delivery of the NVIS, that Bissell was to be able to sell the vehicle from its inventory to a retail customer with the customer being able to have title through ownership.

15 Williamson managed to re-take possession of the Vehicle May 13, 2009 and to re-take possession of the NVIS for the Vehicle, and used the NVIS to have the Vehicle registered in its name May 14, 2009 with the Ministry of Transportation for Ontario.

16 The evidence, as given by the affiant, Mr. Wayne Feasby, for Williamson, in his affidavit dated June 22, 2009, suggests that GM and/or the trustee in bankruptcy for Bissell authorized Williamson to re-take possession of the Vehicle. If so, this is of no import. Mr. Feasby states that "From my conversations with GMAC and GM I knew that GMAC had given up any claims." But there is no evidence that the plaintiff, GMAC, ever authorized, or consented to, Williamson taking back the Vehicle May 13, 2009. Nor is there any evidence to suggest that GMAC waived any of its rights under its security agreements. The repossession of the NVIS by Bissell, if permitted by anyone, was allowed by GM or the trustee in bankruptcy, not by GMAC. GM and GMAC are separate entities, indeed, as known to Mr. Feasby.

17 Williamson asserts that once it re-took possession of the Vehicle that Bissell no longer had an interest in the Vehicle. However, irrespective of whatever continuing interest Bissell may have had, the relevant issue is the interest of GMAC and its claimed perfected and attached security.

18 Williamson sold the Vehicle May 28, 2009 to another GM dealer, John Bear Pontiac ("Bear"), in St. Catharines Ontario for $45,839.85.

19 Williamson relies upon s. 28(1) of the *PPSA*, claiming that it sold the Vehicle to Bear in the ordinary course of its business such that Bear takes the vehicle free from any security interest. However, the bankruptcy had intervened May 1, 2009, which would preclude any sale in the ordinary course of business thereafter. Moreover, s. 28(1) says that a buyer of goods from a seller who sells in the ordinary course of business takes them free of any security interest therein "given by the seller". At issue here is the security interest of GMAC as given by Bissell.

20 The evidentiary record establishes that GMAC did not consent to the repossession by Williamson of the Vehicle and the NVIS in respect thereof. There is no evidence to support Williamson's assertion that GMAC allowed GM to decide upon questions of GMAC's security such that GMAC thereby gave up its security.

The Law

21 Under s. 67(1)(c) of the *PPSA* the Court may make any order necessary to determine questions of priority or entitlement in or to collateral or its proceeds.

22 Under the GSA Bissell granted to GMAC a fixed and specific security interest in Bissell's inventory. The security interest thereby created attached to the Vehicle when Bissell had rights therein.

23 Under paragraphs 1 and 2 of the iCash security agreement, Bissell granted to GMAC a "purchase money security interest" in all motor vehicles for which a wholesale floorplan funding transaction was processed through the iCash system, as occurred in respect of the Vehicle. The iCash security agreement provided by paragraph 8(a) that the security interest created thereby attached when Bissell had rights in the Vehicle.

24 GMAC's purchase-money security interest in the Vehicle was perfected by registrations of the security agreements in favour of GMAC under the *PPSA* dating back to October, 1989, and continuously renewed.

25 On May 28, 2009 GMAC filed a financing change statement to protect GMAC's perfected security interest in the Vehicle and its proceeds.

26 Bissell had rights in the Vehicle at the moment Bissell acquired it from Williamson April 24, 2009. GMAC's security interest attached under the GSA and iCash security agreement when Bissell had rights in the vehicle and value was given, April 29, 2009: s. 11(1), (2) *PPSA*.

27 The bankruptcy of Bissell was an event of default under both of the security agreements held by GMAC, entitling GMAC to repossess and sell the Vehicle.

28 GMAC has a perfected security interest in the proceeds of the sale of the Vehicle.

29 The purchase-money security interest of GMAC in the inventory of Bissell or its proceeds has priority over any other security interest in the collateral given by Bissell if the purchase-money security interest was perfected at the time the debtor, Bissell, obtained possession: s. 33(1) of the *PPSA*.

Disposition

30 For the reasons given, it is determined that GMAC has priority to the Vehicle and to the proceeds from its sale in the amount of $45,839.85. It is ordered pursuant to s. 67(1)(c) and (e) of the *PPSA* that Williamson pay to GMAC the said amount forthwith.

Costs

31 Submissions were made in respect of costs. I fix costs payable to GMAC by Williamson on a partial indemnity basis in the amount of $3,500.00, inclusive of GST and all disbursements, payable forthwith.

P.A. CUMMING J.

cp/e/qllxr/qlmxb/qlaxw/qlcal/qlgpr

TAB 3

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 CDN$230 million super-priority secured debtor in possession credit facility (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 of up to CDN$200 million 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 occur-

rence 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 en-

force 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.).

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD. (THE "APPLICANT")

Court File No: CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

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