Court of Appeal File No. C70436

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

BRYTON CAPITAL CORP. GP LTD. and BAYVIEW CREEK RESIDENCES INC. (formerly known as BRYTON CREEK RESIDENCES INC.)

Applicants (Appellants)

and

CIM BAYVIEW CREEK INC., GRANT THORNTON LIMITED IN ITS CAPACITY AS THE BANKRUPTCY TRUSTEE OF CIM BAYVIEW CREEK INC., BAYVIEW CREEK (CIM) LP, 10502715 CANADA INC., MNP LLP IN ITS CAPACITY AS THE BANKRUPTCY TRUSTEE OF BAYVIEW CREEK (CIM) LP AND 10502715 CANADA INC., GR (CAN) INVESTMENT CO. LTD., MONEST FINANCIAL INC., TRACY HUI, JOJO HUI, CARDINAL ADVISORY LTD. and THE CORPORATION OF THE CITY OF RICHMOND HILL

Respondents (Respondents)

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TAB 1

CITATION: The Corporation of the Town of Oakville v. Clublink Corporation ULC et al., 2020 ONSC 887
COURT FILE NO.: CV-19-631561 & CV-19-631562
DATE: 2020-02-10

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE CORPORATION OF THE TOWN OF OAKVILLE, Applicant

AND:

CLUBLINK CORPORATION ULC and CLUBLINK HOLDINGS LIMITED, Respondents

BEFORE: Schabas J.

COUNSEL: T. Curry, S. Rollwagen, D. Knoke and N. Chandra, Counsel for the Applicant

E. Cherniak, Q.C., M. Flowers, C. Kuehl and L. Woods, Counsel for the Respondents

HEARD: January 23, 2020

REASONS FOR DECISION

Introduction

[1] The Respondents ClubLink Corporation ULC and ClubLink Holdings Limited ("ClubLink") move to strike out these two applications brought by the Applicant, the Corporation of the Town of Oakville ("the Town" and "the Town Applications") on the basis that the applications do not raise legal or justiciable issues for the Court or, in the alternative, are an abuse of process.

[2] The Town seeks declarations that By-laws it passed in 2018 are legal and valid. I agree that the Town Applications should be struck. As laws are presumed to be valid and there is no court challenge to the By-laws, the Court should not entertain these applications. Unlike provincial and federal governments, municipalities cannot refer questions as to the validity of their laws to the Court by way of a Reference, and the applications do not involve the determination of rights based on interpretations of the By-laws as contemplated by Rule 14.03(d). Further, the application and validity of the By-laws is the subject of proceedings before the Local Planning Appeal Tribunal ("LPAT"), where all matters between the parties can be addressed in a factual context. In light of these conclusions, while it is not strictly necessary, I also find that the Town Applications should be struck as an abuse of process.

Background

[3] The Town Applications are part of an ongoing legal battle between ClubLink and the Town over the future of Glen Abbey, one of Canada's most famous golf courses, designed by golfing great Jack Nicklaus. Glen Abbey has hosted the Canadian Open golf tournament 30 times. ClubLink wishes to redevelop the lands for residential and commercial use. On November 10, 2016, pursuant to the *Planning Act*, it brought applications to the Town for this purpose, seeking amendments to the Official Plan and Zoning By-laws and the approval of a plan of subdivision which proposed construction of 3,222 residential units and 121,309 square feet of office and retail space (the "Redevelopment Applications").[1]

[4] The Town rejected the Redevelopment Applications, and ClubLink has appealed those decisions to the LPAT. As discussed below, those appeals have not yet been heard.

[5] Meanwhile, the Town took steps to preserve Glen Abbey, which it regards as a landmark property and a significant cultural heritage landscape. On August 24, 2017, the Town issued a Notice of Intention to Designate Glen Abbey and an adjacent property also owned by ClubLink (the "Greeneagle property") as properties of cultural heritage value or interest under s. 29 of the *Ontario Heritage Act* (the "*OHA*").[2]

[6] Although ClubLink had the right to object to the designation, it did not do so. Instead, ClubLink applied to the Town under s. 34 of the *OHA*, for permission to demolish and/or remove the Glen Abbey golf course (the "Section 34 *OHA* Application"). The Town refused to process that request, and in November 2017 issued a Notice of Application in this Court to determine the Town's right to reject the Section 34 *OHA* Application based on its interpretation of s. 33 and s. 34 of the *OHA*. ClubLink then commenced its own separate application to compel the Town to process the Section 34 *OHA* Application to demolish Glen Abbey (collectively, the "s. 34 court applications"). Unlike the applications in issue on these motions, both s. 34 court applications sought a determination of the respective applicant's rights based on an interpretation of the *OHA*, which is permitted under Rule 14.05(3)(d) of the *Rules of Civil Procedure*.[3]

[7] On December 20, 2017, Town Council passed By-law 2017-138 (the "Heritage By-law") formally designating Glen Abbey and the Greeneagle property as properties of cultural heritage value or interest under s. 29 of the *OHA*.

[8] Following discussion between the parties, the Town considered and refused ClubLink's Section 34 *OHA* Application without prejudice to its position on the s. 34 court applications. ClubLink appealed the Town's refusal to the Ontario Municipal Board ("OMB"), now replaced by the LPAT (the "Demolition Appeal"), but that appeal was, by agreement, held in abeyance pending the final determination of the s. 34 court applications.

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[1] R.S.O. 1990, c. P. 13.
[2] R.S.O. 1990, c. O.18.
[3] R.R.O. 1990, Reg. 194.

[9] In February 2018, ClubLink also applied to quash By-laws implementing the Heritage designation and the Town's Conservation Plan for Glen Abbey on the grounds, *inter alia*, that they were *ultra vires* the Town's jurisdiction, but ClubLink did not apply to quash the Heritage By-law itself.

[10] In the Superior Court, on October 25, 2018, Justice Morgan found in favour of ClubLink's position on the s. 34 court applications, ordering the Town to process the applications for demolition.[4] Subsequently, on December 11, 2018, Justice Morgan quashed the implementation By-laws and Conservation Plan.[5]

[11] The Town appealed to the Court of Appeal which, on October 23, 2019, confirmed the validity of the Section 34 OHA Application, and the quashing of the Conservation Plan, but overturned the quashing of the implementation By-laws.[6] On December 2, 2019, Town Council decided not to seek leave to appeal to the Supreme Court of Canada.

[12] As a result, the LPAT can now hear the Demolition Appeal. Until recently, that appeal and the appeals from the Redevelopment Applications were scheduled to commence on July 6, 2020 and to continue for 20 weeks.

[13] To further complicate matters, however, in the face of the appeal from Justice Morgan's decision and a concern over the expiration of limitation periods, in December 2018 and January 2019, ClubLink issued an Application to quash the Heritage By-law and a separate Application seeking to quash an Official Plan Amendment ("OPA") and a Zoning By-law passed in 2018 restricting the construction of new buildings on the Glen Abbey and Gleneagle properties (collectively, the "ClubLink Applications"). These applications were brought pursuant to provisions in the *Municipal Act, 2001*, which provide that a party can seek to quash a By-law in an application to the Superior Court.[7] ClubLink has also appealed the validity of the Zoning By-law and OPA to the LPAT.

[14] I am the case management judge for the ClubLink applications, which were scheduled to be heard by me in April 2020. However, the ClubLink applications have now been abandoned and are no longer before this Court. Instead, ClubLink wishes to move ahead with its appeals before the LPAT, which will include consideration of the application and validity of the By-Laws and OPA that were the subject of the ClubLink applications, as well as the Redevelopment Applications and the Demolition Appeal.

[15] ClubLink's decision to abandon the ClubLink Applications followed events before the LPAT in October and early November, 2019. In October, 2019, the Town had objected to ClubLink pursuing the same relief found in the ClubLink Applications before the LPAT. ClubLink then offered to abandon its court applications, but the Town argued that those court

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[4] *Town of Oakville v. ClubLink*, 2018 ONSC 6386, 298 A.C.W.S. (3d) 186.
[5] *ClubLink v Town of Oakville*, 2018 ONSC 7395, 143 O.R. (3d) 738.
[6] *Oakville (Town) v. ClubLink Corporation ULC*, 2019 ONCA 826, 310 A.C.W.S. (3d) 867 [*Clublink* ONCA #1]; *ClubLink Corporation ULC v. Oakville (Town)*, 2019 ONCA 827, 311 A.C.W.S. (3d) 637 [*ClubLink* ONCA #2].
[7] S.O. 2001, c. 25, s. 273(1).

applications should proceed first. The Town sought an order from the LPAT forcing ClubLink to withdraw any issues before it that were duplicative of the grounds in the ClubLink Applications. The LPAT dismissed the Town's argument on November 1, 2019, providing additional reasons on January 9, 2020, noting that "[m]atters of bad faith and impropriety are not matters exclusive to the Courts or exclusive to issues relating to the invalidity of municipal by-laws."[8]

[16] Following the decision of the LPAT, the Town Applications were commenced on November 22, 2019. ClubLink then advised the LPAT and the Town on December 10, 2019, that it would be formally abandoning the ClubLink Applications, and did so on December 13, 2019.

[17] The parties differ over whether the LPAT expressed a view on whether it is desirable for the Court to consider and decide the Town Applications prior to the LPAT proceedings. In my view, having read the excerpts from the LPAT proceedings on November 1, 2019, and December 10-11, 2019, the LPAT's view is best summarized in its recent decision of January 16, 2020, where it stated that "*to the extent that any one or more of those court applications remain live*, what the Tribunal is indicating is simply that the Tribunal recognizes the jurisdiction of the court to consider and dispose of matters concerning the legality of municipal instruments."[9] To the extent that the LPAT has otherwise said it is preferable or "in the interests of justice" to have the Town Applications resolved first by the Court, in my view that is simply because those applications are currently pending before the Court. In the absence of the court applications the LPAT would be moving forward with the ClubLink appeals, and the LPAT would address all matters that arise from those appeals.

[18] The Town Applications are mirrors of the now-abandoned ClubLink Applications. The Town seeks a declaration that the Heritage By-law is legal and valid, and a declaration that the Official Plan Amendment and the Zoning By-law passed in 2018, are legal and valid. Neither application seeks an interpretation of those laws, or a declaration of rights or interests.

[19] Following the Town's confirmation that it intended to proceed with the Town Applications in this court, the LPAT adjourned the hearing set to commence on July 6, 2020 until the Town Applications are determined. As a result, ClubLink's appeals of the Town's rejection of the Redevelopment Applications, the Demolition Appeal (which involves consideration of the Heritage By-law), and the appeals to the LPAT regarding the validity of the Official Plan Amendment and Zoning By-law, are delayed pending a decision, at least, of this Court on the Town Applications.

[20] Immediately after the decision of the LPAT to adjourn the hearing set for July 2020, on December 12, 2019, counsel on the ClubLink and Town Applications met with me, as case management judge, and advised me of the Town Applications and of ClubLink's intention to abandon its applications. There was agreement that the Town Applications should be heard on the previously scheduled dates in April 2020; however, ClubLink advised me that it intended to

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[8] *ClubLink Corporation ULC et al. v Oakville (Town)*, 2020 CanLII 1417 (ON LPAT) (9 Jan 2020).
[9] *ClubLink Corporation UCL v Oakville (Town)*, 2020 CanLII 3211, at para. 65 (ON LPAT) (16 Jan 2020) [emphasis added].

bring motions to quash the Town Applications and requested that they be heard expeditiously, and before additional materials had to be exchanged on the Town Applications. The Town objected, suggesting that the ClubLink motions be heard at the hearing of the applications in April. Following receipt of the ClubLink notices of motion, I directed that the ClubLink motions be heard by me on January 23, 2020.

Legal Issues

[21] In ClubLink's view, the sole issue on this motion is whether the Town Applications should be struck on the basis that (i) they are not properly brought under Rule 14 and raise no justiciable issues for adjudication; (ii) they amount to an abuse of process; and (iii) in any event, the LPAT is the appropriate forum for the determination of the issues.

[22] The Town frames the issues slightly differently. The Town submits that there are four issues before the Court: (i) ClubLink failed to meet the appropriate test for a motion to strike under Rules 21 and 25.11; (ii) the Town Applications raise justiciable issues; (iii) the Town Applications are not an abuse of process; and (iv) this Court should in any event exercise its discretion to hear the Town Applications.

[23] In my view the main issues are as follows:

1) Are the Town Applications properly brought under Rule 14 of the *Rules of Civil Procedure*?;

2) If they are not, should this Court nevertheless exercise its discretion to hear the Town Applications?; and

3) Should the Town Applications be quashed as an abuse of process under Rules 21 or 25?

Analysis

Rule 14

[24] The Town brings its applications pursuant to Rules 14 and 38 of the *Rules of Civil Procedure*. It does not specify the particular provision(s) of Rule 14 upon which it relies. ClubLink submits that the only provision under Rule 14 that might apply to the Town Applications is Rule 14.05(3)(d). The Town argues that Rule 14.05(3)(d) and (h) apply.

[25] Under Rule 14.05(3)(d), an application may be brought where the relief claimed is the determination of rights based on "the interpretation of a statute, order-in-council, regulation, municipal by-law or resolution." Here, however, the Town is not seeking a determination of rights, unlike its s. 34 court application commenced in 2017. Rather, the Town is simply seeking declarations that certain By-laws are legal and valid. That is all. Accordingly, I conclude that the Town Applications are not properly brought under Rule 14.05(3)(d).

[26] As to Rule 14.05(3)(h), which allows an application to be brought "where it is unlikely that there will be any material facts in dispute requiring a trial," the Town has not pleaded that there are no material facts in dispute. Given that bad faith and improper purpose are live issues in this complicated and hotly-contested battle between the Town and ClubLink, it is likely that many facts may be in dispute. Therefore I am not satisfied that the Town Applications are properly brought under Rule 14.05(3)(h).

[27] In any event, even if the Town Applications had been properly brought under Rule 14, I would strike them out through the exercise of my inherent jurisdiction or as an abuse of process, as discussed below.

The Court's Discretion to Hear the Town Applications

[28] The parties acknowledge that, independent of the limits of Rule 14, this Court, as a court of inherent general jurisdiction, has discretion to hear applications for declarations.[10] As Miller J.A. stated in *Grain Farmers of Ontario v. Ontario (Ministry of the Environment & Climate Change*), "[a]lthough the court has broad jurisdiction to grant declaratory relief as a result of its inherent jurisdiction and pursuant to s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the party seeking the declaration must establish that the question it raises in its application is a legal or justiciable issue."[11]

[29] While the issues raised in the Town Applications are "legal or justiciable" in the sense that the Court is asked to pronounce on the validity of the By-laws, there is no challenge to the By-laws before the Court. The By-laws are presumed to be valid, as Harvison-Young J.A. recently noted in one of the related proceedings between these parties before the Court of Appeal.[12] Indeed, the Town pleads that presumption in its Notices of Application. As was the case in *Grain Farmers*, the Town Applications raise "no practical questions of interpretation or application."[13]

[30] In *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, the Supreme Court agreed with Professor Sossin, now Sossin J., that "justiciability is about whether to decide a matter in the courts."[14] Writing for the Court, Rowe J. stated:

> There is no single set of rules delineating the scope of justiciability. Indeed, justiciability depends to some degree on context, and the proper approach to determining justiciability must be flexible. The court should ask whether it has the institutional capacity and legitimacy to adjudicate the matter: see Sossin, at p. 294. In determining this, courts should consider "that the matter before the court would be an economical and efficient investment of judicial resources to resolve, that

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[10] *Grain Farmers of Ontario v. Ontario (Ministry of the Environment & Climate Change)*, 2016 ONCA 283, 130 O.R. (3d) 675, at paras. 15-16 [*Grain Farmers*].
[11] *Ibid*, at para. 16.
[12] *ClubLink* ONCA #2, *supra*, at para. 31, citing *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City)* (2005), 258 D.L.R. (4th) 447 (Ont. C.A.), at para. 3, leave to appeal refused, [2006] S.C.C.A. No. 45 (S.C.C.).
[13] *Grain Farmers*, *supra*, at para. 22.
[14] 2018 SCC 26, [2018] 1 S.C.R. 750, citing Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada,* 2nd ed (Toronto: Thomson Reuters, 2012), at p. 1.

> there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute."[15] [emphasis added]

[31] In *Solosky v. The Queen*, the Supreme Court of Canada also addressed the issue of when a court should exercise its inherent jurisdiction to hear applications. Dickson J., as he then was, concluded that when deciding whether to exercise its jurisdiction to hear an application, a court should consider the "utility of the remedy" requested and whether the remedy "will settle the questions at issue between the parties."[16] Additional criteria should also guide the determination: the request for declaration must address a "real and not a theoretical question" by a person with "real interest to raise it," it must be answered by a "proper contradictor," and the court must be satisfied that there is "good reason" to hear the application on a discretionary basis.[17]

[32] I decline to exercise my discretion to hear these applications. To do so would be neither appropriate or fair. First, ClubLink has abandoned its court challenges to the By-laws and wishes to proceed with its existing appeals before the LPAT, which is the appropriate forum with the jurisdiction and expertise to address all issues of fact and law between the parties.[18]

[33] Second, the Town is seeking no remedy against ClubLink. ClubLink is not, therefore, a "proper contradictor" of the claims, nor is it a willing one. Rather, the Town is attempting to drag ClubLink into a dispute before the courts and is even seeking costs against it in its applications. As the English Court of Appeal observed in *Messier-Dowty*, which involved an analogous context of a party seeking a negative declaration, "this can result in procedural complications and potential injustice to an unwilling defendant."[19]

[34] Third, as the By-laws benefit from a presumption of validity, there is no utility to the remedy requested by the Town. Granting the declarations of validity would have "no purpose other than to repeat legislation or common law," an outcome that Justice Swinton cautioned against in *City of Toronto v. Natale*.[20]

[35] Fourth, as in *Natale*, the Town Applications do not call on the court to "interpret a statute in order to determine rights." Rather, the Town Applications are, "in effect...a reference."[21] However, unlike federal and provincial governments, municipalities have no authority to bring

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[15] *Ibid* at para. 34, citing Sossin, at p. 294.
[16] [1980] 1 S.C.R. 821, at para. 16 [*Solosky*], citing Hudson, "Declaratory Judgments in Theoretical Cases: The Reality of the Dispute" (1977), 3 Dal LJ 706.
[17] *Ibid*, at paras. 12-13, quoting from Lord Dunedin in *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438.
[18] *Local Planning Appeal Tribunal Act, 2017*, S.O. 2017, c. 23, Sched. 1, ss. 11(1) and 11(2) [*LPAT Act*].
[19] *Messier-Dowty Ltd. & Anor v. Sabena Sa & Ors*, [2000] EWCA Civ 48, at para. 42 [*Messier-Dowty*].
[20] 2018 ONSC 1608, 289 A.C.W.S. (3d) 844, at para. 6 [*Natale*]. *Godin v. Sabourin*, 2016 ONSC 770, at para. 16.
[21] *Natale, supra*, at para. 12.

References.[22] By contrast, as noted, ClubLink's applications to quash the By-laws were brought validly under a specific provision of the *Municipal Act, 2001*.[23]

[36] The Town takes the position that while the LPAT has jurisdiction to consider the validity of the Official Plan Amendment and the Zoning By-law, it does not have jurisdiction to determine the validity of the Heritage By-law because ClubLink is simply appealing the refusal of the Town council to approve demolition, and there is no avenue to directly challenge the Heritage By-law before the LPAT. While ClubLink's List of Issues puts bad faith and vagueness regarding the Heritage By-law before the LPAT, the Town argues that this is an improper collateral attack on the By-law's validity, which can only be attacked in court.

[37] In my view, this does not justify permitting the Town Applications to proceed. ClubLink has chosen to address issues relating to the validity and application of the Heritage By-law before the LPAT in the Demolition Appeal. While it is clear that the LPAT, as the successor of the OMB, "does not have freestanding jurisdiction, as a court does, to determine that a by-law is valid", in *Goldlist Properties* the Court of Appeal identified a distinction between "dealing with the validity of a by-law as a freestanding issue, which [the LPAT] cannot do, and making a decision on a question of law as incidental to its administrative functions, which it can do."[24] Under the *LPAT Act*, the LPAT has "exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this Act or by any other general or specific Act,"[25] and it has authority to deal with all questions of law within its jurisdiction.[26]

[38] In *Re Neufer*, a case involving the refusal of a demolition permit under the *OHA*, the OMB accepted a list of issues that went "to both designation and demolition" noting that "they are, of necessity, interrelated."[27] Indeed, by operation of s. 34.3 of the *OHA*, should the LPAT allow the Demolition Appeal the Town will be required to repeal the Heritage By-law.

[39] The Court of Appeal also addressed this point in its Reasons on the s. 34 applications, observing that "[t]he Legislature has chosen to provide a property owner multiple avenues by which it may seek to deal with property subject to a designation."[28]

[40] There are also strong policy reasons for tribunals to address all the factual and legal issues that arise before them before parties resort to the courts. The LPAT is a specialized tribunal which will have all the facts before it and will make its decisions in the context of a live dispute between the parties, as opposed to a somewhat untethered freestanding court application proposed by the Town. Furthermore, courts defer to the decisions of expert tribunals and should also defer to their jurisdiction to make decisions. As MacPherson J., as he then was, stated in *Ontario Hydro*:

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[22] *Courts of Justice Act*, R.S.O. 1990, c. C.34, s. 8; *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 53(1).
[23] S.O. 2001, c. 25, s. 273.
[24] *Goldlist Properties Inc. v. Toronto (City)*, [2003] O.J. No. 3931 (C.A.), at para. 15 and para. 35.
[25] *LPAT Act*, s. 11(1).
[26] *Ibid*, s. 11(2).
[27] 2005 CarswellOnt 6365, at para. 8 (OMB).
[28] *Clublink* ONCA #1, *supra*, at para. 83.

> It seems to me that, as a matter of logic, if deference is to be paid to the actual decision of a tribunal, then deference should also be paid to the jurisdiction of the tribunal to make that decision. If the factors of specialization, policy-making role, and limiting overlapping jurisdiction protect the actual decision of a tribunal, those same factors, if present in a particular fact situation, should also protect the integrity of the jurisdiction of the tribunal to make the decision.[29]

More recently, in *Royal 7 Developments Ltd.*, Charney J. stated:

> Even if the Superior Court has concurrent jurisdiction to hear this matter, the Ontario Court of Appeal decided in *Country Pork* that the court must consider whether it should hear the applications or defer to the jurisdiction of the OMB. This is consistent with a long line of cases that hold that parties should not be permitted to circumvent the administrative process by seeking relief to the Superior Court rather than before the specialized tribunal established by the legislature to deal with the subject matter.[30]

[41] It should also be observed that allowing the Town to pursue its applications before this Court will cause further delays in resolving the underlying disputes, as the LPAT would await the outcome of the Town Applications and, probably, appeals. The LPAT's adjournment of the July 2020 hearing dates is already evidence of this consequence. There is also the concern, as Cunningham J. noted in *Minto*, that the court's involvement would "create a multiplicity of proceedings rather than providing a streamlining effect."[31] ClubLink has chosen to pursue its appeals and to raise its legal issues before the LPAT, and it is entitled to have those appeals heard in a timely way. This may include challenges to By-laws which may then be appealed to the Divisional Court,[32] where the court can then consider the issues once, and with the benefit of the LPAT's findings of fact and view of the legal issues.

[42] Returning to the words of Professor Sossin, permitting the Town Applications to proceed when there is a tribunal "given prior jurisdiction of the matter by statute" would not "be an economical or efficient investment of judicial resources." Further, as the presumption of validity applies, and there are concerns about whether there will be "an adequate adversarial presentation of the parties' positions", I conclude that it is not appropriate for the court to hear the Town Applications, and they are not, therefore, justiciable.

Procedural Issues (Rules 21 and 25.11)

[43] The Town attacks ClubLink's motions to strike on procedural grounds. First, the Town contends that the motions are not properly brought under Rule 21 because that rule applies to "pleadings in an action." Rule 14.09 disposes of this issue. It provides that an originating process that is not a pleading may be struck out or amended in the same manner as a pleading. As

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[29] *Ontario Hydro v. Kelly*, [1998] 39 O.R. (3d) 107 at para. 34 (Gen. Div.)
[30] *Royal 7 Developments Ltd. v. Vaughan (City)*, 2018 ONSC 488, 287 A.C.W.S. (3d) 768, at para. 59.
[31] *Ontario Regional Assessment Commissioner, Region No. 3 v. Minto Developments Inc.*, [1998] 77 A.C.W.S. (3d) 481, at para. 9 (Ont. Gen Div.) [*Minto*].
[32] *LPAT Act*, *supra*, s. 37(1).

Nordheimer J., as he then was, concluded in *Martin v. Ontario*, a Notice of Application may be challenged under Rule 21 and Rule 25.[33]

[44] The Town, relying on *Maurice v. Alles*, also argued that I should decline to hear the motions on the basis that an application is a summary process which should not be subject to motions.[34] However, *Maurice* only held that a summary judgment motion cannot be brought in an application proceeding.[35] Motions to strike under Rules 21 or 25 are not summary judgment motions. Rather, they are much simpler procedures, and are useful tools for weeding out improper applications.

[45] In my view, the Town Applications are an abuse of process and should be dismissed or struck under Rules 21.01(1)(d) and/or 25.11(c). The court has inherent jurisdiction to prevent an abuse of process, particularly where proceedings are unfair to the point that they are contrary to the interests of justice. In *Maynes v. Allen-Vanguard Technologies Inc.*, the Court of Appeal commented that the doctrine of abuse of process "seeks to promote judicial economy and to prevent a multiplicity of proceedings."[36] These concerns are present here. Unfairness will arise against ClubLink if it is forced to respond to the Town Applications. The Applications create an unnecessary multiplicity of proceedings. Further, the court's authority to determine the validity of laws is limited to cases in which a litigant challenges the validity of a law or, in the case of government, avails itself of a statutory reference provision. Neither applies here.

[46] In any event, I would also strike the applications under my inherent jurisdiction to control the process of the Court. As the court has inherent jurisdiction to hear an application (a point conceded by the Town), surely it also has jurisdiction to entertain a motion to quash an application.

Disposition

[47] Accordingly, the Town Applications shall be struck out. The April hearing dates, and related schedule, are vacated. The LPAT should proceed to schedule new dates for the appeals pending before it. If the parties cannot agree on costs within 21 days, ClubLink shall provide written submissions not exceeding 3 pages (not including supporting documents) within 30 days of the date of these Reasons, and the Town may file a response of the same length 14 days later.

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[33] [2004] O.J. No. 2247, at paras. 6 - 10 (Ont. Sup. Ct.), aff'd [2005] O.J. No. 4071 (Ont. C.A.).
[34] 2016 ONCA 287, 130 O.R. (3d) 452.
[35] *Ibid*, at para. 2.
[36] 2011 ONCA 125, [2011] O.J. No. 644, at para. 36; *Toronto (City) v. C.U.P.E. Local 79*, [2003] 3 S.C.R. 77, at para. 37.

Schabas J.

Date: 2020-02-10

TAB 2

CITATION: T.T.K.O., S.P.O. G.D.K., 2011 ONSC 6601
DATE: 20111114
DOCKET: FS-11-17267

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:		
T.T.K.O.		*Eric Sadvari*, for the Applicants
S.P.O.		
G.D.K.	Applicants	
		Jeremy Glick and *David Feliciant*, for The Attorney General of Ontario
		HEARD: September 13, 2011

CZUTRIN J.:

[1] This case raises the novel question of whether adult children, one residing in Ontario and one in Alberta, and their non-biological parent residing in Switzerland, can apply for and be granted a declaration of parentage in Ontario when an Ontario adoption is not an available option. For the reasons that follow, I find I do not have the jurisdiction and authority to grant this declaration.

BACKGROUND

[2] The Applicant, T.T.K.O., ("Kevin") was born on July 9, 1954 in Quebec. He is the biological child of G.B. ("Georgette") and T.F.C.O. ("Terence"). Kevin lives in Ontario.

[3] The Applicant S.P.O. ("Shane") was born on July 12, 1956 in Quebec. He is also the biological child of Georgette and Terence. He now lives in Alberta.

[4] Kevin and Shane's biological parents were divorced by *Act of Parliament* on September 29, 1961.

[5] On June 30, 1962, Georgette married G.D.K. ("George"), in Quebec on June 30, 1962. The newly married couple and the then children Kevin and Shane moved to join George in the United States.

[6] Terence died four months after Georgette and George's marriage.

[7] I added George as party to this Application, with his consent, on April 26, 2011.

[8] On April 26, 2011, I also asked for affidavits from all of the Applicants and asked that the Attorney General for Ontario be put on notice to see if they will support, oppose or take no position.

[9] The Attorney General for Ontario ("Attorney General") appeared, filed a comprehensive factum "to provide the court with its submissions on the relevant law", but took no position "with respect to the facts or the merits of this case" and sought no specific order but requested that I take "its submissions into account when making whatever order" I see fit to

make.

[10] Georgette and George agreed that Shane and Kevin would be their only children.

[11] Since that time, George has considered Shane and Kevin to be his sons, and Shane and Kevin have considered George to be their only father. For almost five decades they have been in frequent contact. George has supported Shane and Kevin emotionally and financially.

[12] After graduating with his Ph.D. from the University of Illinois in 1963, George took a position that moved him, his wife, Kevin and Shane to Cambodia as a family. He added his surname to Kevin and Shane's name until they completed primary school.

[13] The family also lived together for a brief period in Cyprus but Kevin was sent to Quebec because of schooling in 1967.

[14] Shane moved with his mother and George to Ethiopia where his name continued to have George's surname added.

[15] The family next moved to Ottawa where George taught at the University. Shane and Kevin dropped George's surname at school.

[16] In 1970, George, Shane, and Kevin looked into formalizing their relationship via adoption ("step parent adoption"), but George deposed that they were informed by a notary in Quebec that this would not be possible because George was not a Canadian citizen. He never became a Canadian citizen. He made no further inquiries while he resided in Ottawa and likely would have discovered that he could have adopted.

[17] In 1972, George moved to Switzerland and Georgette joined him in 1973, but Kevin and Shane did not as they started at universities in Ontario.

[18] In 1995, George deposed that he looked into the possibility of adopting Shane and Kevin under Swiss law, where he is a citizen. He deposed that Swiss law makes it mandatory for any son to adopt the last name of his father, and that this must also apply to every son's descendants.

[19] The parties deposed that they were of the opinion that it was not professionally or personally feasible for Kevin and Shane and all of their children to change their last names.

[20] George and Georgette continued to live together in Geneva until her death on August 13, 2008. Georgette died while she and George were in Toronto visiting their sons. George, Shane and Kevin were able to make health care and burial decisions for her as they were her husband and sons, respectively.

[21] George, Kevin, and Shane continued to maintain father–son relationships.

[22] According to the Applicants, even though Georgette had made the common provision in her Will that her half of her estate go to her husband George, and despite that Shane and Kevin had formally and in writing acquiesced to these terms, Swiss authorities set aside that contract and gave half of Georgette's estate to Kevin and Shane. According to the parties, this happened because the law did not recognize the relationship between George, Kevin and Shane. Since Kevin and Shane were not recognized as George's children, Swiss authorities acted to ensure that Georgette's direct relatives were provided with their share of Georgette's estate. The parties deposed that this caused the family a year of stresses and cost thousands of dollars before

the situation was resolved and Georgette's share in the marital home could be transferred from Shane and Kevin back to George.

[23] George, Shane, and Kevin now seek a declaration that George is the father of Shane and Kevin. George has no other children, and Shane and Kevin have no other father.

[24] I have no evidence of Swiss law and all references to Swiss law are based solely on the parties' affidavits based on their information and belief.

ANALYSIS

[25] I found the Attorney General's stated position curious, as the factum, while not opposing the request relief on the facts, was cautionary, to say the least on the law and the proper considerations and possible unintended consequences.

[26] In its overview, the Attorney General stated:

> The purpose of section 4 of the *Children's Law Reform Act* ("*CLRA*") is to resolve issues of parentage which arise at an early stage in a child's life – specifically at, or prior to, birth. These issues historically revolved around questions of paternity for children born out of wedlock, or in circumstances where it was unclear which individual was the child's biological parent. In these cases, the Act was used, with the proper evidentiary foundation, to declare individuals the father or mother of the child.
>
> *(i) Issues of parentage for individuals who become involved in a child's life after the child's conception are generally dealt with pursuant to the adoption scheme set out by statute and regulation. Where an individual adopts a child, that individual becomes that child's legal parent for all purposes of the law, and the child's biological parents are no longer the child's legal parents, with the*

exception of a step-parent adoption where one parent remains on the birth registration.

[27] The Attorney General then identified the following issues at para. 5:

a. What is the intended scope and purpose of declarations of parentage under the *CLRA*?

b. What is the adoption regime enacted by the legislation?

c. In what circumstances can the Court make use of its *parens patriae* power?

[28] The Applicants submit that I have jurisdiction under a combination of sections 4[1], 8[2] and 18[3] of the of the *CLRA* (declarations of parentage, showing evidence to the contrary to

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[1] **Paternity and maternity declarations**

4. (1) Any person having an interest may apply to a court for a declaration that a male person is recognized in law to be the father of a child or that a female person is the mother of a child. R.S.O. 1990, c. C.12, s. 4 (1).

Declaration of paternity recognized at law

(2) Where the court finds that a presumption of paternity exists under section 8 and unless it is established, on the balance of probabilities, that the presumed father is not the father of the child, the court shall make a declaratory order confirming that the paternity is recognized in law. R.S.O. 1990, c. C.12, s. 4 (2).

Declaration of maternity

(3) Where the court finds on the balance of probabilities that the relationship of mother and child has been established, the court may make a declaratory order to that effect. R.S.O. 1990, c. C.12, s. 4 (3).

Idem

(4) Subject to sections 6 and 7, an order made under this section shall be recognized for all purposes. R.S.O. 1990, c. C.12, s. 4 (4).

[2] **Presumption of paternity**

8. (1) Unless the contrary is proven on a balance of probabilities, there is a presumption that a male person is, and he shall be recognized in law to be, the father of a child in any one of the following circumstances:

1. The person is married to the mother of the child at the time of the birth of the child.

discharge presumptions of paternity and that declarations are not restricted to minor children), and my authority under section 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to make declaratory orders.[4]

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2. The person was married to the mother of the child by a marriage that was terminated by death or judgment of nullity within 300 days before the birth of the child or by divorce where the decree *nisi* was granted within 300 days before the birth of the child.

3. The person marries the mother of the child after the birth of the child and acknowledges that he is the natural father.

4. The person was cohabiting with the mother of the child in a relationship of some permanence at the time of the birth of the child or the child is born within 300 days after they ceased to cohabit.

5. The person has certified the child's birth, as the child's father, under the *Vital Statistics Act* or a similar Act in another jurisdiction in Canada.

6. The person has been found or recognized in his lifetime by a court of competent jurisdiction in Canada to be the father of the child. R.S.O. 1990, c. C.12, s. 8 (1).

[3] **Definitions, Part III**

18. (1) In this Part,

"court" means the Ontario Court of Justice, the Family Court or the Superior Court of Justice; ("tribunal")

"extra-provincial order" means an order, or that part of an order, of an extra-provincial tribunal that grants to a person custody of or access to a child; ("ordonnance extraprovinciale")

"extra-provincial tribunal" means a court or tribunal outside Ontario that has jurisdiction to grant to a person custody of or access to a child; ("tribunal extraprovincial")

"separation agreement" means an agreement that is a valid separation agreement under Part IV of the *Family Law Act*. ("accord de séparation") R.S.O. 1990, c. C.12, s. 18 (1); 1996, c. 25, s. 3 (2); 2001, c. 9, Sched. B, s. 4 (7, 8).

Child

(2) A reference in this Part to a child is a reference to the child while a minor. R.S.O. 1990, c. C.12, s. 18 (2).

[4] **Declaratory orders**

97. The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed. 1994, c. 12, s. 39; 1996, c. 25, s. 9 (17).

[29] The Applicants rely on *A.A. v. B.B.*, [2007] O.J. No. 2 (C.A.), and specifically para. 14, which quotes the *facta* of the intervenors.[5]

[30] The Attorney General refers to para. 20 of *A.A. v. B.B.*, where the court discussed the *CLRA* history:

> The *CLRA* was intended to remove disabilities suffered by children born outside of marriage. As the Ontario Law Reform Commission observed in its 1973 Report on Family Law at p. 1: "These disabilities arise at the moment of birth and may remain with the child throughout his lifetime." The Commission therefore "accorded high priority to finding a means by which the child born outside marriage may be allowed to enjoy the same rights and privileges as other children in our society". The Commission's central recommendation was that Ontario should abolish the concepts of legitimacy and illegitimacy and declare positively that all children have equal status in law. The Commission's recommendations were enacted into legislation in the form of Parts I and II of the *CLRA*. The

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[5] A.A., B.B. and C.C. seek to have A.A.'s motherhood recognized to give her all the rights and obligations of a custodial parent. Legal recognition of her relationship with her son would also determine other kindred relationships. In their very helpful factums, the M.D.R. Intervenors and the Children's Lawyer summarize the importance of a declaration of parentage from the point of view of the parent and the child:

* the declaration of parentage is a lifelong immutable declaration of status;
* it allows the parent to fully participate in the child's life;
* the declared parent has to consent to any future adoption;
* the declaration determines lineage;
* the declaration ensures that the child will inherit on intestacy;
* the declared parent may obtain an OHIP card, a social insurance number, airline tickets and passports for the child;
* the child of a Canadian citizen is a Canadian citizen, even if born outside of Canada (Citizenship Act, R.S.C. 1985, c. C-29, s. 3(1)(b))2;
* the declared parent may register the child in school; and,
* the declared parent may assert her rights under various laws such as the Health Care Consent Act, 1996, S.O. 1996, c. 2, Sched. A., s. 20(1)5.

> Commission's central recommendation concerning equality of children is found in the Act's first section:
>
> > 1.(1) Subject to subsection (2), for all purposes of the law of Ontario a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage.
> >
> > ...
> >
> > (4) Any distinction at common law between the status of children born in wedlock and born out of wedlock is abolished and the relationship of parent and child and kindred relationships flowing therefrom shall be determined for the purposes of the common law in accordance with this section.

[31] The Applicants also submit that, as in *A.A. v. B.B.*, I can exercise my *parens patriae* jurisdiction. However, I do not see this case as being one in which *parens patriae* has any application. There are no minor children here or parties that are under any disability. There were, and apparently may still be, remedies in other jurisdictions, and there were remedies not exercised when there was an opportunity to do so. Not addressed was my authority when the parties are in two different countries and in two different provinces within Canada?

[32] The Applicants recognized that I am being asked to make an *in rem* order that would determine their relationship to the world at large - to all of society - distinct from an in *personam* ruling that affects only the Applicants. For example, had George and Georgette separated while the children were minors or dependants, George may have been able to pursue custody and access as an in *personam* issue and Georgette may have been able to seek child support from him, both affecting them only. Without independent and authoritative evidence it was suggested that Switzerland would respect any order I might make.

Declaration of Parentage

[33] I do not dispute that declarations of parentage are important. In *A.A. v. B.B,* our Court of Appeal summarized the importance of a declaration of parentage from the point of view of the parent and child.

[34] Of primary importance in this case using some of the submissions made in *A.A. v. B.B.* are:

- the declaration of parentage is a lifelong immutable declaration of status
- the declaration ensures that the child will inherit on intestacy
- The declared parents and children may assert their rights under s. 20(1)5 of the *Health Care Consent Act*

[35] I accept that a declaration of parentage is important for George, Kevin, and Shane.

The Applicants submitted:

The Declaration of Parentage is a lifelong immutable declaration of status

[36] Parentage is about more than biology. The status of "parent" connotes a primary caregiver who provides care, love, support, discipline, advice to their dependents. For almost 50 years, Shane, Kevin, and George have maintained an indisputable parent-child relationship dynamic. However, their status has not been recognized in law. Shane and Kevin call George "Dad," but they have at times felt the need to qualify this to others. Similarly, George calls Shane and Kevin his sons, but worries, for example, that he is being dishonest when he tells customs officials that he is in Canada to visit his sons. A declaration of parentage carries with it more

than practical rights and obligations. It is a formal recognition of one's status, which goes to the very core of one's identity.

The Declaration ensures that the child will inherit on intestacy

[37] George has willed his entire estate to Kevin and Shane. He wants to ensure that his wishes will be respected upon his death. Moreover, he is concerned that he not be a burden on his sons when he dies; if there were any issues with George's Will as there were with Georgette's, Shane and Kevin would have to navigate the Swiss system, in a language they do not speak, in order to ensure that their father's wishes were respected.

The declared parents and children may assert their rights under s. 20(1)5 of the Health Care Consent Act

[38] Section 20(1)5 of the *Health Care Consent Act* provide that: "If a person is incapable with respect to a treatment, consent may be given or refused on his or her behalf by… [a] child or parent of the incapable person." If George falls ill on one of his frequent visit to Canada to visit his children, Shane and/or Kevin may not be able to make health care decisions on his behalf unless they take other steps to establish such consent. Similarly, George is currently unable to make health care decisions on behalf of Shane and Kevin as their father. Although he may not be the primary person that would have that role in any event without knowing more about Kevin and Shane's marital status and whom their children are.

The Children's Law Reform Act

[39] Under s. 8 of the *Children's Law Reform Act* ("*CLRA*"), R.S.O. 1990, c. C. 12,

Terence is presumed to be Shane and Kevin's father because he was married to Georgette at the time of the birth of the children. The contrary has not been proven on a balance of probabilities and, in fact, is not disputed.

[40] Section 4(2) of the *CLRA* provides that, if a presumption of paternity exists and the presumption is not refuted, the court shall make a declaratory order confirming that the paternity is recognized in law. The presumption of paternity is on Terence.

[41] The Application is for a paternity declaration of a non-presumptive person who has stood in the place of a parent for almost 50 years.

The Courts of Justice Act

[42] Section 97 of the *Courts of Justice Act* ("CJA") allows this court to make declarations of right whether any consequential relief is or could be claimed. The Applicant argues that this is an appropriate provision under which to grant a declaration of parentage in this case.

[43] Section 97 of the *CJA* does not grant authority to create a right where none exists. It is not a free-standing provision that allows judges to do whatever seems fair. It merely allows the court to confirm a state of affairs that do already lawfully exist.

[44] Counsel for the Applicants cites *J.R. v. L.H.*, [2002] O.J. No. 3998 (S.C.J.) for the proposition that s. 97 of the *CJA* can be used to declare whether or not someone is a parent of a child. However, that case was about making a *negative* declaration of parentage - that is,

declaring that someone was *not* a parent. In that case, the declaration was simply confirming a state of affairs that did already exist.

Parens Patriae

[45] *Parens patriae* may be exercised to bridge a legislative gap. The Court of Appeal referred to my finding from *C.R. v. Children's Aid Society of Hamilton*, [2004] O.J. No. 3301 (S.C.), stating at para. 40 of *A.A. v. B.B.*: That I "held that the exercise of the *parens patriae* jurisdiction does not depend upon a legislative gap if the exercise of that jurisdiction is the only way to meet the paramount objective of legislation. I should not be taken as foreclosing that possibility." I find that there is no basis to exercise any *parens patriae* jurisdiction on the facts of this case.

[46] Section 146(3) of the *Child and Family Services Act*, R.S.O. 1990, c. C. 11 provides that:

> The court may make an order for the adoption of,
>
> (a) a person eighteen years of age or more; or
>
> (b) a child who is sixteen years of age or more and has withdrawn from parental control,
>
> on another person's application.

[47] However, subsection 5 limits the above: "The court shall not make an order under this section for the adoption of, or on the application of, a person who is not a resident of Ontario." In the present case, only Kevin is a resident of Ontario. This provision precludes both Shane and George from making an application for adult adoption. I do not find that there is a

legislative “gap”; the legislation simply does not allow for the adoption of, or an application by, someone who is not a resident of Ontario.

[48] George swore in an affidavit that Swiss law makes it mandatory for any son to adopt the last name of his father, and this applies to the son’s descendants. Although this is not desirable for the family, it is possible for them to do.

[49] Adult adoption under Ontarian law has a residency requirement, and under Swiss Law has a name-change requirement. These requirements are restrictive, but they do not create a vacuum in which there is an absence of legal regulation. George deposed that adult adoption is available in Switzerland, and as such, I cannot find that there is a legislative gap as contemplated *A.A. v. B.B.*

CONCLUSION

[50] I approached my analysis with the aim of looking for a way to grant the requested order, assuming I could find the jurisdiction over the parties and the subject matter, and considering whether this court was the proper jurisdiction to do so given where each of the Applicants reside. While unopposed, I have to exercise jurisdiction only where there is an appropriate, justifiable, basis to do so with a legal authority.

[51] I do not read *A.A. v. B.B.* to extend the declaratory authority to the facts of these Applicants. While the Applicants have a compelling story to tell, I cannot conclude that society has so dramatically changed that their situation was not contemplated by the legislation.

[52] The relationships between George, Kevin, and Shane certainly have father–son dynamics. Although I am sympathetic to the family's situation, I cannot find the authority to make the requested Declaration of Parentage. The appropriate jurisdiction for the issues to be considered appears to be Switzerland.

Czutrin J.

Released: November 14, 2011

CITATION: T.T.K.O., S.P.O., G.D.K., 2011 ONSC 6601
DATE: 20111114
DOCKET: FS-11-17267

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

T.T.K.O.

Applicants

S.P.O.

G.D.K.

REASONS FOR JUDGMENT

CZUTRIN J.

Released: November 14, 2011

TAB 3

COURT FILE NO.: 04-CL-5306
DATE: 20070809

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*	)	*Robert W. Staley, Derek J. Bell and Alan Gardner* for the Debentureholders
AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND OTHER APPLICANTS	)	*Paul G. Macdonald, Andrew J.F. Kent and* Brett Harrison, for the Subordinated Noteholders
	)	*Nancy Roberts and Tim Morgan*, for 2074600 Ontario Ltd.
	)	*Kyla Mahar*, for the Monitor of the Applicants
	)	**HEARD:** July 17, 18, 19, 20 and 21, 2006

H.J.W. Siegel J.

REASONS FOR JUDGMENT

[1] This proceeding is the final chapter of the financial restructuring of Stelco Inc. ("Stelco") under the *Companies' Creditors Arrangement Act* (the "CCAA"). It involves competing claims of entitlement to a pool of cash, notes, shares, and warrants of Stelco known as the "Turnover Proceeds". The dispute is principally between the holders of two series of Stelco debentures, on the one hand, and the holders of subordinated notes, on the other. The Turnover Proceeds were paid under the plan of arrangement of Stelco ("the Plan") to the holders of notes of Stelco. The holders of the debentures submit that the subordination provisions pertaining to the notes were preserved under the Plan. They seek an order requiring the noteholders to pay the Turnover Proceeds to them in accordance with these provisions on the basis that their claims against Stelco

were not fully satisfied under the Plan. In addition, 2074600 Ontario Inc. (“2074600”), which is the assignee of a debt owed by Stelco to EDS Canada Inc. (“EDS”) in the amount of $48,994,917 (the “EDS Claim”), seeks a declaration that it is also entitled to the benefit of the subordination provisions in respect of the EDS Claim and, therefore, is entitled to its *pro rata* share of the Turnover Proceeds.

Background

[2] Stelco is a corporation amalgamated under the laws of Canada with its head office located in Hamilton, Ontario. Stelco is one of Canada’s largest producers and marketers of rolled and manufactured steel products.

Outstanding Debt of Stelco

[3] Pursuant to a trust indenture between Stelco and Royal Trust Company dated as of November 30, 1989, as supplemented (the "10.4% Indenture"), Stelco issued debentures in the principal amount of $125,000,000 bearing interest at 10.4% per annum (the "10.4% Debentures"). Pursuant to a further trust indenture between Stelco and Montreal Trust Company of Canada dated February 15, 1999, as supplemented (the "8% Indenture" and collectively with the 10.4% Indenture the “Debenture Indentures”), Stelco issued debentures in the principal amount of $150,000,000 bearing interest at 8% per annum (the "8% Debentures"). The 10.4% Debentures and the 8% Debentures are herein collectively referred to as the “Debentures” and the holders thereof as the “Debentureholders”.

[4] The Debentures are registered in the name of CDS & Co. and are beneficially owned by institutional holders and individuals. The Debentureholders are represented in this proceeding by a steering committee of six Debentureholders (the “Claimants”). Collectively, the Claimants say they hold $92,030,000 in principal amount of 10.4% Debentures and $93,229,000 in principal amount of 8% Debentures.

[5] Pursuant to a trust indenture between Stelco and CIBC Mellon Trust Company dated as of January 8, 2002, as supplemented by a first supplemental indenture dated as of January 21, 2002 (collectively “the “Note Indenture”), Stelco issued convertible unsecured subordinated debentures in the principal amount of $90,000,000 bearing interest at 9.5% per annum (the “Notes”). The holders of the Notes are herein referred to as the “Noteholders”.

[6] Three corporations and one individual have identified themselves as Noteholders and are participating on their own behalf in this proceeding. They include Sunrise Partners Limited Partnership ("Sunrise") and Appaloosa Management L.P. ("Appaloosa"), both of which are also significant equity investors in Stelco under the Plan.

[7] Under the terms of the Note Indenture (specifically in the first supplemental dated as of January 21, 2002), the Noteholders expressly agreed to subordinate their right of repayment to payment in full of "Senior Debt". Senior Debt is defined in the Note Indenture as follows:

> "Senior Debt" means the principal of, the premium (if any) and interest on: (i) indebtedness, other than indebtedness represented by the [Notes], for money borrowed by the Corporation or for money borrowed by others for the payment of which the Corporation is liable; (ii) indebtedness incurred, assumed or guaranteed by the Corporation in connection with the acquisition by it or by others of any business, property, services or other assets excluding indebtedness incurred in relation to any such acquisitions made in the ordinary course of business; and (iii) renewals, extensions and refundings of any such indebtedness, unless, in any of the cases specified above, it is provided by the terms of the instrument creating or evidencing such indebtedness that such indebtedness is not to be superior in right of payment to the [Noteholders].

[8] It is agreed that the Debentures constitute "Senior Debt" as defined in the Note Indenture. In this proceeding, 2074600 seeks a declaration that the EDS Claim also constitutes Senior Debt. This issue is addressed below.

[9] The provisions governing the subordination of the Notes are set out in Part VI of the first supplemental indenture dated as of January 21, 2002 (collectively the “Subordination Provisions”). The relevant sections of Part VI are set out in the Appendix. In particular the Debentureholders and 2074600 rely on section 6.1, which sets out the subordination covenant, and section 6.2, which addresses the operation of the subordination arrangements in the event of insolvency proceedings including a reorganization.

[10] In particular, subsection 6.2(2) contains a provision requiring any payment or distribution of assets in these circumstances to be paid to the holders of Senior Debt (herein referred to as “Senior Debt Holders”) to the extent necessary to result in payment in full of the principal and interest owing to the Senior Debt Holders. The Debentureholders and 2074600 seek to enforce this covenant as third party beneficiaries. In addition, subsection 6.2(3) provides that any payments or distributions not made in accordance with subsection 6.2(2) are to be held in trust by the Noteholders for the benefit of the Senior Debt Holders. The Debentureholders and 2074600 assert that they are beneficiaries of this trust.

The EDS Claim

[11] 2074600 is a company that was organized to acquire the EDS Claim. It is a wholly owned subsidiary of TriCap Management Limited (“TML”), which was a significant equity investor in Stelco under the Plan.

[12] The EDS Claim related to an agreement between Stelco and EDS dated as of February 25, 2002 entitled the “Master Information Technologies Services Agreement” (the "MITSA").

The MITSA, and the nature of the EDS Claim, are described in greater detail below. EDS assigned its interest in the EDS Claim to 2074600 pursuant to an assignment agreement dated November 14, 2005.

Insolvency Proceedings of Stelco

[13] On January 29, 2004 (the “Filing Date”), Stelco and certain of its subsidiaries filed for and obtained protection under the CCAA. Pursuant to an order of this Court dated January 29, 2004 (the "Initial Order"), Ernst & Young Inc. was appointed as a monitor (the "Monitor") over all of the applicant companies.

[14] In the course of Stelco's lengthy CCAA process, the Monitor oversaw a CCAA claims process through which unsecured creditors proved their claims against Stelco for voting and distribution purposes. The Monitor accepted unsecured creditor claims totaling approximately $546 million. If post-filing interest related to these claims is included, the total of the accepted unsecured creditor claims was approximately $640 million. These claims included the Debentureholders’ claims, which totaled $282,629,761 as of the Filing Date and $342,655,664 as of the Plan Implementation Date (defined below), and the EDS Claim, which Stelco and EDS agreed was $48,994,917 as of the Filing Date.

[15] Throughout the latter part of 2004 and all of 2005, Stelco, the Monitor, and representatives of certain unsecured creditors, including representatives of the Debentureholders, were involved in various efforts to raise capital, sell assets, and negotiate a plan of arrangement or compromise. Ultimately, Stelco proposed its first plan of arrangement in October 2005 (the "Proposed Plan").

[16] The Proposed Plan treated the Debentureholders and the Noteholders, together with other unsecured creditors whose claims were accepted by the Monitor, as members of the same class, referred to in the Plan as the “Affected Creditors”. The Noteholders brought a motion to challenge this classification. They sought alternative relief either (1) directing Stelco to include provisions in the Proposed Plan, and disclosure in the related information circular, reflecting the extinguishment of the Subordination Provisions on implementation of the Proposed Plan, or (2) directing Stelco to extend separate class treatment to the Noteholders. The Noteholders’ position was based on the absence of privity of contract – the fact that the Debentureholders were not parties to the Note Indenture.

[17] The Noteholders’ motion was heard on November 9, 2005 by Farley J. In his Endorsement of the same date, Farley J. denied both items of the requested relief and dismissed the motion: see *Stelco Inc.(Re)* [2005] O.J. No. 4814 (Sup. Ct.). A subsequent appeal to the Court of Appeal was also dismissed. The significance of these decisions for the issues in this proceeding is addressed below.

[18] In response to a comment of Farley J. in his Endorsement of November 9, 2005, Stelco inserted a preliminary version of section 6.01(2) of the Plan in the draft plan to clarify its intentions with respect to the relationship between the Plan and the Subordination Provisions.

This provision was subsequently revised in the course of negotiations that commenced in early December 2005 involving Sunrise and Appaloosa. These negotiations were prompted by an offer by these parties to subscribe for equity in Stelco under the Proposed Plan at $5.50 per common share, which was higher than the price contemplated under the Proposed Plan.

[19] The negotiations in early December 2005 involved, among other parties, TML, Sunrise, Appaloosa, Stelco and the Claimants on behalf of the Debentureholders. They resulted in a revised plan of arrangement that was announced on December 5, 2005.

[20] The final version of section 6.01(2) of the Plan is set out in the Appendix. The Debentureholders and 2074600 say that this provision preserves the rights of the Senior Debt Holders in respect of the Subordination Provisions. The Noteholders say it does not and that the Subordination Provisions were therefore extinguished on implementation of the Plan pursuant to its terms.

[21] In late 2005, Stelco's directors and management obtained reports from UBS Securities Canada ("UBS") and BMO Nesbitt Burns Inc. ("BMO") regarding the estimated enterprise value of Stelco. In addition, the Monitor received a similar report from Ernst & Young Orenda Corporate Finance Inc. ("E&y"). The ranges of enterprise value in these reports was as follows : UBS - $550 - $750 million using a discounted cash flow (" DCF") approach ; BMO - $580 - $780 million using a public trading approach and $615 - $785 using a DCF approach ; and E&Y - $635 - $785 million. The existing holders of Stelco common shares obtained a report from Navigant Consulting ("Navigant"), which concluded that Stelco had an enterprise value in the range of $1.1 - $1.3 billion.

[22] The Affected Creditors approved the revised plan on December 9, 2005. The revised plan was then submitted to the Court for its approval pursuant to the CCAA at a hearing held on January 17 and 18, 2006 (the "Sanction Hearing") and was approved by the Court pursuant to an order dated January 20, 2006 (the "Sanction Order"). As approved, the Stelco plan of arrangement is referred to as the "Plan". The decision of Farley J. approving the Plan is set out in his Endorsement of the same date: see *Stelco Inc. (Re)* [2006] O.J. No. 276 (Sup. Ct.) No appeal was taken from that decision.

[23] The Plan became effective on March 31, 2006 (the "Plan Implementation Date") at the "Effective Time", which was defined under the Plan as "the last moment on the Plan Implementation Date". On the Plan Implementation Date, articles of reorganization of Stelco were filed implementing the various steps in the Plan including the Distributions (as defined below) and the equity subscriptions of the equity sponsors of the Plan.

Treatment of the Parties Under the Plan

[24] Under the Plan, on the Plan Implementation Date, each Affected Creditor received, in respect of its proven claims under the Plan, its *pro rata* share of each of:

(a) the principal amount of the U.S. dollar equivalent (rounded up to the nearest US $1,000) of $275 million of secured fixed rate notes (the "FRNs");

(a) a cash pool of a minimum of $108,548,000 and a maximum of $137,500,000, depending upon the number of Common Shares acquired pursuant to the Share Election (defined below) (the "Cash Pool"), funded by concurrent equity subscriptions of TML, Sunrise and Appaloosa;

(b) 1.1 million new common shares of Stelco (the "Common Shares"); and

(c) warrants to purchase 1,418,500 common shares of Stelco at $11 per share at any time prior to 2013 ("the Warrants").

Pursuant to section 2.07 of the Plan, each Affected Creditor could elect to receive all or any part of its entitlement to cash from the Cash Pool in Common Shares at a subscription price of $5.50 per share, subject to prorating in the event that more than 5,264,000 Common Shares were elected, which occurred. This right is referred to herein as the "Share Election". The securities actually distributed to the Affected Creditors, taking this election into account, are collectively referred to as the "Distributions".

[25] The Distributions received by the Debentureholders under the Plan in satisfaction of their claims against Stelco were as follows:

(a) FRNs having an aggregate US$121,486,000. Assuming an exchange rate of 1.167 as of March 31, 2006, the aggregate face value of the FRNs was Cdn. $141,774,162;

(b) $52,189,293.52 and US$46,477.83 in cash. Assuming an exchange rate of 1.167 as of March 31, 2006, the aggregate cash received was $52,243,533.15;

(c) 4,004,829 of Common Shares; and

(d) 733,311 Warrants.

[26] Valuing the FRNs at par, the Common Shares at $5.50, and the Warrants at $1.44**,** the Debentureholders value these Distributions at $216,044,254.65, resulting in a deficiency claim of $125,611,499.35 (including post-filing interest), which exceeds the value of the Turnover Proceeds. Using a valuation of the FRNs of $105.25, of the Common Shares of $20.50 and of the Warrants of $14.73, the Noteholders value these Distributions at $294,361,504, resulting in a deficiency claim on the same basis of $48,294,160, which represents 53.7% of the Turnover Proceeds.

[27] The Distributions received by the Noteholders under the Plan in full satisfaction of their claims against Stelco were as follows:

(a) FRNs having an aggregate face value of US $40,522,000. Using the same exchange rate assumptions, the aggregate face value of the FRNs was Cdn. $47,289,174;

(b) $20,075,359 in cash;

(c) 849,325 Common Shares; and

(d) 244,528 Warrants.

These assets constitute the "Turnover Proceeds" and were delivered to the Monitor to be held in trust pending resolution of this litigation pursuant to the provisions of section 6.02(a) of the Plan.

Subsequent Events

[28] Trading in the Common Shares, Warrants and FRNs on the Toronto Stock Exchange (the "TSE") began at the opening of business on Monday April 3, 2006, although there were no trades in the FRNs recorded until April 5, 2006. The FRNs also traded in the over-the counter market for which data was not made available to the Court.

[29] On the first day of trading, 2,043,049 Common Shares were traded. The high and low prices for the Common Shares on that day were $19.49 and $15.00, respectively, with the closing price being $19.49. On the same day, 2,496 Warrants were traded. The high and low prices for the Warrants on that day were $12.00 and $10.00, respectively, with the closing price being $12.00.

[30] The volume weighted average price (the "VWAP") of the Common Shares and the Warrants during the five-day period of April 3, 2006 to April 7, 2006 were $20.5049 and $14.7324, respectively. A total of 5,965,531 Common Shares and 91,579 Warrants were traded during that period. The Court was not provided with the VWAP calculation for the Common Shares and the Warrants for trading on April 3, 2006.

The MITSA

[31] The MITSA provided for the transfer from Stelco to EDS of responsibility for all of Stelco's IT needs. In this connection, 205 of Stelco's 212 IT employees were transferred to EDS. In addition Stelco sold to EDS the vast majority of the hardware, equipment, and other assets involved in the provision of Stelco's IT needs. The MITSA also contemplated a major overhaul of Stelco's legacy systems through the development and implementation of three new enterprise planning systems ("ERPs). The ERPs contemplated three projects: (i) a synchronous manufacturing system (the "SMS"), that was completed but not implemented due to concerns for the implementation risk; (ii) an asset management system for Stelco's plants at Hilton Works and Lake Erie; and (iii) a human resources, payroll and financial management system.

[32] The MITSA provided for payment of two types of fees. Operational fees, which were the significant majority of the fees, related to the operation and maintenance of the legacy systems

and the transition to the applications and infrastructure implementing the ERPs. Project fees related specifically to the costs of developing and implementing the ERPs. Total costs over the 10-year term of the MITSA were expected to be approximately $320 million. As Stelco required flat annual payments to EDS, the MITSA was structured to provide that Stelco would incur indebtedness in the early years of the relationship, when the fees payable by Stelco would exceed the flat payments, and would retire that indebtedness over the remaining life of the contract, when the flat payments would exceed the fees payable to EDS. Interest was payable on most, but not all, of the outstanding indebtedness in order to make the debt assignable by EDS, although this became impossible due to Stelco's deteriorating credit rate.

[33] The outstanding indebtedness at the time of Stelco's filing under the CCAA constitutes the EDS Claim. Stelco treated the EDC Claim as long-term indebtedness for financial reporting purposes. Substantially all of this indebtedness was treated as representing project fees for the ERPs. This resulted from Stelco's accounting practice of allocating the flat payments made by Stelco against the operational fees. EDS, however, appears to have treated a substantial portion of the indebtedness as operational fees.

This Proceeding

Procedural Matters

[34] On March 7, 2006, Farley J. issued an order (the "Scheduling Order") setting out the procedure by which entitlement to the Turnover Proceeds would be resolved. The Scheduling Order, as supplemented, governs the current proceeding.

[35] Pursuant to that Order, the Claimants, on behalf of the Debentureholders, and 2074600 filed claims in respect of the Turnover Proceeds on March 17, 2006. Subsequently, the Noteholders filed a defence to these claims and the Claimants and 2074600 filed replies to that defence. In addition, the Claimants filed a dispute to the claims of 2074600 to which 2074600 also filed a response.

Issues

[36] There are eight separate issues in this proceeding as follows:

1. the Noteholders submit that the claims of the Debentureholders should be dismissed because the Debentureholders have failed to provide evidence that they held Debentures at the relevant times;

2. the Noteholders submit that the Subordination Provisions were cancelled on implementation of the Plan and, therefore, cannot be relied upon by the Senior Debt Holders;

3. the Noteholders submit that all debt, including the claims of the Debentureholders and 2074600, was extinguished on implementation of the Plan so there can be no Senior Debt for purposes of the Note Indenture;

4. the Noteholders submit that any claims of the Debentureholders and 2074600 in respect of the Subordination Provisions are limited to their claims as of the date of Stelco's filing under the CCAA and do not include any post-filing interest;

5. the Noteholders submit that the Claimants are not parties to the Note Indenture and therefore cannot enforce its terms;

6. the Noteholders submit that there is no evidence that any of the Debentureholders or 2074600 suffered any deficiency on account of any Debentures held by them at the applicable time or the EDS Claim, as applicable, by virtue of the value of the Distributions received by each of them under the Plan:

7. 2074600 submits that the EDS Claim is Senior Debt; and

8. the Noteholders argue that, to the extent that 2074600 is otherwise entitled to the benefit of the Subordination Provisions as Senior Debt, it has failed to mitigate its damages.

The Debentureholders and 2074600 oppose the positions of the Noteholders in items 1 to 6 inclusive above. The Debentureholders and the Noteholders oppose the position of 2074600 in item 7.

I will discuss each of these issues in turn.

Analysis and Conclusions

Requirement for Proof of Holdings of Debentureholders

[37] The Noteholders accept that the Claimants have been duly authorized to pursue the claims asserted by them in this proceeding on behalf of all Debentureholders. However, they argue that the claims of the Debentureholders should be dismissed because they have not introduced evidence regarding the holdings of individual Debentureholders on and after March 31, 2006 and the extent of their individual deficiency claims.

[38] I do not accept this submission for two reasons.

[39] First, as a procedural matter, I am satisfied that, by virtue of the inherent jurisdiction of the Court under the Plan and the CCAA as well as the specific procedural provisions of the Scheduling Order, the Court has the authority to convene a second hearing in this proceeding if it determines that further issues must be addressed to determine the quantum of the deficiency claims of any or all of the Debentureholders. In this connection, I note that the Court of Appeal

upheld the Scheduling Order on the basis that the jurisdiction of this Court over the CCAA restructuring process extends at least to continued process-related matters concerning the rollout of the Plan in accordance with its provisions.

[40] Pursuant to this authority, I indicated in my earlier Endorsement dated July 18, 2006 that the hearing this week is being treated as a motion for a declaration as to certain matters of law within the proceeding established by the Scheduling Order. If the Court's determination with respect to these issues does not constitute a final determination of the claims of the Debentureholders, the claims of the Debentureholders can be determined at a trial of the remaining factual issues.

[41] Second, and more substantively, for the reasons addressed below under "Approach to the Determination of the Extent of the Deficiency Claims of the Senior Debt Holders", I have concluded that any deficiencies of the Debentureholders should be addressed on a collective rather than an individual basis. Accordingly, given the other determinations in these Reasons, there is no need for a further hearing by the Court to determine the deficiency claims of the Debentureholders except to the limited extent addressed below.

Survival of the Subordination Provisions

[42] The provisions of section 6.01(2) of the Plan are a complete answer to the Noteholders' submission that the Subordination Provisions were terminated on the Plan Implementation Date. Section 6.01(2) could have been drafted to express this purpose more directly. However, the only reasonable interpretation of section 6.01(2) is that the substantive rights and obligations of the Senior Debt Holders and the Noteholders in respect of the Subordination Provisions are not affected in any manner by the implementation of the Plan.

[43] Conceptually, the result is that, while all of the provisions of the Note Indenture respecting the rights and obligations of Stelco and the Noteholders were extinguished on the Plan Implementation Date, the provisions of Part VI of the Note Indenture continue in full force insofar as they relate to the rights and obligations of the Senior Debt Holders vis-à-vis the Noteholders in respect of Distributions made on the Plan Implementation Date. This approach is consistent with both the provisions of the Plan and with the scope of the CCAA.

[44] With respect to the Plan, the Noteholders argue that the proper interpretation of section 6.01(2) is that it preserves the right to assert claims and defences but, as a substantive matter, it does not preserve the Subordination Provisions to the extent that they would otherwise be extinguished by the terms of the Plan on the Plan Implementation Date. I do not accept this position. The Noteholders do not suggest that this provision is susceptible of any other interpretation other than one that renders it meaningless. I agree with the Senior Debt Holders that, as a matter of contract law, the Court should strive to give effect to every provision in an extensively negotiated commercial document. I therefore conclude that the more reasonable interpretation of section 6.01(2) is that it preserves the substantive rights of the parties in respect of the Subordination Provisions.

[45] The Noteholders also rely on the clause "subject to the operation of law" in the last sentence of subsection 6.01(2) of the Plan. However, that clause is preceded by a statement that the last sentence is not intended to limit the generality of the rest of the provision. Absent an express indication that the clause was intended to render meaningless the rest of the provision, I conclude the reference to the operation of law was not intended to extend to the extinguishment of the rights and obligations of the parties in respect of the Subordination Provisions.

[46] The Noteholders' position is essentially that it is not possible for Part VI of the Note Indenture to continue as an enforceable set of rights and obligations if the Note Indenture is otherwise extinguished. I do not think that this is necessarily so. To the extent that Part VI addresses rights and obligations of third parties that are enforceable by those parties, which is addressed below, there is no legal reason why these provisions cannot survive in full force and effect even if the remaining provisions of the Note Indenture are extinguished. Nor do I think that it is appropriate to characterize this result as rewriting the contract, as the Noteholders argue.

[47] With respect to the CCAA, it is clear that the CCAA does not purport to affect rights as between creditors to the extent they do not directly involve the debtor. Farley J. confirmed this principle in his Endorsement dated November 9, 2005 at paragraph [7]. To succeed, the Noteholders must demonstrate clear and unambiguous language in the Plan evidencing an agreement to extinguish such rights. Subsection 6.01(2) of the Plan does not satisfy that requirement.

[48] Based on the foregoing, I have therefore concluded that the Subordination Provisions were not extinguished on the implementation of the Plan.

[49] The Senior Debt Holders go further and argue that the issue of the survival of the Subordination Provisions is *res judicata* in light of the above-mentioned Endorsement of Farley J. and the decision of the Court of Appeal dated November 14, 2005 upholding his decision. Given my determination of this issue it may be unnecessary to address this argument.

[50] However, if it becomes relevant, I believe that the decision of Farley J. is limited to the principle set out above that, in the absence of any provision expressly extinguishing the Subordination Provisions in the Proposed Plan, neither the provisions of the CCAA nor the Proposed Plan would operate to extinguish the Subordination Provisions if the Proposed Plan were implemented. As there are no material differences between the Proposed Plan and the Plan that are relevant to this issue, apart from section 6.01(2), that principle also applies *prima facie* in the interpretation of the Plan in this proceeding. However, because the Proposed Plan did not include section 6.01(2) of the Plan, the decision of Farley J. did not address the legal effect of that provision with the result that the issue of the interpretation of section 6.01(2) is not technically *res judicata*.

[51] I should note that I also think it is clear that Farley J. did not determine the further issue of whether the Subordination Provisions were enforceable by the Senior Debt Holders. While he alludes to this issue in paragraphs [3] and [4] of his Endorsement, he does not express a

conclusion as to whether the Subordination Provisions are enforceable in the particular circumstances of this CCAA proceeding.

Survival of the Senior Debt Holders' Claims

[52] As a related matter, the Noteholders also argue that, because the Plan extinguished the Senior Debt on the Plan Implementation Date, there is no longer any Senior Debt to which the Subordination Provisions apply. I do not accept this interpretation of the operation of the Subordination Provisions in respect of the Plan for the following reasons.

[53] First, this interpretation of the effect of the Plan robs section 6.2 of the Note Indenture of any meaning in the very circumstances in which it was intended to apply, as evidenced by the reference in the introductory clause to "insolvency or bankruptcy proceedings, or any in reorganization or similar proceedings relative to [Stelco]". For this reason alone, I would conclude that the parties to the Note Indenture cannot have intended the Subordination Provisions to operate in this manner.

[54] Second, I do not think this position is correct based on the language of section 6.2 of the Note Indenture. Subsections 6.2(1) and (2) require that a determination of whether the Senior Debt Holders continue to have outstanding claims shall be made concurrently with any particular payment or distribution to the Noteholders. If the Senior Debt Holders have outstanding claims, the Subordination Provisions operate with respect to such payment or distribution. The extinguishment of the outstanding claims of the Senior Debt Holders cannot affect the operation of the Subordination Provisions in respect of the particular payment or distribution that may be subject to those Provisions.

[55] Lastly, while I do not think it should be necessary to establish, as a technical matter, that the Senior Debt had not been extinguished at the precise moment at which the Distributions were received by the Noteholders, I think it is possible do so based on the sequencing of the transactions set out in section 5.04 of the Plan. Section 5.04 sets out an order in which the events described therein occur, including the separate distribution of each of the securities comprising the Distributions. Because the Senior Debt Holders' claims can only be extinguished after payment of all of the property comprising the Distributions in accordance with the Plan, I conclude that, notwithstanding the language of section 2.03 of the Plan, their claims were not extinguished until all of these transactions were completed and that the Distributions were completed immediately prior to such time.

Post-Filing Interest Claims

[56] The claim of the Senior Debt Holders in respect of post-filing interest involves two issues:

1. whether interest continues to accrue in respect of the claims of the Senior Debt Holders against Stelco notwithstanding Stelco's filing under the CCAA?

2. whether the Subordination Provisions extend to post-filing interest?

I will address the position of the Debentureholders and of 2074600 separately.

Post-Filing Interest Claims of the Debentureholders

[57] I am satisfied that interest continues to accrue on the Debentures after the Filing Date up to and including the Plan Implementation Date even though it was not payable by Stelco under the Initial Order. A filing by a debtor under the CCAA does not, as a matter of law, automatically terminate, or even suspend, the accrual of interest on its outstanding indebtedness. Suspension of the obligation of the debtor to pay interest is entirely based on the terms of any stay order issued by this Court in respect of the CCAA proceedings.

[58] There is no authority to the contrary apart from the decision in *Air Canada (Re)*, Decision of Claims Officer Stockwood, dated August 4, 2004. I think that the decision is incorrect and, in any event, is not binding on this Court. On the other hand, there is authority in support of the position that post-filing interest continues to accrue after a CCAA filing in the statement of Binnie J. in *Canada 3000 Inc., Re; Inter-Canadian (1991) inc. (Trustee of)*, [2006] S.C.J. 24 at para. 96.

[59] The Noteholders argue that the "Interest Stops Rule", which applies in bankruptcy and winding-up proceedings, should also apply in respect of CCAA proceedings. I do not see why this should be the case. There may be circumstances, such as an increasing equity value of an entity in CCAA proceedings, that would justify inclusion of some or all post-filing interest in the claims of creditors in the plan of arrangement implemented at the end of the CCAA proceedings. There is no reason why creditors should be prevented from receiving satisfaction of such claims by imposition of the Interest Stops Rule.

[60] The Noteholders also rely on the definition of "claim" in section 12 of the CCAA as "a debt provable in bankruptcy within the meaning of the [*Bankruptcy and Insolvency Act*]". They argue that, since a claim in bankruptcy includes interest only to the date of the assignment in bankruptcy, the Court should interpret the definition of "claim" in the CCAA analogously to limit interest claims to interest prior to the date of filing under the CCAA. I do not think this is a necessary implication of the definition of claim in the CCAA, which has meaning principally in the context of voting provisions.

[61] The last argument of the Noteholders is that the Debenture Indentures are not sufficiently explicit that interest continues to accrue after the institution of insolvency proceedings. I do not agree. I am satisfied that the provisions of the Debenture Indentures that provide that interest is payable after default are sufficient to continue the accrual of interest after the commencement of insolvency proceedings and imposition of a stay. The Noteholders point to more explicit wording in certain securities referred to in the *Air Canada* decision at page 33. However, the language to which they refer does not relate to the payment of interest but rather to the operation of subordination provisions. In that context, such language is not essential if the subordination

provisions do not otherwise exclude the accrual of interest, although it is helpful in confirming the fact that the parties directly addressed the issue.

[62] With respect to the second question, the critical fact, as discussed above, is that the Subordination Provisions continue to operate independently of the Plan and are not affected by implementation of the Plan. Section 6.01(2) specifically preserves the rights of the Senior Debt Holders in respect of post-filing interest. While it also preserves any defences of the Noteholders, they assert none that are not based on the operation of the Plan. Accordingly, I conclude that the Subordination Provisions also extend to post-filing interest.

[63] I agree with the Senior Debt Holders that the legal result is analogous to the treatment of guarantees of entities that have filed under the CCAA. As illustrated in *Guardian Trust Co. v. Gaglardi* (1989), 64 D.L.R. (4th) 351 at 361, interest continues to accrue post-filing in respect of the obligation of a guarantor even if a stay is imposed under the CCAA in respect of the obligation of the debtor. In that situation, as in the present circumstances, the result flows from the existence of an independent contract or document between parties other than the debtor and the absence of language that excludes the accrual of post-filing interest.

[64] On the basis of the foregoing, I conclude that the holders of the Debentures are entitled to the benefit of the Subordination Provisions in respect of post-filing interest.

Post-Filing Interest Claims of 2074600

[65] As a holder of Senior Debt, 2074600 would also be entitled to the benefit of the Subordination Provisions in respect of post-filing interest if it could establish that interest had continued to accrue, as between EDS and Stelco. The Debentureholders and the Noteholders argue that the claim of 2074600 for post-filing interest was, however, extinguished by the provisions of a term sheet dated November 14, 2005 between EDS and Stelco (the "Term Sheet") immediately prior to the assignment of the EDS Claim to 2074600.

[66] In section 2(g) of the Term Sheet, EDS and Stelco agreed that the EDS claim in the CCAA proceeding would be $48,944,917 and specifically agreed that interest could not accrue after that date. 2074600 argues that the inference to be drawn from this provision is that nothing in the Term Sheet extinguished the accrual of interest prior to that date in respect of the EDS Claim. However, section 1 of the Term Sheet constitutes, among other things, an absolute release of all claims of EDS against Stelco as of November 14, 2005. There is nothing in section 2(g) that preserves any claim of EDS for interest accrued prior to that date.

[67] Accordingly, I conclude that the effect of the Term Sheet is to extinguish the obligation of Stelco to pay post-filing interest on the EDS Claim.

Enforceability of the Subordination Provisions by the Senior Debt Holders

[68] The Senior Debt Holders assert (1) that they are entitled to enforce the Subordination Provisions directly as third party beneficiaries and (2) that they are beneficiaries under a trust of

the Turnover Proceeds established under subsection 6.2(3) of the Note Indenture. I will discuss each submission in turn.

Application of Third Party Beneficiary Rule

[69] The Debentureholders (through the Claimants) and 2074600 seek to enforce the covenants of the Noteholders in favour of Stelco in section 6.1 and subsections 6.2(1) and (2) of the Note Indenture as third party beneficiaries by virtue of their status as Senior Debt Holders. The Noteholders submit that the Senior Debt Holders cannot enforce the Subordination Provisions on their own. I will address the two arguments of the Noteholders on this issue in turn.

[70] First, the Noteholders say that the Senior Debt Holders cannot enforce the covenants of the Noteholders in favour of Stelco in section 6.1 and subsections 6.2(1) and (2) of the Note Indenture because they are not parties to the Note Indenture. The Debentureholders and 2074600 argue that they are entitled to enforce the covenants on the basis of the principles articulated in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108. The Noteholders say that the limited relaxation of the privity of contract rule permitted in these decisions does not extend to assertion of claims as a plaintiff but is limited to assertion of defences as a defendant in any action. In support of this position, they point to dicta in two recent British Columbia decisions: *Kitimat (District) v. Alcan, Inc.*, [2005] B.C.J. No. 58 and *R.D.A. Film Distribution Inc. v. British Columbia Trade Development Corp.*, [2000] B.C.J. No. 2550. On the basis of these decisions, they argue that the Senior Debt Holders can only enforce the covenants of the Note Indenture if Stelco had constituted itself a trustee of these covenants in favour of the Senior Debt Holders.

[71] I do not agree with the Noteholders for the following reasons.

[72] First, I am satisfied that the two-part test set out by Iacobucci J. at para. 32 in *Fraser River* is satisfied. There is no question that the benefit of the provisions extends to the Senior Debt Holders. Unlike the situations presented in *London Drugs* and *Fraser River*, the Senior Debt Holders are the only parties who benefit from these provisions. The second part of the test is satisfied insofar as the actions of the Debentureholders and 2074600 are limited to enforcing the covenants made in favour of Stelco that are intended to ensure that the Senior Debt Holders receive the benefit of the Subordination Provisions. In addition, because the policy concerns of multiplicity of actions and double recovery do not present themselves in the present action, there is no principled reason to refuse to extend the principle in *London Drugs* to the present action.

[73] The Noteholders' second argument is that the limited relaxation of the doctrine of privity of contract in *London Drugs* and *Fraser River* is limited to use by a third party beneficiary as a shield to defend an action rather than as a sword to initiate one. They rely on dicta of Ehrcke J. in *Kitimat* at para. 65 and of Newbury J.A. in *R.D.A. Film Distribution* at paras. 67 and 68 in

support of this position. The Debentureholders argue that the Noteholders are the real plaintiffs in this proceeding.

[74] I do not think it is possible, as the Debentureholders argue, to characterize their claims as a shield to prevent appropriation of assets by the Noteholders to which they are not entitled. While the circumstances of a debtor not enforcing subordination provisions directly may be novel, there is no question that the onus in this proceeding rests with the Debentureholders to establish that they are entitled to enforce the Subordination Provisions. However, there is a more fundamental reason why the decisions relied upon by the Noteholders are not applicable in the present circumstances.

[75] The conclusion of Ehrcke J., which is the clearer of the two statements relied upon by the Noteholders, is a deduction from the more general statement of Iaccobucci J. in *Fraser River* at para. 44 that the exception should be applied in an "incremental" manner. It is clear from that decision that the fundamental consideration in the determination of whether, in any particular circumstance, relaxation of the doctrine of privity can be characterized as "incremental" is the potential for double recovery and multiplicity of actions. I would note that these concerns were present in both *Kitimat* and *R.D.A. Film Distribution*. In the present proceeding where such concerns are not present, I believe the principle in *Fraser River* contemplates extension of the third party beneficiary principle regardless of whether it is being used as a shield or a sword.

[76] Accordingly, I conclude that, in the absence of enforcement by Stelco, the Senior Debt Holders are entitled to enforce section 6.1 and subsections 6.2(1) and (2) of the Note Indenture directly as third party beneficiaries.

Alleged Existence of Trust

[77] The Senior Debt Holders also submit that they are the beneficiaries of a trust of the Turnover Proceeds established in their favour in subsection 6.2(3) of the Note Indenture. The Noteholders make two arguments in denying that the holders of Senior Debt are entitled to rely on the trust language expressed in section 6.2(3).

[78] First, they say that this provision is remedial and, as such, is only enforceable to the extent that the Senior Debt Holders can enforce the provisions of section 6.1 and subsections 6.2(1) and (2) as a third party beneficiaries. Given the decision above, this requirement is satisfied. I am of the opinion in any event that the two issues are not related. In particular, a trust could be validly created in respect of property received by or on behalf of the Noteholders irrespective of whether the Senior Debt Holders were entitled to enforce these covenants of the Note Indenture as third party beneficiaries.

[79] In addition, the Noteholders argue that the pre-conditions to the establishment of a trust have not been satisfied. In particular they say that there has been no receipt of trust property by the Noteholders because the Distributions have been paid to the Monitor in accordance with the paragraph 6.01(2)(a) of the Plan. This is an argument of form over substance. The Monitor has no interest in the Distributions. For the purpose of this proceeding, payment to the Monitor

satisfies the requirement of delivery of the corpus of the trust to the Noteholders. The only other possibility - that the Distributions were paid to the Senior Debt Holders - is, of course, denied by the Noteholders and would render consideration of this issue unnecessary.

[80] In the course of oral argument, a third issue was raised – the revocability of the trust by the Noteholders, as trustees, without the consent of the Debentureholders, as beneficiaries. I conclude, however, that the possibility of revocation in these circumstances should not displace the existence of the trust for the following reasons. First, there is no question that the "three certainties" necessary to establish the existence of a trust have been demonstrated. Second, revocation of the trust was more a theoretical than a real possibility. The Noteholders could only revoke the trust with the consent of Stelco, as the other party to the Note Indenture. There was no realistic possibility that Stelco would have consented while Senior Debt was outstanding. In addition, if it had done so, there remains the possibility that the Debentureholders would have had a right to prevent the revocation based on principles of reliance or other applicable law.

[81] Accordingly, I conclude that the Senior Debt Holders are also entitled to the benefit of a trust of the Turnover Proceeds established in their favour pursuant to section 6.2(3) of the Note Indenture.

Approach to the Determination of the Extent of the Deficiency Claims of the Senior Debt Holders

[82] The most difficult issue for this proceeding is the approach to valuing the Distributions for purposes of determining the extent, if any, of the entitlement of the Senior Debt Holders to the Turnover Proceeds pursuant to the Subordination Provisions.

[83] The patires have suggested three different approaches. 2074600 argues that the Distributions should be valued as of the date of the Sanction Order. The Debentureholders argue that the Distributions should be valued as of the Plan Implementation Date. Both of these parties submit, however, that the Common Shares and the Warrants should be valued using the $5.50 subscription price for the Common Shares under the Plan, resulting in a modest value for the Warrants using the Black-Scholes model valuation. The Noteholders argue that the Court should use actual recoveries during the week of April 3, 2006, to the extent Senior Debt Holders sold any FRNs, Common Shares or Warrants during that period, and the volume weighted average sale price ("VWAP") for the week for any such securities held by the Debentureholders at the end of the week. The approach of the Debentureholders and 2074600 would calculate any deficiencies of the Senior Debt Holders on an aggregate basis. By contrast, the Noteholders argue that the deficiencies of the Senior Debt Holders must be calculated on an individual basis.

[84] There are, therefore, four interrelated issues to be addressed in determining this issue:

1. whether any deficiencies of the Senior Debt Holders are to be claimed collectively or individually;

2. whether deficiencies of the Senior Debt Holders should be valued taking into account actual recoveries in respect of any securities sold by the Debentureholders after the Plan Implementation Date;

3. the appropriate date or dates for valuing the Distributions received by the Senior Debt Holders; and

4. the appropriate value of the Common Shares, Warrants and FRN's received by the Senior Debt Holders, to the extent that recoveries are not to be taken into account in such determination.

[85] The point of commencement for these questions is the principle of subordination set out in subsection 6.2(1) of the Note Indenture, which provides that "the holders of all Senior Debt will first be entitled to receive payment in full of [their claims] before the [Noteholders] will be entitled to receive any payment or distribution of any kind or character, whether in cash, property or securities, which may be payable or deliverable in any such event in respect of any of the [Notes]". The resolution of each of the four issues must be consistent with the principles embodied in section 6.2(1). I will address each issue in turn.

Are Deficiencies to be Claimed Collectively or Individually?

[86] The approach of the Noteholders requires the Court to approach the determination of the deficiency claims of the Debentureholders on an individual basis. As mentioned above, the Noteholders go further and submit that the failure of the Claimants to provide evidence of the actual deficiency claims of each of the Debentureholders is a fatal defect that should result in dismissal of their claims.

[87] I do not accept either of these propositions.

[88] The claims of the Debentureholders are based on the Subordination Provisions. While each claim for a deficiency is ultimately an individual claim, the Note Indenture generally, and section 6.2(1) thereof in particular, clearly contemplates treatment of these claims on a collective basis. In the ordinary course, the trustees under the Debenture Indentures (the "Trustees") would enforce the Subordination Provisions on behalf of all Debentureholders against Stelco in respect of all payments to Noteholders, whether cash or securities, in contravention of those Provisions. Any payments owing by the Noteholders would be paid to the Trustees for distribution *pro rata* among the Debentureholders. I do not believe that either the involvement of the Claimants or the disproportionate deficiency claims resulting from the exercise of the Share Election by Debentureholders changes the process for enforcement of the Subordination Provisions.

[89] The Claimants are duly authorized by special resolutions of the holders of each of the 10.4% Debentures and 8% Debentures. The substitution of the Claimants for the Trustees as representatives of the Debentureholders does not affect the authority of the duly authorized representatives to enforce the claims of the Debentureholders collectively.

[90] The fact that the claims of the individual Debentureholders will not be proportionate to their holdings of Debentures because of differing exercise of the Share Election by Debentureholders also does not affect the enforcement process in respect of their claims pursuant to the Subordination Provisions. The Noteholders have not argued that the differing exercise of the Share Election on its own requires, as a matter of law, that the Debentureholder claims that would otherwise be pursued collectively must now be pursued individually. In addition, I do not think that there are any practical difficulties in the determination of, or payment in respect of, the deficiency claims of individual Debentureholders that require that the claims be pursued individually.

[91] The aggregate deficiency claims of the Debentureholders can be determined by a comparison of the aggregate value of their claims on the Plan Implementation Date with the aggregate value of the Distributions actually received by the Debentureholders, collectively, after the exercise of the Share Election. If there is a deficiency, the Noteholders are required to deliver Turnover Proceeds having an aggregate value equal to the aggregate amount of the deficiency claims of the Debentureholders, *pro rata* according to their holdings of Notes. The parties are agreed that this would proceed by payment of a percentage of each category of the Turnover Proceeds equal to the percentage that the aggregate deficiency claim of the Senior Debt Holders represents of the total value of the Turnover Proceeds. Such delivery will satisfy the Noteholders' obligations under the Subordination Provisions. Determination of the entitlement of individual Debentureholders to those Proceeds is entirely a mechanical exercise to be conducted outside of this proceeding by the Trustees, who have the responsibility of allocating the Turnover Proceeds, or the cash proceeds thereof if sold by the Trustees, to the Debentureholders *pro rata* in accordance with their respective deficiencies. As a practical matter, there is nothing in this process that requires that the individual deficiency claims of the Debentureholders be established in this proceeding if the aggregate deficiency claims of the Debentureholders are ascertainable.

[92] I would note, as well, that the Noteholders' position on this issue is closely related to, but distinct from, their position that actual recoveries of the individual Debentureholders must be taken into consideration in the determination of the aggregate deficiency claims of the Debentureholders. This issue is addressed further below.

Are Recoveries to be Considered in the Determination of Debentureholder Deficiencies?

What is the Appropriate Date for Valuing the Distributions?

[93] As these two issues are closely related, I propose to deal with them in the same section.

[94] The Noteholders submit that the determination of the value of the Distributions received by the Senior Debt Holders should take into account the actual recoveries of individual Debentureholders who sold securities in the market after the Plan Implementation Date.

[95] I do not think, however, that the "actual recoveries" approach of the Noteholders is consistent with the principles embodied in section 6.2(1) of the Note Indenture. The Note Indenture does not expressly provide any mechanism for valuing securities or other property

received in payment of Senior Debt claims. In these circumstances, I think it necessarily follows that:

1. the valuation must be made as of the time the Noteholders became legally entitled to the Distributions, which was the Plan Implementation Date; and

2. the valuation must be determined independently of any actual recoveries by Senior Debt Holders arising from subsequent sales transactions.

I will address each issue in turn.

[96] First, I reach the conclusion that the valuation must be made as of the time the Noteholders became legally entitled to the Distributions for the following reasons. Most importantly, the language of section 6.2(1) specifically refers to deferral of the entitlement of the Noteholders to receive any distribution otherwise payable or deliverable to them until the Senior Debt Holders shall have received payment in full of their claims. The reference to "payment in full" requires a valuation of any payment, including property, made to the Senior Debt Holders at or before at the time of receipt of any payment made to the Noteholders. There is no authority in section 6.2(1) for deferring the date as of which the value of any such payment to the Senior Debt Holders shall be determined beyond the time of receipt of the particular payment to the Noteholders. In this proceeding, the time of receipt is also the time at which the Noteholders became legally entitled to the Distributions, being the Plan Implementation Date, and the concepts are used interchangeably except where expressly indicated to the contrary.

[97] Second, the case law in this area, while dealing with a number of different circumstances, does exhibit a presumption that, absent special circumstances, securities will be valued as of the date on which a party becomes legally entitled to them. In the present circumstances, the Senior Debt Holders became entitled to the Distributions paid to them on the Plan Implementation Date. Accordingly, in order to succeed in their argument, the Noteholders must demonstrate an intention to displace this presumption in the provisions of the Note Indenture. They have failed to do so.

[98] Third, in circumstances where the valuation exercise relates to a receipt of publicly-traded securities, rather than a compulsory sale, the valuation exercise should proceed as of the date of receipt, or as nearly as possible to the date of receipt, to reflect the fact that the recipients are in a position to realize the value of the securities in the market on that date if they so decide, subject, of course, to issues related to their ability to obtain the market price of the shares.

[99] Fourthly, it must be presumed that the parties would not have intended to place any undue risk upon the Noteholders. In particular, I do not think that the parties to the Note Indenture would have intended at the date of its execution to provide for a deferral of the date as of which a valuation is to be made to provide greater certainty of the quantum of the claims of the Senior Debt Holders. Despite the actual trading experience, such an approach was at least as

likely to increase the quantum of such deficiency claims and thereby increase the loss of the Noteholders.

[100] Lastly, implementation of the approach of the Noteholders requires resolution of a number of issues for which there is no legal standard in the Note Indenture. For example, any determination of value based on actual recoveries requires a decision as to which sales will be considered and which will not. The Noteholders choose all sales during the first trading week after the Plan Implementation Date. There is, however, no principle based in the Note Indenture that justifies selection of this period rather than any shorter or longer period. There is also no presumption in the case law from which it can be inferred that the parties intended such an approach. Appeals to general considerations of fairness also fail. What the Noteholders regard as fair the Senior Debt Holders regard as unfair, given the fluctuations in market prices.

[101] More fundamentally, the absence of any applicable legal standard in the Note Indenture is a strong indication that, in substance, the Court is being asked by the Noteholders to rewrite the Subordination Provisions rather than to interpret the intentions of the parties to the Note Indenture with respect to these Provisions. It is being asked to impose a regime that is not contemplated in any manner by the Note Indenture. In the absence of a clear indication that the parties to the Note Indenture intended such a regime, or provided broad authority to this Court to impose a valuation regime, I do not think the Court should engage in such an exercise.

[102] A separate but related issue is the submission of 2074600 that the proper date for valuation should be the date of the Sanction Order on the basis that, in its view, the Senior Debt Holders became legally entitled to the Distributions to be paid to them as of that date. This argument is also rejected for the following reasons in addition to the reasons set out above.

[103] First, as a matter of law, I do not think that the Senior Debt Holders were legally entitled to the Distributions as of the date of the Sanction Order. Implementation of the Plan was subject to satisfaction of a considerable number of conditions set out in section 5.03 of the Plan. There was no certainty that these conditions would be satisfied. There was therefore no legal entitlement to the Distributions until the Plan Implementation Date. Until that time, the Senior Debt Holders had only a conditional right to receive the securities.

[104] Second, in any event, section 6.02(1) mandates a determination of the value of any payments received by the Senior Debt Holders as of the date of receipt of the Distributions by the Noteholders. As mentioned, this determination must be made as of the date that the Senior Debt Holders are in a position to sell any securities received by them. Otherwise, the Senior Debt Holders would bear the risk of a decline in value prior to the date of receipt of the securities. There is no evidence of any market for the securities included in the Distributions prior to the Plan Implementation Date. Accordingly, even if the Senior Debt Holders had become legally entitled to receive the Distributions as of the date of the Sanction Order, the determination of the amount or value of the payment could only be made as of the Plan Implementation Date because the payment of the Distributions did not occur until that date.

Valuation of the Distributions to the Senior Debt Holders

[105] The issue for the Court can therefore be put simply: did the Senior Debt Holders receive Distributions on the Plan Implementation Date having a value that constituted "payment in full" of their claims and, if not, what is the extent of their deficiency? For this purpose, the Court must determine the value of the payments received by the Senior Debt Holders. For the reasons set out above, I have concluded that the payments were received by the Senior Debt Holders at the Effective Time on March 31, 2005 and must be valued as of that time. There is, however, no provision in either the Note Indenture or the Plan that specifically addresses the proper approach to the valuations of the property received in reorganization. Accordingly, the issue for the Court is the most appropriate evidence of the value of the Distributions received by the Senior Debt Holders on March 31, 2006.

[106] The Court is not, of course, to conduct its own inquiry into the value of the securities. The Court must determine, instead, the best evidence of the value of the Distributions based on the evidence before it. For this purpose, I am of the opinion that "value" means the price for the securities that the Senior Debt Holders could have received if they had sold their securities in an open market at the Effective Time on March 31, 2006. This reflects the fact that, at that time, the Senior Debt Holders were in a position to realize the value of the securities paid to them by selling them in the market. Accordingly, the Court must determine the market price for the securities at the Effective Time. For this purpose, therefore, "value" does not mean the "fair market value", the "fair value" or the "intrinsic value", if those terms mean something other than the price of the securities in an open market. In particular, the issue is not whether the Senior Debt Holders received fair value, but rather what value should be ascribed to the Distributions received by the Senior Debt Holders. I would observe that this is not an exercise in the determination of the fair market value of securities pursuant to a statutory right provided to minority shareholders and, accordingly, the case law that has developed dealing with such valuations is not helpful in the present proceeding.

[107] For the reasons set out above, I have rejected the approach proposed by the Noteholders that would use actual recoveries during the first week of trading and the VWAP for securities retained after the first week. The alternative argument of the Noteholders is that the securities should nevertheless be valued on the basis of market prices for the securities, disregarding recoveries. They propose using either the VWAP for the entire week or the VWAP for the first day of trading in each of the securities, although the Noteholders argued the latter with less enthusiasm. I will address the appropriateness of the use of VWAP data for the first trading week before considering the merits of the two approaches to value before the Court.

Appropriateness of Determination of Value Based on Trading Data for the First Week of Trading

[108] I do not think that the VWAP data for the first week of trading in the securities is an appropriate reflection of the value of the securities on March 31, 2005 for three reasons.

[109] First, there is no principled basis for establishing a trading period exceeding the day closest to the date of receipt of the securities. I accept that, if there were market imperfections on the first day of trading that were eliminated in the course of the week, there could be a basis for such an approach. However, there is no evidence of any such imperfections. Nor are there any market considerations relating to trading in the following weeks, when apparently market prices fell, that would justify exclusion of such later period. In these circumstances, selection of trading for the week could legitimately be characterized as "averaging up" the market price even if that were not the intention.

[110] Second, there are no legal precedents brought to the attention of the Court for the Noteholders' approach to the determination of the value of publicly traded securities. There is, instead, a marked preference in the case law for selection of a single date as the date for determination of the value of publicly traded securities.

[111] Lastly, any such approach necessarily invites use of the actual recoveries of the Senior Debt Holders during the period, which has been rejected for the reasons set out above. The longer the period selected, the larger the amount of such recoveries and, correspondingly, the less the integrity of weighted average trading data for the period as the determinant of value of the securities received by the Senior Debt Holders.

[112] Accordingly, I have rejected the VWAP data for the first week of trading of the Common Shares as the determinant of the value of those shares. I have, however, considered the volume weighted average price of trading in the securities on the first trading day after the Plan Implementation Date. In the case of the Common Shares and Warrants, the first trading day was April 3, 2006. In the case of the FRNs, the first trading day on the TSE was April 5, 2006 although, as addressed below, it may be that the FRNs traded in the over-the-counter market as early as April 3, 2006.

Preliminary Issues Regarding the Position of the Senior Debt Holders

[113] I will deal next with two arguments of the Debentureholders and 2074600 that, if accepted, would dispose entirely of the issue of the determination of value.

[114] First, the Debentureholders and 2074600 argue that, in his Endorsement dated January 20, 2006 approving the Plan, Farley J. approved the $5.50 value of the Common Shares as fair and reasonable for all purposes relating to the Plan, including the operation of the Subordination Provisions. I do not think that this is a correct reading of the decision of Farley J.

[115] Reading the reasons of Farley J. in their entirety, it is clear that the issue before Farley J. relating to value was whether the Plan was unfair to the holders of equity in Stelco at that time because their common shares had value. This is clear from paragraph [37] of the Endorsement, which sets out his only finding relative to value:

> The end result is that given the above analysis, I have no hesitation in concluding that it would be preferable to rely upon the analysis of UBS, BMO Nesbitt Burns

> and Ernst & Young Orenda, both as to their direct views as to the enterprise value of existing Stelco and as to their criticism of the Navigant and MBR reports concerning Stelco. Therefore, I conclude that the existing shareholders cannot lay claim to there being any existing equity value….

On the basis of a number of factors including the valuations before the Court and the history of negotiations regarding the Plan, Farley J. found that the enterprise value of Stelco was not sufficient to attribute any value to the existing common shares. His conclusion in this paragraph does not, however, constitute a determination of the actual enterprise value of Stelco from which a finding as to the value of the Common Shares could be inferred, nor is there such a finding elsewhere in his Endorsement. He also made no separate finding regarding the fairness of the subscription price of $5.50 per Common Share. I would add that the Endorsement also does not address any issues relating to the Subordination Provisions.

[116] Second, the Debentureholders argue that the transactions effected on the Plan Implementation Date evidence a real market for the Common Shares on that date in which shares were effectively traded at $5.50 per Common Share. The transactions to which they refer are: (1) the equity subscriptions under the Plan by TML, Sunrise and Appaloosa; (2) the exercise of the Share Election by Affected Creditors; and (3) the issue and allotment of Common Shares and Warrants to purchase Common Shares to the new president of Stelco at a subscription price, and a strike price, of $5.50 per Common Share.

[117] I also do not accept the submission that an open market for the Common Shares existed on the Plan Implementation Date from which the Court can conclude that the value of the Common Shares was $5.50. None of the transactions to which the Senior Debt Holders refer were entered into on the Plan Implementation Date. The equity subscriptions by TML, Sunrise and Appaloosa were agreed to prior to the meetings of the stakeholders to approve the Plan held on December 9, 2005. The subscription price for the Share Election had also been agreed by that time and the actual elections by individual Debentureholders were made well in advance of the Plan Implementation Date. Similarly, the issue price of the Common Shares, and the strike price of the warrants to purchase additional Common Shares that were issued to the new president of Stelco, were the result of negotiations that began in January and were completed well before the Plan Implementation Date. Completion of these transactions on the Plan Implementation Date is insufficient to establish the existence of a market for the Common Shares and Warrants of Stelco on that date. The Debentureholders must demonstrate sales of these securities or the FRNs, as applicable, by the recipients of these securities in these transactions, including the Affected Creditors, to establish the existence of a market on March 31, 2006. There is no such evidence.

Alternative Approaches to Determination of the Value of the Securities

[118] There are therefore two alternatives before the Court proposed by the parties as the best evidence of the value of the securities received by the Senior Debt Holders on the Plan Implementation Date. The Debentureholders and 2074600 say that the most appropriate evidence

of the value of the Common Shares and Warrants is the subscription price of $5.50 per Common Share used in respect of subscriptions for Common Shares under the Plan. They also suggest that the FRNs should be valued at their face value. The Noteholders argue that the market prices of these securities are the best indications of the actual value of the securities even though the trading took place after the Plan Implementation Date. As mentioned, I have limited consideration of this approach to a valuation of the securities based on the market prices on the first trading after the Plan Implementation Date for each of the securities.

[119] Neither approach is entirely satisfactory. I will state my concerns with each before setting out my conclusions.

Approach of the Senior Debt Holders

[120] Under the Plan, Common Shares were issued to the equity investors and Affected Creditors who exercised the Share Election at a subscription price of $5.50 per share. This implied an enterprise value of Stelco of $816.6 million. The Debentureholders and 2074600 argue that the Common Shares should be valued at $5.50 because this is the only value established for the Common Shares on and prior to March 31, 2006.

[121] In support of this position, they submit that this price was the outcome of negotiations among the major stakeholders in Stelco. They also point to the fact that this subscription price was used in respect of the transactions with the incoming president of Stelco and was determined to represent the fair market value of the Common Shares by the incoming board of directors of Stelco on March 31, 2006 for purposes of all issues of Common Shares on that date.

[122] In further support of their position, the Debentureholders and 2074600 rely upon the UBS, BMO and E&Y valuations, which Farley J. preferred to the Navigant valuation in approving the Plan. These valuations determined a range of enterprise values for Stelco based on a discounted cash flow approach using EBITDA projections for Stelco generated in late 2005. The BMO valuation included a second range based on a multiple of projected EBITDA reflecting BMO's estimate of appropriate multiples of EBITDA based on the market multiples of other publicly traded steel companies. As set out above, the ranges of enterprise value in these reports was as follows: UBS - $550 - $750 million; BMO - $580 - $780 million using a market multiple approach and $615 - $785 using a DCF approach; and E&Y - $635 - $785 million.

[123] In addition, the Debentureholders obtained a further dated June 19, 2006 from Deloitte & Touche LLP (the "Deloitte Report") that calculated the enterprise value of Stelco at March 31, 2006 to be in the range of $910 to $956 million resulting in a value per Common Share of $5.93 to $7.70 after deduction of Stelco's post-reorganization debt at that date of $755 million. Deloitte was not asked to determine its best estimate of the value of the securities at that date. Instead, it was specifically mandated to assume that $5.50 represented the fair market value of the Common Shares at January 20, 2006 and to approximate the fair market value of the Common Shares on the Plan Implementation Date by "reflecting the impact of the changes in

major value drivers" of that value, an exercise described as "rolling forward" the $5.50 value to March 31, 2006.

[124] I have four principal difficulties with the approach of the Debentureholders and 2074600.

[125] First, while the subscription price of $5.50 per Common Share was the result of protracted negotiations, I do not think the Court can rely on that fact alone as establishing the value that the Senior Debt Holders would have received on the Plan Implementation Date if they had been able to sell their shares in the open market on that date. Without an extensive analysis of the interests of each of the parties in the negotiations, as well as the history and dynamic of the negotiations, which is beyond the role and capability of the Court on the evidence before it in this proceeding, the Court cannot conclude that the outcome represented the value that the Common Shares would have obtained in the market at December 9, 2005, when the price was finalized, if it had been possible to sell the shares at that time. In any event, there is no way of establishing that the same negotiations conducted in March 2006 would have arrived at the same result. In fact, it is probable that developments since December 2005 would have resulted in a higher price, as indicated in the Deloitte Report, although it is not possible to say whether the difference would have been large or small.

[126] Second, the four valuations upon which the Debentureholders and 2074600 rely are estimates of the enterprise value of Stelco as a whole rather than of the market values of the Common Shares, the Warrants or the FRNs. While the estimates of enterprise value in the UBS, BMO and E&Y reports play an important role in the determination of the relative contributions to value of the various creditor groups, there is no suggestion in these valuations that they also address the value of the Common Shares in an open market on the Plan Implementation Date. The utility of these reports is further diminished by developments in the market and otherwise since December 2005. For these reasons, there is no direct relationship between the estimates of the enterprise value of Stelco in late 2005 and the market values of the Common Shares, Warrants and FRNs on or about the Plan Implementation Date.

[127] Third, there are also specific reservations identified by the Noteholders pertaining to each of the UBS, BMO and E&Y valuations. Among other things, each is based on information and projections that have been superceded. In addition, the BMO and UBS valuations are not based on the capital structure of the Plan as they pre-date it. More significantly, each is subject to limitations expressed in the valuations that limit their usefulness as an estimate of the value of the Common Shares.

[128] Fourth, there are a number of qualifications expressed in the Deloitte Report that limit its usefulness as a valuation of the Common Shares as of the Plan Implementation date.

[129] First, insofar as the Report does not review the validity of the $5.50 valuation as at January 20, 2006 but merely considers the extent to which developments since that date would impact value, it is difficult to assess the utility of its conclusions. In addition, the Report

specifically states that it does not constitute a comprehensive valuation report as to the fair market value of the securities as of the Plan Implementation Date.

[130] Second, the author of the Report did not have access to the new management team at Stelco or full access to the prior management team. In addition, the most recent forecast made available to Deloitte was dated November 18, 2005, even though Stelco management has prepared more current forecasts. The Report also indicates that it was not possible to fully assess the credit risk of Stelco and the debt facilities without a current cash flow forecast. This casts doubt on the conclusion in the Report that the FRNs should be valued at their face value.

[131] Third, statements in the Deloitte Report suggest that it attempts to do more than is required or is appropriate for the issue before the Court in this proceeding. The Report uses a definition of fair market value that assumes, among other things, that the parties have full access to information about Stelco and its future prospects. It states that, in the view of its author, "it is doubtful that public market investors had sufficient knowledge of the new [Stelco] on which to make the kind of fully informed investment decision contemplated by the definition of fair market value". It also states that "the definition of fair market value contemplates a number of assumptions or valuation principles not applicable to actual market price."

[132] In the present proceeding, however, it is irrelevant that the market price of the securities may not reflect full information or that the market price of the securities may have exceeded the fair market value of the securities as determined by Deloitte based on an estimation of the enterprise value of Stelco. The issue for the Court is the determination of the prices that the Senior Debt Holders could have obtained for their securities if it had been possible to trade the securities at the Effective Time on the Plan Implementation Date.

[133] Lastly, while the Deloitte Report suggests that the valuation approach of the Noteholders based on the VWAP of the securities for the first trading week incorporates "elements of information, circumstances and future expectations that were not known or foreseeable at the [Plan Implementation Date]", the Report does not specify what these elements were. Nor is there any evidence before the Court of any such matters that should be considered in assessing the reliability of the market data. In addition, it does not reconcile its calculations of the fair market value of the Common Shares with the market prices of the Common Shares immediately after the Plan Implementation Date.

[134] On the other hand, I have three concerns with the approach of the Noteholders based on the use of the trading data before the Court.

[135] First, the data relates to a period after the Plan Implementation Date and is therefore being used with the benefit of hindsight. More significantly, the Court must be satisfied that there were no events between the Plan Implementation Date and the first day of trading in the securities that invalidates use of this data as evidence of value.

[136] Second, the market prices for the securities can only be used if the evidence demonstrates that the market was sufficiently deep to have absorbed all of the securities of the

Senior Debt Holders without a reduction in price if they had chosen to sell their securities on the first trading day. If, in fact, Senior Debt Holders would have incurred a significant discount if they had sold rather than retained their securities on that day, the Court cannot use the market prices as evidence of the value of the securities. The materials before the Court indicate that this was not considered by the expert engaged by the Noteholders whose report was provided to the Court. However, I think the onus of demonstrating that the market was not a reliable indication of value rests with the Senior Debt Holders.

[137] Third, the evidence with respect to the Warrants and the FRNs is not as complete or persuasive as the evidence with respect to the Common Shares. Only a small number of Warrants, representing a very small percentage of the Warrants issued under the Plan, traded on August 3, 2006. None of the FRNs traded on the TSE until August 5, 2006, when a relatively small proportion of the FRNs traded. In an affidavit included in the materials before the Court, the financial advisor to Sunrise states that a larger number of trades took place in the over-the-counter market. However, no data is before the Court with respect to the prices or volumes of over-the-counter trading in the FRNs commencing April 3, 2006.

Conclusions

[138] Although I have reservations regarding the issue of the market data before the Court, I have concluded that it represents better evidence of the value of the Common Shares, the Warrants and the FRNs than the $5.50 subscription price for the Common Shares used in respect of transactions in the Plan. I will set out my reasons dealing separately with each of the securities.

[139] As mentioned, the principal issues relate to the Common Shares. I conclude that the VWAP for April 3, 2006 should be used to determine the value of the Common Shares for the following reasons.

[140] First, and most importantly, it more closely reflects the conceptual approach of the Court to the valuation exercise before it than an approach based on an estimation of the enterprise value of Stelco. In the case of publicly traded securities, a recipient of securities is in a position to realize the value of the securities by selling them in the market. In such circumstances, and the securities should therefore be valued using the market prices as of the date of receipt. If the securities had been freely tradable on and prior to March 31, 2006, the securities would have been valued on such basis. In the absence of a market on that date, the Court must determine the best evidence for the market prices of the securities if such a market had existed. For this purpose, the VWAP for the first trading day of the securities is a more appropriate indication of the price at which the Senior Debt Holders could have sold their Common Shares on March 31, 2006 than the subscription price of $5.50 under the Plan. While the market for the Common Shares did not begin until two days after the Plan Implementation Date, there is no evidence that the market price levels would have been different if trading had commenced at the Effective Time or that the market prices did not reflect the possibility that all Senior Debt Holders could have sold their security positions on the first day of trading.

[141] In particular, there were no events between the Effective Time and April 3, 2006 that cast doubt on the validity of the price on April 3, 2006. Nor is there any evidence of market imperfections that were eliminated later in the week that indicate that the trading on April 3, 2006 should be excluded. While there was bound to be uncertainty in the market, particularly at the opening of trading of a new security, I do not think that is relevant where the question of value reduces to the issue of the price that the Senior Debt Holders could have received for their Common Shares if they had sold them on April 3, 2006.

[142] A more significant issue is the suggestion in the Deloitte Report that a sale of all of the Senior Debt Holders' Common Shares would have attracted a block discount. This opinion of the author of the Report is not, however, supported by any evidence. It assumes that trading in the Stelco shares during the first week was in relatively small blocks. While this may be true, I do not think there is any evidence to this effect. Second, it does not explain why trading on the first day would not have been influenced by the possibility that other Affected Creditors, including the Debentureholders, were free to sell at any time and, apart from Sunrise and Appaloosa, were not naturally long-term holders of the Common Shares.

[143] Second, there is no conceptual basis on which it can be argued that the $5.50 subscription price of the Common Shares under the Plan represents reliable evidence as to the value of the Common Shares as of the Effective Time. There is no necessary relationship between the use of the $5.50 price in the Plan, representing the outcome of negotiations between the stakeholders in late 2005, and the market price for the Common Shares as of the Plan Implementation Date. As mentioned, there is also no necessary connection between the enterprise value of Stelco as a whole calculated in late 2005, from which a value of $5.50 can be derived as an arithmetic calculation, and the market price of the Common Shares as of the Plan Implementation Date. The issue is the value of the Common Shares, independently of the enterprise value of Stelco, except to the extent that it is possible to demonstrate a direct relationship based on the operation of the market. There are circumstances in which the market price for the equity of an entity is materially higher or lower than the price indicated by enterprise value calculations. This is clearly one of those situations. In the absence of an explanation of this divergence that casts doubt on the reliability of the market prices for the Common Shares and demonstrates the credibility of the $5.50 subscription price as the market price for the Common Shares of the Senior Debt Holders, I conclude that the VWAP of the Common Shares on April 3, 2006 is a more credible indication of the value received by the Senior Debt Holders.

[144] With respect to the Warrants, the reasons for using the trading data for the Common Shares compel use of similar data to determine the price of the Warrants.

[145] The use of a value of $5.50 for the Common Shares results in a modest value for the Warrants using the Black-Scholes model. If, however, a substantially higher value is ascribed to the Common Shares, the Warrants necessarily have a substantially increased value. The only evidence of that increased value is the market trading data. While the volume of trading in the Warrants on April 3, 2006 is limited, the pricing information derived from those

trades has reasonable credibility as the prices of the Warrants are closely related to the prices at which the Common Shares are trading at the time.

[146] Accordingly, in the absence of evidence that the prices at which the Warrants traded were outside the expected range given the concurrent market prices of the Common Shares, I conclude that the VWAP of the Warrants for April 3, 2006 should be used to determine the value of the Warrants.

[147] Valuation of the FRNs under either approach is more problematic. The Senior Debt Holders suggest there is no reason to use a value in excess of par but provide no support for this position. The Noteholders rely instead on market data, which their own advisor states is inadequate because much of the trading was conducted privately in the over-the-counter market and is therefore not available.

[148] I am of the opinion that the prices at which the FRNs traded on the first trading day after the Plan Implementation Date should be the determinant of the value of these securities. In the absence of data for April 3 and April 4, 2006, the VWAP for trades on the TSE on April 5, 2006 is the best available evidence of the value of the FRNs on March 31, 2006. However, before making that determination, I think it appropriate to permit the parties to make representations on this issue based on any additional evidence of trading activity that may be available. I will convene a telephone conference with counsel shortly to establish a process for such representations unless the parties are able to agree among themselves on the value to be ascribed to the FRNs based on the principles set out above.

[149] Finally, I wish to state that, in reaching the determinations set out above, I am not suggesting that the value ascribed to the Common Shares in the Plan and found to be the fair market value by the board of directors of Stelco is not valid in the context in which it was used by the stakeholders in the Stelco reorganization and by the board of directors. My conclusion is simply that the market price of the securities is the best evidence of the value of the securities for the purposes of determining the value received by the Senior Debt Holders on the Plan Implementation Date and the amount of their deficiency claim for the purposes of the Subordination Provisions on that date.

Is the Indebtedness In Respect of the MITSA Senior Debt?

[150] The Supreme Court of Canada has held that there is no comprehensive definition of the term “ordinary course of business” and that the Court must consider the circumstances of each case in order to determine how to characterize any particular transaction: *Pacific Mobile Corp (Trustee of) v. American Biltrite (Canada) Ltd.*, [1985] 1 S.C.R. 290 at 291. In this proceeding, it is necessary to interpret this term in the context of the definition of “Senior Debt” in the Note Indenture, which includes indebtedness incurred in connection with the acquisition by Stelco of any “business, property, services or other assets *excluding indebtedness incurred in relation to any such acquisitions made in the ordinary course of business*” (italics added).

[151] 2074600 argues that the indebtedness incurred by Stelco pursuant to the deferred payment arrangements under the MITSA is Senior Debt because it was not incurred in connection with the acquisition of property and services made in the ordinary course of business. 2074600 points to a number of factors specific to Stelco that it submits demonstrate that the transaction was unusual for Stelco and therefore out of the ordinary course of business for it. These include the following: (1) the transaction was, in its view and in the view of Stelco representatives, complex, far-reaching in terms of its impact on Stelco's operations, and significant in terms of its day-to-day operations; (2) the Stelco board of directors approved the transaction; (3) the transaction was the subject of a Stelco press release; and (4) it was an isolated transaction arising out of special and particular circumstances related to the need to address replacement of Stelco's legacy systems to meet modern needs and a knowledge drain as employees knowledgeable in these legacy systems retired. 2074600 also argues that the transaction contemplated by the MITSA could not be characterized as being in the ordinary course of business within Stelco's industry as there were no similar agreements entered into by any of the other major Canadian steel producers. Similarly, it argued that the MITSA was not a typical outsourcing arrangement for EDS and was therefore out of the ordinary course of business for EDS.

[152] The transaction envisaged by the MITSA was a unique outsourcing transaction. It is not disputed that the transaction contemplated by the MITSA was both comprehensive in terms of the scope of Stelco's IT requirements and was also significant to Stelco, because a failure by EDS to perform adequately would be costly. The issue for the Court, however, is whether the acquisition transaction contemplated by the MITSA was out of the ordinary course of business for Stelco.

[153] The cases cited by 2074600 regarding the meaning of "ordinary course of business" deal with dispositions of assets, rather than acquisitions, in circumstances in which the applicable covenant or legislation is directed toward fair treatment of, or protection of, creditors: see for example *Pacific Mobile*, which deals with an alleged fraudulent preference; *Roynat Inc. v. Ron Clark Motors Ltd.* (1991), 1 P.P.S.A.C. (2d) 191 (Ont. Ct. J. (Gen. Div.)), which deals with a covenant in a floating charge; and *Rowbotham v. Nave* (1991), 1 P.P.S.A.C. (2d) 206 (Ont. Ct. J. (Gen. Div.)), which deals with bulk sales legislation. I do not find them to be helpful in the present circumstances. They do not deal with the concept of non-ordinary course transactions involving the purchase of assets or services by a solvent company. It is therefore necessary to start with a consideration of the purpose or intention of the definition of Senior Debt.

[154] That definition has three parts – indebtedness for borrowed money; indebtedness incurred in connection with the acquisition of any business, property, services or other assets other than indebtedness incurred in relation to any such acquisitions made in the ordinary course of business; and renewals or refinancings of qualifying Senior Debt.

[155] The first part of the definition contemplates new indebtedness, because refinancing of existing indebtedness is treated separately. The indebtedness permitted by this

clause could be incurred to finance day-to-day operations, or more broadly ordinary course transactions, as well as acquisitions out of the ordinary course. There is no restriction on the source of such financing, which could include banking facilities as well as debt instruments placed in public or private financings. There is also no limit on the aggregate amount of any such indebtedness. As a result, this clause provides sufficient flexibility to Stelco to finance all of its activities, including all acquisitions, using Senior Debt.

[156] The second part of the definition, which is operative in this proceeding, requires a consideration of whether the indebtedness in question was incurred in relation to an acquisition that was made in the ordinary course of business. The issue is therefore whether the acquisition transaction giving rise to the indebtedness was made in the ordinary course of business. It is not immediately obvious why this limitation was imposed on acquisition-related indebtedness when any direct borrowings for acquisition purposes are unrestricted. The type of indebtedness contemplated is clear however. The clause addresses indebtedness that is incurred on an acquisition, such as vendor take-back financing, or that is assumed or guaranteed in order to complete the transaction, in each case rather than raised separately to fund a particular acquisition. However, the intended breadth of this part of the definition depends on the scope of the concept of an acquisition made in the ordinary course of business of Stelco as an on-going business enterprise.

[157] I am of the opinion that, for this purpose, the concept of an ordinary course acquisition should be interpreted broadly and, accordingly, a non-ordinary course acquisition should be given a narrow scope. The concept of an acquisition in the ordinary course of business goes beyond transactions with trade creditors. The reference to "*business, property*, services *or other assets*" (emphasis added) suggests that the principal focus of the clause is the acquisition of businesses or assets. The reference to the acquisition of services, while included in the list, is secondary and suggests that it was included to reflect the possibility that an acquisition could include a service component, rather than the possibility of a 'services only' transaction. This reading of the definition of an ordinary course transaction suggests that the intention was to narrow transactions that qualified as non-ordinary course transactions to those that are material to Stelco in terms of both the amount of the indebtedness incurred or assumed and in terms of their impact on Stelco' business and operations. Accordingly, I think the clause implicitly requires demonstration that the acquisition will have the effect of significantly changing the nature of the business conducted, being the goods and services produced and sold, the scale of operations, the manner of manufacturing or distributing the products sold by Stelco, or the anticipated financial results of Stelco.

[158] While I do not think that the clause contemplates transactions in which services are the principal subject matter, I accept, however, that such acquisitions could qualify as Senior Debt if it can be demonstrated that the transaction will have an effect on Stelco that is described by the test set out above. In particular, if a service contract, for which the most obvious candidate would be an outsourcing contract such as the MITSA, materially changes the manner in which Stelco manufactures or distributes its products, or its financial prospects, the contract can be said

to envisage a transaction that is analogous to a non-ordinary course acquisition of a business, property or assets.

[159] I have concluded, however, that the transaction contemplated by the MITSA does not satisfy this test for the following three reasons.

[160] First, considering all of the elements of the transaction contemplated by the MITSA collectively, the transaction contemplated by the agreement will not significantly change the nature of Stelco's business or the scale of its operations. Nor will it change either the products manufactured and sold by Stelco over this period or Stelco's manufacturing or distribution activities.

[161] The principal result of the transaction contemplated by the MITSA is an increase in operating efficiencies in the conduct of Stelco's business. This is evidenced, for example, in the Stelco press release announcing the transaction, dated February 25, 2002. The press release focussed on the ERPs stating that implementation of the ERPs will "generate significant production and operational efficiencies for Stelco". This reflects the reality that, as an outsourcing contract, the day-to-day IT functions will be carried on largely as might have been anticipated if the contract had not been entered into with EDS.

[162] Second, I think that it is necessary to separate the components of the MITSA into ordinary course elements and non-ordinary elements. EDS assumed two very separate functions under the MITSA. When these components of the MITSA are analysed separately in terms of the test, the characterization of the MITSA as a non-ordinary course transaction is much weaker.

[163] The initial and principal agreement of the parties under the MITSA involved the transfer the IT division of Stelco, including its assets and employees, to EDS, and its commitment to carry on the business in the same manner as before, subject to performance standards. By itself, this does not meet the standard set out above for a non-ordinary course transaction.

[164] Over the longer term, the transaction contemplates the development and implementation of new IT systems in three projects – the ERPs. However, while beyond Stelco's in-house capabilities and more extensive than any other projects undertaken by the other major Canadian steel producers, the ERPs do not significantly change any of the nature of Stelco's business, the scale of its business activities, or the nature of its manufacturing or distribution activities.

[165] Based on the information before the Court, the SMS comes closest to satisfying this test. The other two ERPs deal with service functions. There is, however, insufficient evidence before the Court to demonstrate that the SMS, even if implemented, would so materially change the manner of Stelco's manufacturing and distribution activities that the contract for the SMS, by itself, could constitute an acquisition of services out of the ordinary course of business.

[166] Finally, while the total fees anticipated over the ten-year term of the MITSA are undoubtedly significant, there is no evidence that the transaction contemplated by the MITSA was material to the projected annual financial performance of Stelco. While a press release was issued, it does not appear that the transaction was treated as constituting a material change under applicable securities legislation. The annual expenditures involved under the MITSA were not materially greater than under other outsourcing arrangements to which Stelco is a party. The Stelco press release indicated that Stelco believed that the transaction would be neutral in terms of its impact on costs, with realized cost savings financing the additional costs, particularly of the ERPs.

[167] In addition, the largest portion of the fees under the MITSA related to the operation and maintenance of the existing IT systems of Stelco. Stelco expensed the operational fees for these services as incurred rather than capitalizing them as would be appropriate for a non-ordinary course acquisition. On the other hand, it treated the indebtednesss relating to the project fees for the ERPs as long-term indebtedness under the deferred payment arrangements provided for under the MITSA. However, neither this indebtedess, and in particular the indebtedness relating specifically to the SMS, nor the total of project fees over the life of the MITSA, are sufficiently large to satisfy the test of materiality for a non-ordinary course transaction.

[168] Based on the foregoing, I conclude that the EDS Claim does not constitute Senior Debt for purposes of the Subordination Provisions.

Alleged Failure of 2074600 to Mitigate

[169] In light of the determination that the EDS Claim is not Senior Debt, it is unnecessary to address the following submission. I have set out my conclusion on this issue in case I have erred in reaching the prior conclusion.

[170] The Noteholders allege that 2074600 failed to mitigate its damages. While acknowledging that there was a limit on the number of Common Shares for which TML was prepared to subscribe, or for which TML was allowed to subscribe by the other stakeholders, they argue that TML should have negotiated greater flexibility in its subscription arrangements. Specifically, they argue that TML should have required that 2074600 retain the right to elect Common Shares in lieu of cash from the Cash Pool, reducing the number of shares TML received as an equity sponsor correspondingly. The Noteholders argue that, had it done so, the recovery of 2074600 would have been increased, although the TML recovery as an equity sponsor would have been correspondingly reduced. This imaginative argument fails on at least two counts.

[171] First, I doubt that TML was subject to any such duty to mitigate in the negotiations or otherwise. Even if there were such a duty, there cannot have been a breach in the absence of unequivocal evidence in advance of the election date that the Common Shares would

have a market value in excess of $5.50. There is no such evidence before the Court. For this purpose, the subsequent trading history is totally irrelevant.

[172] Second, the argument envisages a different plan of arrangement from what was agreed by the Stelco stakeholders. As was acknowledged by counsel for the Noteholders, the assumptions underlying this argument imply a plan with a smaller Cash Pool as a result of a reduced equity subscription by TML. There is no evidence that this plan of arrangement could have succeeded.

[173] Third, and more technically, while the Noteholders assert that 2074600 failed to mitigate, their claim is actually asserted against TML, as the parent of 2074600.

[174] In the absence of both a conceptual basis for this position in the Plan as negotiated and a legal basis for the duty of mitigation in the circumstances, this argument fails.

Conclusions

[175] Based on the foregoing, I make the following determinations:

1. the Distributions received by the Debentureholders are to be valued as of March 31, 2006;

2. for such purpose, the Common Shares and Warrants shall be valued using the volume weighted average prices at which the Common Shares and Warrants traded on the Toronto Stock Exchange on April 3, 2006;

3. in the absence of agreement, the Debentureholders and the Noteholders shall be entitled to make representations regarding the trading of FRNs on the first trading day in respect thereof, including any additional evidence of trading activity that may be available;

4. after determination of the valuation of the FRNs, pursuant to the Subordination Provisions, the Noteholders shall pay to the Trustees on behalf of the Debentureholders Turnover Proceeds having a value equal to the amount of the aggregate Debentureholder deficiency claim as of March 31, 2006 against Stelco, including post-filing interest, pro rated against each of the four classes of property comprising the Turnover Proceeds in the manner agreed to and described above; and

5. the claims of 2074600 are denied.

Costs

[176] The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further fifteen days from

the date of receipt of the other parties' submissions to provide the Court with any reply submissions they may choose to make. Any such submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, and shall include supporting documentation as to both time and disbursements.

H.J.W. Siegel J.

Released: August 9, 2006

APPENDIX A

Excerpts from Subordination Provisions of the Note Indenture

6.1 Agreement to Subordinate.

The Corporation covenants and agrees, and each Debentureholder, by his acceptance thereof, likewise agrees, that the payment of the principal of and of any interest on the Debentures is hereby expressly subordinated, to the extent and in the manner hereinafter set forth, in right of payment to the prior payment in full of all Senior Debt whether outstanding on the date of this First Supplemental Indenture or thereafter incurred.

6.2 Distribution on Insolvency or Winding-up.

In the event of any insolvency or bankruptcy proceedings, or any receivership, liquidation, reorganization or other similar proceedings relative to the Corporation, or to its property or assets, or in the event of any proceedings for voluntary liquidation, dissolution or other winding-up of the Corporation:

(1) the holders of all Senior Debt will first be entitled to receive payment in full of the principal thereof, premium (or any other amount payable under such Senior Debt), if any, and interest due thereon, before the Debentureholders will be entitled to receive any payment or distribution of any kind or character, whether in cash, property or securities, which may be payable or deliverable in any such event in respect of any of the Debentures;

(2) any payment by, or distribution of assets of, the Corporation of any kind or character, whether in cash, property or securities (other than securities of the Corporation or any other company provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in this Article 6 with respect to the Debentures, to the payment of all Senior Debt, provided that (i) the Senior Debt is assumed by the new company, if any, resulting from such reorganization or readjustment and (ii) without prejudice to the rights of such holders with respect to any such plan (including without limitation as to whether or not to approve same and on what conditions to do so), the rights of the holders of Senior Debt are not altered adversely by such reorganization or readjustment) to which the Debentureholders or the Trustee would be entitled, except for the provisions of this Article 6, will be paid or delivered by the Person making such payment or distribution, whether a trustee in bankruptcy, a receiver, a receiver-manager, a liquidator or otherwise, directly to the holders of Senior Debt or their representative or representatives or to the trustee or trustees under any indenture under which any instruments evidencing any of such Senior Debt may have been issued, rateably according to the aggregate amounts remaining unpaid on account of the Senior Debt held or represented by each, to the extent necessary to make payment in full of all Senior Debt remaining unpaid after

giving effect to any concurrent payment or distribution (or provision therefor) to the holders of such Senior Debt; and

(3) subject to Section 6.6, if, notwithstanding the foregoing, any payment by, or distribution of assets of, the Corporation of any kind or character, whether in cash, property or securities (other than securities of the Corporation as reorganized or readjusted or securities of the Corporation or any other company provided for by a plan of reorganization or readjustment the payment of which is subordinate, at least to the extent provided in this Article 6 with respect to the Debentures, to the payment of all Senior Debt, provided that (i) the Senior Debt is assumed by the new company, if any, resulting from such reorganization or readjustment and (ii) without prejudice to the rights of such holders with respect to any such plan (including without limitation as to whether or not to approve same and on what conditions to do so), the rights of the holders of Senior Debt are not altered adversely by such reorganization or readjustment), is received by the Trustee or the Debentureholders before all Senior Debt is paid in full, such payment or distribution will be held in trust for the benefit of, and will be paid over to the holders of such Senior Debt or their representative or representatives or to the Trustee or trustees under any indenture under which any instruments evidencing any of such Senior Debt may have been issued, rateably as aforesaid, for application to the payment of all Senior Debt remaining unpaid until such Senior Debt has been paid in full, after giving effect to any concurrent payment or distribution (or provision therefor) to the holders of such Senior Debt.

Excerpts from the Plan of Arrangement

5.04 **Implementation**

(1) As soon as practicable after satisfaction (or waiver, if applicable) of each of the conditions to the implementation of the Plan as set out in Section 5.03, Stelco will cause to be posted to the Website a notice confirming that each of the conditions to the implementation of the Plan as set out in Section 5.03 has been satisfied (or waived, if applicable) and thereafter Stelco will file the Articles of Reorganization and seek to obtain the Certificate of Amendment. The Plan will become effective at the Effective Time. All the agreements and other instruments that have to be entered into or executed and all other actions that have to be taken in order for the transactions and agreements to be completed and occur or be effective at the Effective Time will be entered into, executed, taken and completed in escrow prior to the Effective Time. At the Effective Time, the transactions and agreements contemplated by the Plan set out below will be completed and be deemed to occur or be effective in the order set out below:

(a) the Articles of Reorganization will be effective and the New Redeemable Shares and New Common Shares to be issued under Section 2.03(c) will be validly issued;
(b) the New ABL Facility will be effective;
(c) the New Secured Revolving Term Loan Agreement will be effective;
(d) the New Platform Trust Indenture and the Supplemental Indenture will be effective and the New Secured FRNs to be issued in connection with this Plan will be validly issued;
(e) the New Inter-creditor Agreedment will be effective;
(f) the Pension Agreement will be effective;
(g) the New Warrant Indenture will be effective and the New Province Note, the New Province Warrants and the New Warrants to be issued in connection with this Plan will be validly issued;
(h) the New Common Shares to be issued to the Equity Sponsors under the Plan Sponsor Agreement will be validly issued; and
(i) the New Common Shares to be issued to Electing Affected Creditors, and to the Standby Purchasers under the Plan Sponsor Agreement, will be validly issued.

(2) Upon receipt of the Certificate of Amendment, the Applicants will deliver to the Monitor, and file with the Court, a copy of a certificate stating that each of the conditions set out in Section 5.03 has been satisfied or waived, the Articles of Reorganization have been filed and have become effective as of the date set out in the Certificate of Amendment and the transactions set out in Section 5.04(1) have been completed and occurred.

6.01 **Effect of Plan Generally**

(1) At the Effective Time, the treatment of Affected Claims and the determination of Proven Claims will be final and binding on the Applicants, the Affected Creditors and the trustees under the trust indentures for the Bonds (and their respective heirs, executors, administrators and other legal representatives, successors and assigns), and this Plan will constitute: (a) full, final and absolute settlement of all rights of the Affected Creditors against Stelco; (b) an absolute release and discharge of all indebtedness, liabilities and obligations of or in respect of the Affected Claims against Stelco, including any interest and costs accruing thereon; (c) an absolute assignment to Stelco of all indebtedness, liabilities and obligations of or in respect of the Affected Claims against Subsidiary Applicants, including any interest and costs accruing thereon (whether before or after the Filing Date), and an absolute release and discharge of any rights of Affected Creditors in respect thereof (excluding, for greater certainty, any rights assigned to Stelco); and (d) a reorganization of the capital and change in the number of directors of Stelco in accordance with the provisions of Article 3 and the Articles of Reorganization.

(2) For greater certainty, notwithstanding any of the other provisions herein, nothing in the wording of Section 6.01(1) or any other language in this Plan will bar or prejudice or be deemed to bar or prejudice the ability of any holder of Senior Debt (as defined in the Subordinated 2007 Bond Indenture) or any trustee in respect of the Senior 2006 Bonds or Senior 2009 Bonds to maintain or pursue claims or other remedies, including any third party beneficiary claims or remedies they may have, against holders of Subordinated 2007 Bonds or their trustee under the Subordinated 2007 Bond Indenture (including claims against or to distributions under this Plan that otherwise would be made to the holders of Subordinated 2007 Bonds or their trustee) or bar or prejudice or be deemed to bar or prejudice the ability of any holders of Subordinated 2007 Bonds or their trustee to raise any defences in respect of such claims or other remedies. In that regard, without restricting the right of the holders of Subordinated 2007 Bonds to exercise the Share Option, and subject to any Order confirming the following process or providing for a different process:

(a) all New Secured FRNs, New Common Shares, New Warrants and cash from the Cash Pool (collectively, the "Turnover Proceeds") to be issued to the holders of the Subordinated 2007 Bonds or to their trustee will be delivered to the Monitor, to be held by the Monitor in trust; and

(b) the Monitor will, before or within 30 days after the Plan Implementation Date, bring a motion to the Court on no less than 10 days' notice to each of the Affected Creditors that has filed a Notice of Appearance in the CCAA Proceedings and each of the trustees in respect of the Senior 2006 Bonds, Senior 2007 Bonds and Subordinated 2007 Bonds, seeking directions in respect of a process to determine on a timely basis entitlements to the Turnover Proceeds.

For greater certainty, and without limiting the generality of the foregoing, all rights of holders of Senior Debt to assert and require that the rights and claims of holders of Subordinated 2007 Bonds and their trustee are subordinated to the prior payment in full of the Senior Debt under the provisions of the Subordinated 2007 Bond Indenture or otherwise or the rights and claims of the holders of Subordinated 2007 Bonds or their trustee to raise any defences in respect of such claims and other remedies are not intended to be diminished, impaired or prejudiced by the wording of this Plan. Specifically, but without limiting the generality of the foregoing, but subject to the operation of applicable law, the fact that the Plan provides that the calculation of the quantum of Claims and Affected Claim [sic]is limited to principal, plus interest accrued to the Filing Date and that the Plan contains releases in favour of Stelco and other Persons, and provides for full satisfaction of Affected Claims against Stelco and other Persons, is not intended to bar or prejudice any entitlement of holders of Senior Debt (as defined in the Subordinated 2007 Bond Indenture) to make a claim for the full benefit of subordination against the holders of the Subordinated 2007 Bonds and their trustee in respect of *all* amounts owing to them or

that would have been owing to them had the CCAA Proceedings and the Plan never been implemented, even amounts in excess of their Claims or Affected Claims for purposes of the Plan or the rights and claims of the holders of the Subordinated 2007 Bonds or their trustee to raise defences in respect of such claims and other remedies.

For greater certainty, nothing in this Section 6.01(2) is intended or shall be construed as derogating from any provision in this Plan that provides that all Proven Claims determined in accordance with the Claims Procedure Order are final and binding on Stelco, the Subsidiary Applicants and all Affected Creditors.

COURT FILE NO.: 04-CL-5306
DATE: 20060809

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND OTHER APPLICANTS

PAUL MACDONALD, ANDREW J.F. KENT and BRETT HARRISON, for the Subordinated Note holders

ROBERT W. STALEY, DEREK J. BELL and ALAN P. GARDNER, for the Senior Debenture holders

NANCY ROBERTS and TIM MORGAN, for 2074600 Ontario Ltd.

GYLA MAHAR for the Monitors of the Applicants

REASONS FOR JUDGMENT

H.J.W. Siegel J.

Released: August 9, 2006

TAB 4

CITATION: Maynes v. Allen-Vanguard Technologies Inc. (Med-Eng Systems Inc.), 2011 ONCA 125
DATE: 20110214
DOCKET: C52263 and C52584

COURT OF APPEAL FOR ONTARIO

Weiler, Watt and Karakatsanis JJ.A.

BETWEEN

Steve Maynes, 6223087 Canada Inc.,
6223362 Canada Inc., Jean Robichaud and Ken Gingrich

Plaintiffs (Appellants)

and

Allen-Vanguard Technologies Inc. (formerly Med-Eng Systems Inc.),
Maurice J.M. Baril, Pierre Boivin, Thomas Csathy, Paul Echenberg, Mathieu Gauvin,
Cecile Ducharme, Mark Norton, Danny Osadca, Richard L'Abbé
(Collectively, the "Original Defendants")

Allen-Vanguard Corporation, 1062455 Ontario Inc.,
GrowthWorks Canadian Fund Ltd.,
Schroder Venture Managers (Canada) Limited
in its capacity as general partner of each of
Schroder Canadian Buy-Out Fund II Limited Partnership CLP1,
Schroder Canadian Buy-Out Fund II Limited Partnership CLP2,
Schroder Canadian Buy-Out Fund II Limited Partnership CLP3,
Schroder Canadian Buy-Out Fund II Limited Partnership CLP4,
Schroder Canadian Buy-Out Fund II Limited Partnership CLP5,
Schroder Canadian Buy-Out Fund II Limited Partnership CLP6,
Schroder Ventures Holding Limited, in its capacity as general partner
of Schroder Canadian Buy-Out Fund II UKLP, and on behalf of
Schroder Canadian Buy-Out Fund II Coinvestment Scheme and SVG Capital plc
(formerly, Schroder Ventures International Investment Trust plc),
and Computershare Trust Company of Canada
(Collectively, the "Added Defendants")

Defendants (Respondents)

John P. O'Toole and Mandy E. Moore, for the plaintiffs

Ronald G. Slaght, Q.C., and Eli S. Lederman, for the defendants Allen-Vanguard Technologies Inc. (formerly Med-Eng Systems Inc.) and Allen-Vanguard Corporation

K. Scott McLean and Christopher R.N. McLeod, for the defendants Maurice J.M. Baril, Pierre Boivin, Thomas Csathy, Paul Echenberg, Mathieu Gauvin, Cecile Ducharme, Mark Norton, Danny Osadca and Richard L'Abbé

Thomas G. Conway and Christopher J. Hutchison, for the defendants Richard L'Abbé, 1062455 Ontario Inc., GrowthWorks Canadian Fund Ltd., Schroder Venture Managers (Canada) Limited and Schroder Ventures Holding Limited

Heard: December 16, 2010

On appeal from the order of Justice James E. McNamara of the Superior Court of Justice, dated May 18, 2010.

Weiler J.A.:

OVERVIEW

[1] The issue on this appeal is whether the motions judge erred in granting the defendants' motion to strike the plaintiffs' statement of claim in their New Action (Ottawa Court File No. 09-45392) and in dismissing the plaintiffs' cross-motion seeking leave to amend that claim or to join that claim to two pre-existing Ongoing Actions (Ottawa Court Files 06-CV-36222 and 07-CV-38942).

[2] I agree with the motions judge that the statement of claim in the New Action is an abuse of process (rules 21.01(3)(d) and 25.11(c)). It repeats substantially the same allegations against the same defendants, known as the Original Defendants, as in the two other Ongoing Actions. As against the Added Defendants (i.e. those defendants who had not been named in the Ongoing Actions[1]), the statement of claim in the New Action circumvented the requirement in rule 26.02(c) to obtain leave of the court to add a non-consenting party to an action after pleadings are closed.

[3] The motions judge also held that, as against the Added Defendants, the claim in the New Action disclosed no reasonable cause of action (rule 21.01(b)). I agree with the motions judge. As I understand it, however, the plaintiffs further argue that even if they have not pled a cause of action against the Added Defendants, they may nevertheless be entitled to the imposition of a constructive trust against the Added Defendants on the basis of the oppression remedy pleaded against the Original Defendants. For the reasons that follow, I do not agree that the Added Defendants are properly parties on this basis.

[4] Having regard to my reasons, the appeal of the motions judge's refusal to grant leave to amend the statement of claim in the New Action is dismissed, as is his refusal to grant joinder or consolidation. Accordingly, I would dismiss this appeal.

[1] There is one exception. Richard L'Abbé is named as an Original Defendant in his capacity as former director of Med-Eng Systems Inc. and Trustee of a Voting Trust Agreement among participating shareholders of the corporation. He is also being sued in the New Action as an Added Defendant in his capacity as a shareholder.

THE LITIGATION

i. The pleaded facts relating to the Ongoing Actions and the Original Defendants

[5] The plaintiffs Steve Maynes, Jean Robichaud, and Ken Gingrich were all senior executives of Med-Eng Systems Inc. ("Med-Eng"), an Ontario corporation that specialized in the research, design, and manufacture of personal protective military equipment. In the course of their employment, they each acquired a number of Class A common shares in Med-Eng through the company's employee stock option plan ("the Plan"). Maynes also transferred some of his shares to his two corporations, 6223362 Canada Inc. and 6223087 Canada Inc., which are the remaining plaintiffs.

[6] Under the Plan, Med-Eng was entitled under certain circumstances to elect to repurchase the shares at fair market value, which was determined by Med-Eng's Board of Directors. The Plan stipulated that if Med-Eng were to exercise this share repurchase option, it had to give written notice to the employee shareholder and state what the Board determined to be the fair market price.

[7] All of the Med-Eng shares that the plaintiffs held were deposited with Richard L'Abbé, a director of Med-Eng, who held the shares in trust as Trustee under a Voting Trust Agreement. Under that agreement, L'Abbé could exclusively exercise all shareholders' rights on behalf of the plaintiffs.

[8] In February 2006, Med-Eng issued a notice of repurchase to both Maynes and Robichaud, stipulating a fair market price of $1.60 per share. The notices contained a number of errors and deficiencies that were not resolved to the plaintiffs' satisfaction. Subsequent to issuing the notices, the Board of Directors twice assigned a new fair market value to Med-Eng's common shares—first at $2.00 per share in April 2006, then at $4.00 per share in July 2006—but did not advise Maynes or Robichaud of the second valuation and did not seek to amend or reissue the repurchase notices to them.

[9] Similarly, Med-Eng issued two written notices to Gingrich in May and June 2006 informing him that the company was exercising its option to repurchase his shares at a fair market value of $2.00 per share. As in the case of Maynes and Robichaud, the notices contained a number of errors and deficiencies that were not resolved to Gingrich's satisfaction. When the Board of Directors re-evaluated Gingrich's common shares in Med-Eng at $4.00 per share in July 2006, they failed to advise him of the new valuation and did not amend or reissue the repurchase notices.

[10] The plaintiffs claim that the repurchase of their shares by Med-Eng was invalid, ineffectual and void because the repurchase notices did not conform to the requirements of the Plan, and the Board of Directors was acting oppressively and did not determine the fair market value listed in the notices in good faith. The plaintiffs allege that the actual market value of the shares was considerably higher than what was stated in the notices, and so the stock repurchases constituted an unlawful expropriation from the plaintiffs.

They further allege that the shares that Maynes had transferred to 6223362 Canada Inc. and 6223087 Canada Inc. were not subject to the Plan. Finally, they allege that L'Abbé breached his fiduciary duties to the plaintiffs as trustee of their shares by endorsing and delivering their share certificates to Med-Eng without their authorization under the terms of the Voting Trust Agreement.

ii. Procedural history respecting the Ongoing Actions and the Original Defendants

[11] On October 18, 2006, Maynes, Robichaud, 6223362 Canada Inc. and 6223087 Canada Inc. initiated proceedings against Med-Eng and its directors (collectively, "the Original Defendants"),[2] by way of a statement of a claim. On August 7, 2007, Gingrich followed suit and filed a statement of claim against the Original Defendants, asserting substantially the same claims.

[12] In summary, the plaintiffs in these two actions seek: a declaration that the Original Defendants breached their fiduciary duties to them; a declaration that Richard L'Abbé breached his duties as trustee under the Voting Trust Agreement; a declaration that the repurchase transactions were invalid and so they continue to be registered shareholders of Med-Eng; and an order directing Med-Eng to pay the plaintiffs all unpaid dividends accruing in respect of their shares. In the alternative, the plaintiffs advance an oppression

[2] The former directors of Med-Eng who are being sued as Original Defendants are Maurice J.M. Baril, Pierre Boivin, Thomas Csathy, Paul Echenberg, Mathieu Gauvin, Cecile Ducharme, Mark Norton, Danny Osadca, and Richard L'Abbé. As mentioned, Richard L'Abbé was also Trustee under a Voting Trust Agreement among participating shareholders. He has also been named as an Added Defendant in his capacity as a Med-Eng shareholder.

claim against the Original Defendants pursuant to s. 248 of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"). They seek as an oppression remedy an order directing Med-Eng, now Allen-Vanguard Technologies Inc., to repurchase their shares at a price equal to fair market value.

[13] The proceedings for these two actions are ongoing. The pleadings have closed and documentary and oral discovery is substantially complete.

iii. The pleaded facts relating to the genesis of the New Action and the Added Defendants

[14] Subsequent to Med-Eng's repurchase of the plaintiffs' shares and the plaintiffs' commencement of proceedings against Med-Eng and the other Original Defendants, Med-Eng became the target of a takeover bid. On or about August 2, 2007, Allen-Vanguard Corporation ("AVC") offered to pay $600 million to purchase 100% of the issued and outstanding shares of Med-Eng from certain shareholders ("the Offeree Shareholders"[3]) whose combined interests constituted 70% of Med-Eng's capital stock. Since the Offeree Shareholders had a majority stake in Med-Eng, pursuant to a

[3] The Offeree Shareholders, as defined in their share purchase agreement with AVC and Med-Eng, are: 1062455 Ontario Inc., GrowthWorks Canadian Fund Ltd., Schroder Canada Ventures Managers (Canada) Limited (in its capacity as general partner of each of Schroder Canadian Buy-Out Fund II Limited Partnership CLP1, Schroder Canadian Buy-Out Fund II Limited Partnership CLP2, Schroder Canadian Buy-Out Fund II Limited Partnership CLP3, Schroder Canadian Buy-Out Fund II Limited Partnership CLP4, Schroder Canadian Buy-Out Fund II Limited Partnership CLP5, and Schroder Canadian Buy-Out Fund II Limited Partnership CLP6), and Schroder Ventures Holding Limited (in its capacity as general partner of Schroder Canadian Buy-Out Fund II UKLP, and on behalf of Schroder Canadian Buy-Out Fund II Coinvestment Scheme and SVG Capital plc (formerly Schroder Ventures International Investment Trust plc)). The Offeree Shareholders were co-shareholders of Med-Eng with the plaintiffs.

shareholders' agreement they could compel all minority shareholders to sell their shares to AVC in accordance with the terms of the accepted offer.

[15] On or about August 23, 2007, the Offeree Shareholders accepted AVC's offer by way of a share purchase agreement. They compelled the minority shareholders to sell their Med-Eng shares to AVC. The plaintiffs also each sold their non-disputed shareholdings (i.e. shares that were not purchased through Med-Eng's employee stock option plan) to AVC pursuant to the shareholders' agreement. The minority shareholders were advised that the purchase price would be in the range of $11.50 to $12.00 per share. The plaintiffs allege that at all material times, the Offeree Shareholders and AVC were fully aware of the litigation against Med-Eng and the Original Defendants.

[16] The share purchase transaction closed on or about September 17, 2007. Following the closing, two developments occurred.

[17] AVC eventually merged Med-Eng with another of its subsidiaries to form Allen-Vanguard Technologies Inc. The successor corporation remains an Original Defendant in the Ongoing Actions.

[18] As well, pursuant to the share purchase agreement, an Escrow Fund was established in the amount of $40 million. The purpose of the Escrow Fund was to create a fund to which AVC could have recourse if the representations and warranties of Med-Eng and/or the Offeree Shareholders proved to be incorrect. To the extent that the Escrow

Fund is not applied in satisfaction of successful claims asserted by AVC, the Escrow Fund will be released to all shareholders of Med-Eng who sold their shares to AVC under the share purchase agreement. AVC has asserted a claim against the entirety of the Escrow Fund, which is now the subject of separate litigation.

iv. The Added Defendants

[19] After the close of pleadings in the Ongoing Actions, the plaintiffs sought to combine the Ongoing Actions and also to add as defendants the Offeree Shareholders, AVC and the escrow agent Computershare Trust Company of Canada (collectively, "the Added Defendants"). Counsel for the plaintiffs sent a letter dated June 4, 2009, to the Original Defendants with a draft Fresh As Amended Statement of Claim. The letter stated, "As you will see, we propose to combine the Maynes/Robichaud action with the Gingrich action. All Plaintiffs then join in an enhanced claim against the 'Added Defendants' to seek relief in relation to the Escrow Fund that was established in the context of the Allen-Vanguard share purchase transaction." The plaintiffs did not obtain the consent required by rule 26.02(b) of the *Rules of Civil Procedure* to add a party after pleadings have closed.

[20] Rule 26.02 provides:

> 26.02 A party may amend the party's pleading,
>
> > (a) without leave, before the close of pleadings, if the amendment does not include or necessitate the

> addition, deletion or substitution of a party to the action;
>
> (b) on filing the consent of all parties and, where a person is to be added or substituted as a party, the person's consent; or
>
> (c) with leave of the court.

[21] When the consent of the defendants was not given, the plaintiffs did not seek leave of the court under rule 26.02(c) to have the proposed Added Defendants added as parties to the Ongoing Actions. Nor did they bring a motion pursuant to rule 26.01, which obliges the court to grant an amendment to a pleading "on such terms as are just, unless prejudice would result that could not be compensated for by costs or an adjournment."

[22] Instead, on June 18, 2009, the plaintiffs initiated a New Action against both the Original and Added Defendants, and sought joinder or consolidation of the New Action to the Ongoing Actions.

v. What is sought in the New Action

[23] The New Action duplicated the same five claims the plaintiffs made against the Original Defendants in the Ongoing Actions. However, under the heading, "Claims Arising From the Allen-Vanguard Share Purchase and Related Events", the statement of claim in the New Action also stated that:

> - The individual Original Defendants (i.e. the former directors of Med-Eng) and the Offeree Shareholders each obtained a financial benefit (directly or indirectly)

from the purported Med-Eng share repurchases upon the conclusion of AVC's purchase of the Med-Eng shares in September 2007.

- The plaintiffs are the lawful owners of certain shares in Med-Eng and, as such, "are entitled to compensation and payment by way of distribution of a portion of the Escrow Fund".

- The Escrow Fund is subject to an express, implied or resulting trust in the plaintiffs' favour.

- The Added Defendants have a form of discretion or power in relation to the Escrow Fund that could unilaterally be exercised so as to prejudice the plaintiff's interests and that the plaintiffs are "particularly vulnerable to the Added Defendants in respect of the Escrow Fund". As such the Added Defendants are fiduciaries of the Plaintiffs.

- If the Escrow Fund were to be paid out or distributed without regard to their claims, the individual Original Defendants and the Offeree Shareholders would be unjustly enriched.

[24] The plaintiffs sought a series of declarations in "Claim Six" against the Added Defendants:

- A declaration that the Added Defendants are fiduciaries of the plaintiffs in relation to the Escrow Fund.

- A declaration that some of the Added Defendants have been unjustly enriched to the extent of the plaintiffs' interest in the Escrow Fund.

- A declaration that the Escrow Fund (or a portion thereof) is subject to an express, implied or resulting

trust in favour of the plaintiffs (the plaintiffs later conceded at the motions hearing that they were pursuing a declaration of a resulting trust only).

- A declaration that the Added Defendants are constructive trustees of the Escrow Fund to the benefit of the plaintiffs, and an order imposing a remedial constructive trust and primary first charge over the Escrow Fund in favour of the plaintiffs.

- Some other declaration that the plaintiffs are entitled to compensation and payment by way of distribution of a portion of the Escrow Fund, and an order that Computershare pay this entitlement out to them from the Escrow Fund.

[25] In the alternative, the plaintiffs sought damages by way of restitution and compensation for the "wrongful conduct of the Added Defendants".

[26] All the defendants in the Ongoing and New Actions moved to strike the claim in the New Action.

ISSUES AND ANALYSIS

[27] I propose to deal with the abuse of process issue first.

[28] The motions judge considered whether the New Action was an abuse of process. With respect to the Original Defendants, given that Claims One through Five were already the subject of Ongoing Actions before the Superior Court of Justice, he held that the New Action created a multiplicity of proceedings that constituted an abuse of process. In relation to the Added Defendants, he held that the New Action was an attempt to re-

litigate issues that should have been raised by the plaintiffs in the Ongoing Actions. The motions judge remarked that key representatives of the Added Defendants were already involved in the Ongoing Actions. For example, Richard L'Abbé is an Original Defendant, though he was being named again as an Added Defendant in his capacity as an Offeree Shareholder. Also, the Original Defendants Echenberg, Gauvin and Ducharme were representatives of the Schroder shareholders' interests. If the Plaintiffs succeeded in the Ongoing Actions they would be able to execute against the Original Defendants. The motions judge held that the statement of claim in the New Action was nothing more than an attempt to file execution against the Escrow Fund without having to prove a claim against the Added Defendants.

i. Did the motions judge err in striking the New Action on the basis that it constituted an abuse of process?

[29] As the plaintiffs concede, Claims One through Five in the New Action are substantively identical to claims already being asserted in the two Ongoing Actions. Specifically, Claims One through Four are the subject of ongoing proceedings against the Original Defendants in the action initiated on October 18, 2006.[4] Claim Five is the subject of ongoing proceedings commenced as against the Original Defendants in the action initiated on August 7, 2007.[5]

[4] Ottawa Court File No. 06-CV-36222.
[5] Ottawa Court File No. 07-CV-38942.

[30] The plaintiffs submit that the motions judge erred in holding that Claim Six constituted an abuse of process. They state in their factum that the claims against the Added Defendants arose in September 2007 with the completion of the Allen-Vanguard share purchase transaction—that is, after the litigation against the Original Defendants had begun. Consent to amend the pleadings in the Ongoing Actions was not requested from the Original Defendants until June 4, 2009, at which time it was refused. The plaintiffs' reason for not bringing a motion to seek leave from the court to amend their pleadings, pursuant to rule 26.02(c), is that "a potential limitation period was approaching" and they were concerned that the motion would not be heard prior to the expiry of the limitation period. As I understand it, the potential limitation period that the plaintiffs were concerned about was the basic two-year limitation period, which would have ended two years after the closing of the Allen-Vanguard share purchase transaction, or September 2009: see *Limitations Act, 2002*, S.O. 2002, c. 24, s. 4.

[31] The plaintiffs' reason for not seeking leave of the court to amend their pleading to add the Added Defendants is not tenable for three reasons.

[32] First, the limitation period may not have begun to run until October 2008. If the affidavit of Maynes, filed in opposition to the motion to strike, is accepted, the court might have agreed that "[i]t was not until after the completion of the Examinations for Discovery in the Original Actions in October of 2008 that the Plaintiffs *discovered* they had a basis upon which to … assert enhanced claims against the Offeree Shareholders"

(emphasis added). Having regard to the discoverability principle in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, the limitation period would only have begun to run when the plaintiffs discovered they had "a cause of action" or a basis on which to make a claim.

[33] Second, assuming they had a cause of action (an issue I will address below), and that the limitation period did begin in September 2007, the plaintiffs had all the information they needed to try and obtain the defendants' consent or to obtain leave of the court to amend their pleadings in the Ongoing Actions after discovery in October 2008. Paragraph 68 of their factum even acknowledges:

> The doctrine of abuse of process, which underlies Rule 21.01(3)(d), seeks to prevent a multiplicity of proceedings or the litigation of issues that could have been raised in earlier proceedings but the party now raising the issues before the Court chose not to do so.

[34] The plaintiffs chose to do nothing from October 2008 until June 2009; that is, about seven months.

[35] Third, even if a limitation period was imminent, the plaintiffs could have invoked rule 37.05(3), which provides, "An urgent motion may be set down for hearing on any day on which a judge or master is scheduled to hear motions, even if a lawyer estimates that the hearing is likely to be more than two hours long." The plaintiffs' other arguments that the motions judge misapplied the doctrine of abuse of process similarly have no merit.

[36] The doctrine of abuse of process seeks to promote judicial economy and to prevent a multiplicity of proceedings: *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, at para. 37. The motions judge correctly identified Claims One to Five against the Original Defendants in the New Action as being an abuse of process because they were virtually identical to the claims asserted against them in the Ongoing Actions. If Claims One to Five in the New Action were allowed to proceed, it would amount to a relitigation of the same issues as between the same parties. The rationale against this approach is found in para. 51 of *Toronto (City) v. C.U.P.E., Local 79*:

> First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is difficult from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

[37] The plaintiffs submit that the motions judge was wrong to strike the entirety of their statement of claim as an abuse of process because while Claims One to Five are already being litigated in the Ongoing Actions, Claim Six has never been asserted before and could not have been raised when the statements of claim for the Ongoing Actions were filed. They submit that if the motions judge found that Claim Six was deficient because it was not sufficiently particularized, he should have allowed leave to amend. They also argue he should have granted the plaintiffs an order to join Claim Six with the

Ongoing Actions. During oral submissions, counsel for the plaintiffs submitted that Claim Six may stand on its own even if Claims One through Five are struck as an abuse of process.

[38] In addition to avoiding a multiplicity of actions, the doctrine of abuse of process seeks to uphold the integrity of the administration of justice: see *Toronto (City) v. C.U.P.E.* at paras. 35-37. In the present case, the plaintiffs' assertions in Claim Six are intricately linked to Claims One through Five, which are already being pursued in the Ongoing Actions. The plaintiffs should have sought leave of the court to name the Added Defendants in the Ongoing Actions and to amend their pleadings to plead any relief they had not already claimed, either pursuant to rule 26.02(c) or rule 26.01. As mentioned, rule 26.01 obliges the court to amend a pleading "on such terms as are just unless prejudice would result that could not be compensated for by costs or an adjournment."

[39] Instead, the plaintiffs commenced the New Action for the purpose of naming the Added Defendants as parties to the related litigation and sought declaratory relief against them in Claim Six. By doing so, the plaintiffs effectively circumvented the express procedural requirement in rule 26.02(c) that leave of the court be obtained to add a non-consenting party to the proceeding after pleadings have closed. This was an abuse of process. By starting the New Action instead of moving to amend their pleadings in their existing actions to claim "enhanced relief" against the Added Defendants, the plaintiffs circumvented the court's jurisdiction to: (1) assess whether the defendants would be

prejudiced by an amendment and to determine whether that prejudice can be compensated for by costs; (2) to impose costs in favour of the defendants for granting the amendment; and (3) to impose other terms that are just.

[40] The filing of the statement of claim in the New Action also placed an inappropriate burden on the defendants who had to bring a motion to strike the New Action, when the onus should have properly been on the plaintiffs to convince the court that leave should be granted to amend their pleadings in the Ongoing Actions.

[41] My conclusion that there has been an abuse of process is buttressed by the principle of law that the court should refuse to grant a declaration when an alternate appropriate process is available. This principle was put to the plaintiffs in oral argument as a basis for upholding the motions judge's decision to strike Claim Six, which claims only declaratory relief. The plaintiffs made no comment.

[42] In *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53 at pp. 85-88, La Forest J. observed that two judicial policies historically prevented the use of the declaration. The first was the discretion to refuse the granting of a declaration when other remedies were available and the second was the refusal to grant it where no other relief was sought. In relation to the first barrier, La Forest J. held at p. 87:

> The policy concern against allowing declarations, even of unconstitutionality, as a separate and overriding procedure is that they will, in many cases, result in undesirable procedural overlap and delay. As long as a reasonably effective

> procedure exists for the consideration of constitutional challenges, I fail to see why another procedure must be provided.

[43] The court's inherent jurisdiction to grant declaratory relief is not to be exercised in a vacuum. As Morawetz J. observed in *Scion Capital, LLC v. Gold Fields Ltd.* (2006), 15 B.L.R. (4th) 331 (Ont. S.C.), at para. 34:

> Inherent jurisdiction [to grant a declaration] is a power derived from the very nature of the court as a superior court of law, permitting the court to maintain its authority and to prevent its process being obstructed and abused. In *Re Stelco* [(2005), 75 O.R. (3d) 5], the Court of Appeal, at para. 35, states:
>
> > In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines [(1999), 7 C.B.R. (4th) 293], inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play".

[44] The second barrier to granting a declaratory order, i.e. that no other relief is sought, has been removed in Ontario by the enactment of s. 97 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. This reform does not detract from the plaintiffs' inability to overcome the first barrier. I note that s. 97 does not exist to enable litigants to do an end run around the *Rules of Civil Procedure.* The plaintiffs' conduct in initiating the New Action against the Added Defendants effectively eviscerates the requirements of rule 26.02(c) and robs the court of its discretion to grant leave to add parties to an action after pleadings have closed.

[45] Disputes about whether parties may be added and whether a claim may be amended must be resolved through the process established by the *Rules*, not by circumventing them by the commencement of a new action seeking declaratory relief. Where, as here, the *Rules* provide an effective means to obtain a remedy, it is reasonable to assume that the legislature intended that litigants and their counsel would rely on the prescribed provisions. Otherwise, the integrity of the administration of justice is undermined, as is the goal of efficiency.

[46] The present statement of claim is an abuse of process because it duplicates claims in the two Ongoing Actions with respect to the Original Defendants and undermines the integrity of the administration of justice by circumventing rule 26.02(c) with respect to the Added Defendants.

[47] While my conclusion that the statement of claim in the New Action is an abuse of process is sufficient to dispose of this appeal, I will, like the motions judge, consider whether a reasonable cause of action exists against the Added Defendants.

ii. Did the motions judge err in holding no reasonable cause of action had been pleaded against the Added Defendants?

[48] The motions judge identified four claims made in Claim Six, all of which relate to the Added Defendants. He found that, given the pleaded facts, none of the claims had a basis on which the court could find a reasonable cause of action or grant the relief sought. I review his decision on each claim and comment on it below.

a. Declaration of unjust enrichment

[49] To briefly review the facts, AVC presented an offer to the Offeree Shareholders to buy their shares at a certain price, and the Offeree Shareholders accepted. Together, they agreed to set aside a certain portion of the consideration paid for the shares in escrow, to be used as security against any claims of incorrect representations or warranties by Med-Eng and the Offeree Shareholders in the purchase agreement. The motions judge held that any benefit to the Offeree Shareholders or any of the other Added Defendants from the Escrow Fund would be in accordance with the contract between those parties. The contract constituted a valid juristic reason for any potential enrichment. As a result, the requirements of the unjust enrichment principle could not be satisfied.

[50] Although the plaintiffs submit that the motions judge accepted that the first two criteria of the unjust enrichment claim were met—namely a benefit to the Added Defendants and a corresponding deprivation to the plaintiffs—on my reading of the motions judge's reasons he formed no conclusion as to whether the pleaded facts disclosed any benefit or corresponding deprivation. He merely wrote that "there was an interesting debate amongst Counsel as to whether the competing claims of the added Defendants ... could be characterized as a 'benefit' with a corresponding deprivation".

[51] I would agree with the motions judge's conclusion that, regardless of whether there was a benefit and corresponding deprivation, the escrow agreement between AVC and the Offeree Shareholders constituted a clear juristic reason for any alleged or

potential enrichment. Since the Escrow Fund was purely a contractual creation between AVC and the Offeree Shareholders, any benefit enjoyed by either AVC or the Offeree Shareholders would be received as consideration from the other party under a contract.

[52] I would therefore hold that the motions judge did not err in striking the claim of unjust enrichment.

b. Declaration of breach of fiduciary duty

[53] The motions judge observed that novel fiduciary relationships are generally marked by three characteristics. First, the fiduciary must have the ability to exercise some discretion or power on behalf of the beneficiary. Second, a unilateral exercise of this power can affect the beneficiary's legal or practical interests. Third, the beneficiary is peculiarly "vulnerable" or at the mercy of the fiduciary holding this power or discretion. See *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 408; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574. In addition, I note that a critical characteristic of a fiduciary relationship is that of loyalty: the fiduciary undertakes to act in the interests of another person. See *Galambos v. Perez*, [2009] 3 S.C.R. 247, at para. 69.

[54] The motions judge held that the statement of claim failed to disclose any facts to support the proposition that the Added Defendants were in a fiduciary relationship with the plaintiffs, nor to establish the nature and scope of the discretion and power that the

Added Defendants could exercise over the plaintiffs so as to place them in a vulnerable position. The statement of claim also contained no allegation that any duty was breached.

[55] I would agree with the motions judge.

[56] Even assuming all the plaintiffs' allegations are taken to be true, AVC is nothing more than an arm's length purchaser of Med-Eng shares, the Offeree Shareholders are merely co-shareholders with the plaintiffs, and the only role played by Computershare is to hold a sum of money in escrow for the potential benefit of the Offeree Shareholders. It cannot be said that the relationship between the plaintiffs and any of the Added Defendants is one where the Added Defendants have undertaken to act in the plaintiffs' interests.

[57] The plaintiffs argue that they are vulnerable to the Added Defendants because the Added Defendants have significant power over the distribution of the Escrow Fund that, if exercised, could adversely affect their interests. However, the Supreme Court of Canada has expressly rejected the notion that a fiduciary duty may arise in "power-dependency" relationships without any express or implied undertaking by the fiduciary to act in the best interests of the other party: *Galambos* at paras. 71-74. Not all relationships involving power imbalances are fiduciary in nature, and a power dependency does not, on its own, materially determine whether a relationship is fiduciary.

[58] It is therefore plain and obvious that the plaintiffs' claim for a declaration of a fiduciary relationship cannot succeed.

c. Declaration of resulting trust

[59] The motions judge found that there were no facts pleaded that could suggest that the Escrow Fund was subject to a resulting trust in favour of the plaintiffs. No facts were pleaded that the plaintiffs contributed to the Escrow Fund or that the Added Defendants intended the Escrow Fund to be held in trust for them.

[60] In their submissions on the resulting trust claim, the plaintiffs asked this court to consider the following passage from *Gorecki v. Canada (Attorney General)*, [2005] O.J. No. 3465 (S.C.), at para. 67, which was also quoted by the motions judge:

> Waters describes a resulting trust as arising "whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who did give value for it" (op.cit. at p. 362). Like an express trust, the settlor's intent is important but intent is inferred as a matter of law: *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436.

[61] There is no fiduciary relationship between the plaintiffs and the Added Defendants, and the Added Defendants never received property "for which they gave no value". The plaintiffs merely make a bare submission that it would be open to a trial judge to find that the Escrow Fund was being held as a resulting trust in favour of the

plaintiffs, “either as an independent equitable remedy or as an appropriate element of” an oppression remedy.

[62] The plaintiffs’ submission misapprehends the law of resulting trust. An essential characteristic of all resulting trust situations is that “either the claimant [i.e. the would-be beneficiary of the resulting trust] originally transferred the property in question to the alleged resulting trustee, or that the claimant supplied the whole or part of the purchase price when the property was bought from a third party and transferred into the alleged resulting trustee’s name”: Donovan W.M. Waters, Q.C., Mark R. Gillen & Lionel D. Smith, eds., *Waters' Law of Trusts in Canada*, 3rd ed. (Toronto: Thomson Canada, 2005), at pp. 365-66. In the present case, the plaintiffs seek a resulting trust over the Escrow Fund. However, as the motions judge noted, the facts as pleaded do not show that the plaintiffs were ever the original title owner of the Escrow Fund nor did they ever contribute to it. The money in the Escrow Fund originated solely from the Added Defendants, not the plaintiffs.

[63] I would therefore hold that the motions judge did not err in holding that there were no facts pleaded that would form a basis on which a resulting trust might be found.

d. Oppression claim and remedial constructive trust remedy

[64] The motions judge observed that a remedial constructive trust had been imposed in situations where claims based on unjust enrichment, breach of fiduciary duty or oppression had been made out. He had already held that there was no basis on which to

argue unjust enrichment or breach of fiduciary duty in relation to the Added Defendants. The oppression remedy did not exist at common law but was a statutory cause of action created by the provisions of Ontario's *Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"), and had to be specifically pleaded. It was not. As a result, he held it "plain and obvious that there is no basis for a declaration that the Escrow Fund is held as a constructive or remedial trust in favour of the Plaintiffs."

[65] I have already determined that even if all the pleaded facts are accepted as true, a claim for unjust enrichment or breach of fiduciary duty cannot succeed. Therefore, the only remaining ground upon which a constructive trust could possibly be imposed in this case is as a remedy for oppression.

[66] Counsel for the plaintiffs made forceful oral submissions that the motions judge, in concluding that it was plain and obvious that there was no basis for a declaration of constructive trust, misinterpreted the plaintiffs' pleadings and erred in finding that they had failed to plead an oppression claim. As I have indicated, the plaintiffs' counsel explained at the oral hearing before this court that the plaintiffs do not, in fact, wish to assert a claim of oppression against the Added Defendants. Instead, they advance an oppression claim against the Original Defendants only, and seek a constructive trust over some or all of the Escrow Fund as a remedy for the Original Defendants' oppressive conduct.

[67] The claim for declaratory relief in the form of a constructive trust cannot stand on its own in the present action. A constructive trust is an equitable remedy imposed by the court and cannot be declared or recognized in the abstract without a finding of a breach of an equitable obligation. Since the claims against the Original Defendants have been struck as an abuse of process, and since the plaintiffs do not assert any actionable wrong against the Added Defendants, it follows that there is no basis in the present action upon which the court could impose a constructive trust.

[68] In other words, once Claims One through Five are struck, there is no cause of action from which a constructive trust remedy could flow. Otherwise, it would be akin to allowing a claim for damages to proceed without there being any pleading of an actionable wrong. The motions judge was therefore correct in holding that the statement of claim provided no basis upon which the court could declare a constructive trust over the Escrow Fund in favour of the plaintiffs.

[69] This alone is a basis for dismissing this ground of appeal.

[70] Having regard to the plaintiffs' cross-motion for joinder or consolidation, however, I must make further comment. Even if this court were to grant an order joining or consolidating Claim Six to the Ongoing Actions, it is still plain and obvious that there is no factual basis upon which a trial judge could impose a constructive trust over the Escrow Fund—which is essentially property belonging to third parties—as relief against the Original Defendants' oppressive conduct.

[71] Section 248(3) of the OBCA provides that "the court may make any interim or final order it thinks fit" as a remedy for oppression. In some circumstances, the court has imposed a constructive trust as an oppression remedy: see e.g. *Waxman v. Waxman*, *infra*, and *C.I. Covington Fund Inc. v. White* (2000), 10 B.L.R. (3d) 173 (Ont. S.C.). However, it must also be remembered that the constructive trust, as a general remedial device, is founded squarely on the principles of "good conscience" or preventing an unjust enrichment: Peter D. Maddaugh, Q.C., & John D. McCamus, *The Law of Restitution* (Toronto: Canada Law Book, 2010) at c. 5:200; see also *Pettkus v. Becker*, [1980] 2 S.C.R. 834, and *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217.[6]

[72] I have already held that the plaintiffs' claim for unjust enrichment against the Added Defendants is not made out in law. The pleaded facts also do not allege that the Added Defendants breached any equitable obligation or committed any other actionable wrong against the plaintiffs.

[73] The plaintiffs argue, however, that if all the pleaded allegations relating to the Original Defendants' conduct are proven and there is a finding that the Original

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[6] In *Soulos*, McLachlin J. recognized that "under the broad umbrella of good conscience," constructive trusts serve to remedy both: (1) situations where the formal elements of unjust enrichment are made out; and (2) situations where a person charged with an equitable obligation has committed a wrongful act, but there has been no enrichment and corresponding deprivation: *Soulos* at para. 43. She held the view that a constructive trust may not only be a remedy for an unjust enrichment but can also serve "to condemn a wrongful act and maintain the integrity of the relationships of trust which underlie many of our industries and institutions": *Soulos* at para. 14. McLachlin J. thus determined that although the case before the Court did not have the formal characteristics of an unjust enrichment, a constructive trust could nonetheless be imposed based on the concept of "good conscience", because the defendant had breached an equitable obligation to the plaintiff. However, Maddaugh & McCamus note at c. 5:200.50 that the Court did not need to recognize a separate type of constructive trust based upon the notion of "good conscience", because even such cases can be subsumed within a broader reading of "unjust enrichment".

Defendants oppressed the plaintiffs, then it is open to the trial judge to fashion a remedy that would impose a constructive trust over the property of the Added Defendants (i.e. the Escrow Fund), even though there are no pleaded facts alleging that the Added Defendants had any role in the plaintiffs' oppression. Because s. 248(3) of the OBCA allows the court to make any "order it thinks fit" to remedy oppressive conduct, the plaintiffs submit that the remedies available to the court are "virtually unlimited" and include awarding a constructive trust over third party recipients of the benefits from oppression. As support for the court's authority to fashion such a remedy, they cite *Waxman v. Waxman* (2002), 25 B.L.R. (3d) 1 (Ont. S.C.), at para. 1641, aff'd with minor variations (2004), 44 B.L.R. (3d) 165 (Ont. C.A.), at paras. 571-589.

[74] In *Waxman*, two brothers, Morris (the plaintiff) and Chester (the defendant), built up a multi-million dollar scrap metal and refuse business, with each owning a 50% share in the company. While Morris was ill and preoccupied with his health problems, Chester tricked him into signing an agreement that sold his stake in the company to Chester. Chester also inappropriately allocated company bonuses to himself and his sons, and had allowed the diversion of company assets to various other corporations owned by his sons. The trial judge found, among other things, that Chester was liable for oppression and breaches of fiduciary duty, and that the share transfer agreement could be set aside on the basis of undue influence and unconscionability. The trial judge also made various findings of knowing receipt and knowing assistance against Chester and his sons. As a remedy for the invalid share transfer, the trial judge ordered that 50% of Chester's share

in the company be held in constructive trust for Morris. She also ordered Chester to pay Morris 50% of the profits and distribution of equity of the company from the date of the impugned share transfer to the date of judgment. Finally, she ordered a tracing process to permit Morris to attempt to trace these profits into the hands of Chester's sons and other persons who were not bona fide purchasers for value without notice. The trial judge's decision in *Waxman* was largely upheld on appeal to this court, which found that the constructive trust was imposed on the basis of both equity (for example, as a remedy for the breaches of fiduciary duty) and as a remedy of oppression under s. 248 of the OBCA.

[75] *Waxman*, however, is not authority for the proposition that the court, in fashioning an oppression remedy under s. 248, may impose a constructive trust over the property of third parties that had no role in the oppressive conduct. In *Waxman*, all parties whose property was subject to the constructive trust by virtue of the tracing order were participants in or otherwise directly benefited from the oppressive conduct. For example, Chester's son Robert and his companies were found liable for knowing receipt of the profit diversions from Morris and Chester's company as a result of Chester's oppressive acts and breach of fiduciary duty. *Waxman* is readily distinguishable from the present case, where the plaintiffs have not pleaded a cause of action against the Added Defendants in knowing receipt, and have not pleaded that AVC and the Offeree Shareholders had anything to do with the Original Defendants' alleged oppressive conduct as described in Claims One through Five.

[76] The plaintiffs argue that, nevertheless, if the trial judge found that the Original Defendants had engaged in oppressive conduct it would be open to the trial judge to fashion a remedy that would impact the Added Defendants and thus in fairness they ought to be before the court.

[77] I do not agree. Oppression is a fact-specific determination. The reach of the oppression remedy is limited by the reasonable expectations asserted by the claimant: *BCE Inc. v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, at paras. 59, 68, 72, 89 and 95. The plaintiffs do not plead that the shareholder agreements they had with the Original Defendants gave them a reasonable expectation that the Added Defendants would have regard to their interests. Indeed, the plaintiffs have not asserted any basis on which they had a reasonable expectation that the Added Defendants—namely, the Offeree Shareholders, AVC and Computershare—would protect their economic interests.

[78] In assessing a claimant's reasonable expectations, the court looks to a variety of factors, including commercial practice and any shareholder agreements: see *BCE* at paras. 73 and 79. The Supreme Court stated that the latter "may be viewed as reflecting the reasonable expectations of the parties".

[79] The plaintiffs do not suggest that the escrow agreement established to compensate AVC in the event of a breach of Med-Eng's and the Offeree Shareholders' representations and warranties is a departure from commercial practice. Nor do they submit that anything in any shareholder agreements creates a reasonable expectation that

AVC and the Offeree Shareholders would have regard to the plaintiff's interests. The same is all the more true with respect to the agreement with the escrow agent Computershare. Consequently, I would hold that it is plain and obvious that there is no basis in law for the court to impose a constructive trust over the Added Defendants' Escrow Fund as an oppression remedy against the Original Defendants.

[80] It is plain and obvious that Claim Six must be struck in its entirety.

iii. Did the motions judge err in dismissing the plaintiffs' cross-motion?

[81] The motions judge did not err in denying the plaintiffs leave to amend their statement of claim. As I have indicated the New Action constituted an abuse of process. To grant the plaintiffs request for joinder or consolidation would only continue the abuse of process.

[82] I would also agree with the motions judge that, as against the Added Defendants, the claim disclosed no reasonable cause of action (rule 21.01(1)(b)). The pleading discloses no basis on which to grant a remedy over the Escrow Fund. Thus, a basis for joinder or consolidation of the New Action with the Ongoing Actions does not exist.

[83] I would therefore uphold the motions judge's decision to refuse a joinder or consolidation.

iv. Are there inconsistent judgments?

[84] In advance of the appeal hearing, counsel for the plaintiffs referred this court to a recent motion decision in one of the Ongoing Actions (Ottawa Court File 06-CV-36222) that was rendered by Master C.U.C. MacLeod on August 27, 2010: *Maynes v. Med-Eng*, 2010 ONSC 4704. That decision was released just shortly before the present appeal was perfected.

[85] Counsel for the plaintiffs submits that the motions judge's decision (which is the subject of the current appeal) is at odds with Master MacLeod's ruling. The plaintiffs argue that while the motions judge found that there was no basis on which to award a constructive trust, Master MacLeod states that if the former directors were found liable for an oppression claim, then the court would clearly have jurisdiction to structure a remedy that would extend beyond those individual defendants. The plaintiffs submit that Master MacLeod's decision allows for a constructive trust to be imposed on the Escrow Fund.

[86] I disagree. Master MacLeod's decision concerns a Rule 20 motion for partial summary judgment brought by the former directors of Med-Eng (who, along with Med-Eng itself, constitute the Original Defendants in the Ongoing Actions). He found that the question of whether or not the former directors of Med-Eng were acting oppressively when they set the strike price and triggered the buyback provisions was a genuine issue requiring a trial. He also found that the former directors were proper parties in the

litigation because an oppression remedy may be made against them personally. In the process of coming to this conclusion, he wrote:

> The OBCA permits orders binding directors and officers of a corporation following a finding of oppression ... . Here however we are dealing with former officers and directors who for the most part were also the shareholders ultimately benefitting from the concentration of shares. ... Given that AVTI [Allen-Vanguard Technologies Inc.] has subsequently been sold, it is far more likely that a court would order a remedy in damages against the enriched former shareholders than against the merged subsidiary of Allen-Vanguard. The personal defendants [i.e. the former Med-Eng board members] are therefore in my view proper parties.

[87] As the above passage makes clear, in referring to the court's ability to fashion an appropriate remedy, Master MacLeod refers only to the possibility that the former officers and directors of Med-Eng, as "enriched former shareholders" benefiting from the alleged oppression, may be found liable for damages. Master MacLeod makes no mention of a constructive trust, the Escrow Fund, or any of the Added Defendants. His statements certainly cannot be read as stating that an oppression remedy can involve imposing a constructive trust over the funds of parties which shares no nexus whatsoever to the oppression pleaded. Master MacLeod's decision has no relevance to the present appeal.

CONCLUSION

[88] For the reasons given, I would dismiss the appeal.

COSTS

[89] I would award the costs of the appeal on a partial indemnity basis to the defendants as follows: $12,000 to the individual Original Defendants; $20,000 to Allen-Vanguard Corporation and Allen-Vanguard Technologies Inc.; and $18,500 to the Added Defendants Richard L'Abbé, 1062455 Ontario Inc., GrowthWorks Canadian Fund Ltd., Schroder Venture Managers (Canada) Limited, and Schroder Ventures Holding Limited.

RELEASED: Feb. 14, 2011
"KMW"

"Karen M. Weiler J.A."
"I agree David Watt J.A."
"I agree Karakatsanis J.A."

Court of Appeal File No.: C70436

B E T W E E N:

BRYTON CAPITAL CORP et al **v.** **CIM BAYVIEW CREEK INC et al**

Appellants Respondents

COURT OF APPLEAL FOR ONTARIO

(PROCEEDING COMMENCED AT TORONTO)

BRIEF OF AUTHORITIES OF THE SUBORDINATE SECURED CREDITORS

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