Court File No. CV-09-7966-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

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

AND IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SMURFIT-STONE CONTAINER CANADA INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Applicants

FACTUM OF THE APPLICANTS
(Returnable May 3, 2010)

April 29, 2010

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Last updated on February 8, 2010

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FACTUM OF THE APPLICANTS
(May 3, 2010)

PART I - OVERVIEW

1. Smurfit Canada and the other Applicants and Partnerships convened a meeting of their creditors on April 6, 2010 to allow them to consider and vote on a Joint Plan of Reorganization for Smurfit-Stone Container Corporation and its Debtor Subsidiaries and Plan of Compromise and Arrangement for Smurfit-Stone Container Canada Inc. and Affiliated Canadian Debtors (the "**Plan**").[1]

2. Consistent with the recommendation of the Monitor, the Plan was overwhelmingly approved at the creditors' meeting by all five classes of Affected Secured Creditors and by the classes of Affected Unsecured Creditors of Smurfit Canada and Smurfit-MBI.

3. While the Plan was not approved by the class of Affected Unsecured Creditors of Stone Container Finance Company of Canada II ("**Finance II**"), being the holders of unsecured 7.375% Notes issued by Finance II due 2012 (the "**Notes**"), their approval is not required to give effect to the Plan. Instead, the Affected Unsecured Creditors of Finance II are deemed to be Unaffected Creditors holding Excluded Claims. The stay will be lifted in respect of Finance II and the Noteholders will be free to pursue their claims against Finance II as well as Finance II's contribution claim against Smurfit Canada's U.S. parent company, Smurfit-Stone Container Enterprises Inc. ("**SSCE**"), based on section 135 of the Nova Scotia Companies Act. Moreover, the Noteholders will receive a distribution of New SSCC Common Stock pursuant to the Plan based on SSCE's guarantee of the Notes.

4. The Plan is fair and reasonable and otherwise meets the test for approval and sanction under section 6 of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). If sanctioned, the Plan will represent a truly successful compromise and restructuring, fully in line with the objectives of the CCAA. The Plan has the support of more than 98.5% of the unsecured creditors (by number and value) of Smurfit Canada and Smurfit-MBI. Assuming that the Plan is sanctioned and other conditions are met, the assets of Smurfit Canada and Smurfit-MBI will be sold to repay the secured debt in full; the businesses will continue to operate; current employees will keep their jobs; the collective bargaining agreements,

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[1] Capitalized terms used herein but not otherwise defined have the meanings ascribed to them in the Plan.

pension plans and employee benefit plans will be assumed; and the unsecured creditors of Smurfit Canada and Smurfit-MBI will receive distributions (including payment in full to small creditors). If not sanctioned, the Plan will fail in Canada and possibly in the United States, where sanction by this Court is a condition precedent to the Plan's effectiveness. Furthermore, if the debtors do not emerge by mid-July, the exit financing required to effect the Plan will expire.

5. Nonetheless, the managers of the funds holding a majority of the Notes (the "**Fund Managers**") and the indenture trustee for the Notes object to the sanctioning of the Plan. They maintain that Finance II has a valid $200 million Intercompany Claim against Smurfit Canada that should be taken into account.

6. On January 28, 2010, this Court rejected the Fund Managers' position and determined that Finance II's Intercompany Claim against Smurfit Canada is not a "debt provable in bankruptcy" or, in the alternative, has a value of $0 (the "**Characterization Decision**"). Leave to appeal the Characterization Decision and two other related decisions of this Court was denied by the Court of Appeal. The Plan was then approved by the creditors.

7. Following the creditors' meeting, the Fund Managers filed an application for leave to appeal to the Supreme Court of Canada. They now object to the sanction order on the basis that their leave application remains outstanding and that, should a distribution be made under the Plan, their leave application would be rendered moot.

8. Merely filing an application for leave has no impact on these proceedings. The Applicants and Partnerships are entitled to seek an order sanctioning the Plan based on this Court's standing determination that the Finance II Intercompany Claim is not a debt provable in bankruptcy. That decision is a valid, final and binding decision of this Court. The possibility that the Fund Managers could get leave to appeal does not change that fact. All orders of this Court remain valid and can be enforced and relied upon unless stayed or successfully appealed - neither of which has happened. A Plan based upon the Characterization Decision remains fair and reasonable and it would be unfair to the creditors of the Smurfit group to allow the Fund Managers to hold the insolvency proceedings hostage indefinitely by simply filing an application for leave.

PART II - FACTS

Insolvency Proceedings

9. SSCE and its parent company, Smurfit-Stone Container Corporation ("**SSCC**"), and certain of its direct and indirect subsidiaries (together, the "**U.S. Debtors**"), including the Applicants and the Partnerships, filed for protection from their creditors under title 11 of chapter 11 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1532 (the "**U.S. Bankruptcy Proceedings**") in the United States Bankruptcy Court for the District of Delaware (the "**U.S. Court**") in the early hours of January 26, 2009.

Affidavit of Dean Jones, sworn February 5, 2010, Excluding Exhibits ("Jones Affidavit") at para. 4, Applicants' Compendium, Tab 5, p. 403

10. Later on January 26, 2009, Smurfit-Stone Container Canada Inc. ("**Smurfit Canada**") and the other Applicants and Partnerships were granted protection from their creditors pursuant to the CCAA, and the initial order of the Ontario Superior Court of Justice (the "**Court**"), as subsequently amended, restated and extended.

Jones Affidavit at para. 5, Applicants' Compendium, Tab 5, pp. 403-404

Joint Plan

Plan Is Conditional on Sanction

11. On or about December 1, 2009, the U.S. Debtors filed the first draft of the Plan with the U.S. Court. The Plan (as amended) was also accepted for filing with this Court on February 10, 2010 when the Court issued and entered the Plan Filing and Meeting Order.

12. The Plan, which includes provisions relating to the classification and treatment of Affected Claims against the Applicants and Partnerships in the CCAA Proceedings (Article IV) and the Canadian Asset Sale (Article V), serves as the Plan for purposes of both the U.S. Bankruptcy Proceedings and the CCAA Proceedings. The Plan's effectiveness in both Canada and the United States is conditional upon its sanction and confirmation by this Court and the U.S. Court.

Jones Affidavit at para. 6, Applicants' Compendium, Tab 5, p. 404

Joint Plan of Reorganization for Smurfit-Stone Container Corporation and its Debtor Subsidiaries and Plan of Compromise and Arrangement for Smurfit-

Stone Container Canada Inc. and Affiliated Canadian Debtors, dated January 29, 2010, modified April 13, 2010 (the "**Plan**"), Articles IV and V and Section 9.2, Applicant's Compendium, Tab 1.

Plan Is Based upon an Offer by Canadian Newco

13. The Plan is premised upon an offer by Canadian Newco to purchase the assets of Smurfit Canada, Smurfit-MBI, MBI Limited, B.C. Shipper Supplies Ltd. and Francobec Company (together, the "**Sellers**") pursuant to an Asset Purchase Agreement described in Article V of the Plan in consideration for the following, as well as the assumption of certain liabilities:

(a) the payment of cash in the amount necessary to repay the principal amount of the Prepetition Canadian Revolving Loans and the Prepetition Canadian Term Loans in full, plus any accrued but unpaid interest thereon payable at the non-default interest rate;

(b) the payment of cash in the amount necessary to pay the principal amount of all Other Secured Claims against the Sellers in full, plus any accrued but unpaid interest thereon;

(c) the payment of cash in the amount necessary to satisfy in full all Administrative Expense Claims, Post-Filing Claims and CCAA Charges against the Canadian Debtors, including, without limitation, any monetary amounts by which each executory contract and unexpired lease to be assigned to Canadian Newco is in default;

(d) the assumption by Canadian Newco of certain liabilities of the Sellers as set forth in the Asset Purchase Agreement, including, without limitation, all existing and future obligations of the Sellers under:

(i) the Canadian Collective Bargaining Agreements,

(ii) the Canadian Pension Plans (including all unfunded liabilities thereunder), and

(iii) the Canadian Employee Benefit Plans; and

(e) the payment of cash in the amounts necessary to fund the Smurfit Canada $19.5 million Distribution Pool and the Smurfit-MBI $19.5 million Distribution Pool, which shall be available for distribution to Affected Unsecured Creditors of Smurfit Canada and Smurfit-MBI provided that both such classes accept the Plan.

Plan, Applicants' Compendium, Tab 1

14. The offer by Canadian Newco is to be funded by exit financing that will expire if the U.S. Debtors do not emerge prior to July 16, 2010 and the transfer to Canadian Newco has not taken place.

Senior Secured Term Loan Exit Facility, section 2.09, p. 43, filed with the Court as Exhibit 15A to the Plan Supplement

Term Sheet for the Revolving Loan Facility, p. 14, field with the Court as Exhibit 15B to the Plan Supplement.

Plan Represents a Choice for Creditors

15. The Plan divides Affected Creditors into eight classes for purposes of voting on the Plan (together, the "**Voting Creditors**"): five classes of Affected Secured Creditors; the Affected Unsecured Creditors of Smurfit Canada; the Affected Unsecured Creditors of Smurfit-MBI; and the Affected Unsecured Creditors of Finance II.

Plan, Article IV, section 4.2, Applicants' Compendium, Tab 1, pp.80-82

16. Pursuant to section 5.1.5 of the Plan, if the Plan is approved by the requisite double majority of each class of Affected Secured Creditors and the Affected Unsecured Creditors of both Smurfit Canada and Smurfit-MBI, the Plan is sanctioned and other conditions are met, the Canadian Assets will be transferred to Canadian Newco on the Effective Date.

Plan, Article V, section 5.1.5, Applicants' Compendium, Tab 1, p. 90

17. Section 5.1.6 of the Plan governs the circumstance where either the Affected Unsecured Creditors of Smurfit Canada or the Affected Unsecured Creditors of Smurfit-MBI, or both of them, fail to approve the Plan by the Required Majority or if the Plan is not sanctioned in respect of either such class. In those circumstances, (i) the Debtors shall be permitted to pursue a marketing process for the Canadian Assets; and (ii) Canadian Newco's offer for the Canadian Assets described above shall be modified to exclude the cash necessary to fund the Smurfit Canada Distribution Pool and the Smurfit-MBI Distribution Pool.

Plan, Article V, section 5.1.6, Applicants' Compendium, Tab 1, pp. 90-91

18. In other words, a sale will take place provided that the Plan is approved by each class of Affected Secured Creditors and is sanctioned and confirmed. Approval of the Affected Unsecured Creditors is not required for a sale to occur. However, the Plan provides the Affected Unsecured Creditors of Smurfit Canada and Smurfit-MBI with the choice as to how that sale will take place. They can decide whether to accept Canadian Newco's offer (and receive a distribution from the Distribution Pools) or compel a sales process and take whatever recovery may result (without the benefit of the Distribution Pools).

19. The Monitor currently estimates the distribution to Affected Unsecured Creditors of Smurfit Canada from the Smurfit Canada Distribution Pool to be 29%, after taking into account the fact that creditors with claims of less than $5,000 would

receive payment in full of their claims (and Affected Unsecured Creditors with claims in excess of $5,000 can elect to receive $5,000 in full satisfaction of their claims). The Monitor similarly estimates the distribution to Affected Unsecured Creditors of Smurfit-MBI from the Smurfit-MBI Distribution Pool to be 84%, after taking into account persons receiving $5,000 in full satisfaction of their claims (and Affected Unsecured Creditors with claims in excess of $5,000 can elect to receive $5,000 in full satisfaction of their claims).

Thirteenth Report of the Monitor, dated March 19, 2010 ("Thirteenth Report") at para. 21, Applicants' Compendium, Tab 6, p. 431

Monitor Identifies the Risks and Recommends the Plan

20. Due to the nature of the choice being offered to creditors, the Applicants and Partnerships did not conduct a post-filing sales process for the assets of either Smurfit Canada or Smurfit-MBI. However, the Monitor assessed the reasonableness of the Plan as it relates to the Affected Unsecured Creditors of Smurfit Canada and Smurfit-MBI in its Thirteenth Report.

Thirteenth Report, Applicants' Compendium, Tab 6, p. 415

21. The Monitor made its own determination of the enterprise value of each of Smurfit Canada and Smurfit-MBI based on the financial projections provided by the U.S. Debtors. Given the distributable value that would be available to third party unsecured creditors of each of Smurfit Canada and Smurfit-MBI based on such estimate, the Monitor came to the conclusion that the quantum of the Distribution

Pools is reasonable. In recommending the Plan, the Monitor further noted three factors for consideration in the event that the Plan is not approved:

(a) the risk that a competing bid may not emerge in a sales process due to, among other things, the integrated nature of the operations of Smurfit Canada and Smurfit-MBI and the wider Smurfit-Stone organization,

(b) the fact that Intercompany Claims of SLP and SSCE against Smurfit Canada ($421.9 million) and Smurfit-MBI ($12.8 million) respectively would share with the General Unsecured Claims, significantly reducing the distribution available to arm's length holders of General Unsecured Claims in a sales process; and

(c) the risk that, if no Superior Competing Bid is received in a sales process, no funds would be available for distribution to Affected Unsecured Creditors of either Smurfit Canada or Smurfit-MBI.

Thirteenth Report, at paras. 25, 33 and 64, Applicants' Compendium, Tab 6, pp. 434-435, 437 and 452-453

22. The Monitor also estimated the liquidation values of SSC and Smurfit-MBI and concluded that the realizations from the assets of those entities would be insufficient to repay the Prepetition Canadian Revolving Loans and Prepetition Canadian Term Loans, meaning that it is unlikely that in a liquidation scenario there would be funds available for distribution to the Affected Unsecured Creditors of either Smurfit Canada or Smurfit-MBI.

Thirteenth Report at para. 37, Applicants' Compendium, Tab 6, p. 439

Creditors' Meeting

23. In accordance with the Plan Filing and Meeting Order, notice of the creditors' meeting (in English and French) and the other Meeting Materials were sent to the Voting Creditors and published on the Monitor's website. In addition, the Thirteenth

Report of the Monitor was served, filed and posted on the Monitor's website (together with a French translation).

Fifteenth Report of the Monitor, dated April 13, 2010 ("Fifteenth Report) at para. 19-20, Applicants' Compendium, Tab 7, pp. 459-460

24. On April 6, 2010, the Applicants and Partnerships convened a meeting of the Voting Creditors to consider and vote on the Plan. The result of the vote, as reported by the Monitor, was as follows:

Class	**Accept the Plan**		**Reject the Plan**	
	Number	**Value**	**Number**	**Value**
Affected Secured Creditors of Smurfit Canada	**91.46%**	**95.48%**	8.54%	4.52%
Affected Secured Creditors of Smurfit-MBI	**91.46%**	**95.48%**	8.54%	4.52%
Affected Secured Creditors of MBI Limited	**91.46%**	**95.48%**	8.54%	4.52%
Affected Secured Creditors of Francobec Company	**91.46%**	**95.48%**	8.54%	4.52%
Affected Secured Creditors of 3083527 Nova Scotia Company	**91.46%**	**95.48%**	8.54%	4.52%
Affected Unsecured Creditors of Smurfit Canada	**98.58%**	**98.72%**	1.42%	1.28%
Affected Unsecured Creditors of Smurfit-MBI	**99.12%**	**99.20%**	0.88%	0.80%
Affected Unsecured Creditors of Finance II	**80.56%**	19.16%	19.44%	**80.84%**

Fifteenth Report at para. 27, Applicants' Compendium, Tab 7, p. 462

25. In approving the Plan by the requisite double majority, the Affected Unsecured Creditors of Smurfit Canada and Smurfit-MBI elected to forego the sales process contemplated by the Plan and accept the offer made by Canadian Newco, including the Distribution Pools.

26. As the class of Affected Unsecured Creditors of Finance II did not approve the Plan, they are deemed to be Unaffected Creditors holding Excluded Claims against Finance II. However, their approval is not required to implement the Plan.

> Plan, Article IV, sections 4.1.3 and 4.2.2.(l), Applicants' Compendium, Tab 1, pp. 80-82

PART III - LAW AND ANALYSIS

27. Pursuant to section 6 of the CCAA, a plan will bind applicants and affected creditors when two conditions are met: (i) approval of the plan by the necessary classes of creditors, in the requisite majorities and (ii) approval and sanction by the Court. In this case, the required majorities in each class necessary to approve the Plan voted in favour of it. Accordingly, the sole issue for determination is whether the Court should approve and sanction the Plan.

> CCAA, s. 6
>
> *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at para. 31, aff'd (1989), 73 C.B.R. (N.S.) 1995 (B.C.C.A.) ("*Northland*"), Applicants' Book of Authorities, Tab 1.

28. The exercise of the court's statutory authority to sanction a compromise or arrangement under the CCAA is a matter of discretion. The general requirements to be satisfied in seeking approval of a plan of compromise or arrangement are well established:

(a) there must be strict compliance with all statutory requirements and adherence to the previous orders of the court;

(b) all materials filed and procedures carried out are authorized by the CCAA; and

(c) the plan must be fair and reasonable.

Olympia & York Developments Ltd. v. Royal Trust Co. (1993), 12 O.R. (3d) 500 (Gen. Div.) ("*Olympia & York*") at para. 17, Applicants' Book of Authorities, Tab 2.

There Has been Strict Compliance with Statutory Requirements and CCAA Orders

29. Both the first and the second general requirements set out above refer to compliance with the various procedural requirements of the CCAA itself and compliance with the various orders granted by the court during the course of the CCAA process.

Olympia & York, supra, at para. 19, Applicants' Book of Authorities, Tab 2.

30. When considering whether applicants have acted in compliance with statutory requirements, the court may consider whether:

(a) the applicant comes within the definition of "debtor company" in section 2 of the CCAA;

(b) the applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of $5 million;

(c) the notice calling the meeting was sent in accordance with the order of the Court;

(d) the creditors were properly classified;

(e) the meetings of creditors were properly constituted;

(f) the voting was properly carried out; and

(g) the plan was approved by the requisite double majority or majorities.

Canadian Airlines Corp. (Re), (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.) ("*Canadian Airlines*") at para. 62, Applicants' Book of Authorities, Tab 3.

31. In this case, the Applicants and Partnerships have met all such requirements. In particular:

(a) at the time of granting of the Initial Order, the Court found that the Applicants were insolvent and met the criteria for protection under the CCAA;

(b) the notice of the creditors' meeting and other Meeting Materials were sent out in accordance with the Plan Filing and Meeting Order. At the creditors' meeting, a quorum (being one Voting Creditor in each class of Affected Creditors present in person or by proxy) was present and the chair of the Meeting confirmed that the meeting was properly constituted;

(c) classification of Creditors was not opposed at the hearing to approve the Plan Filing and Meeting Order, the creditors' meeting or subsequently;

(d) the voting was properly carried out; and

(e) a majority in number representing more than two thirds in value of each of the classes other than the Affected Unsecured Creditors of Finance II have approved the Plan overwhelmingly. The Plan provides that the Affected Unsecured Creditors of Finance II are deemed to be Unaffected Creditors holding Excluded Claims

Initial Order of Justice Pepall dated January 26, 2009

Fifteenth Report at paras. 19-23, 27 and 28, Applicants' Compendium, Tab 7, pp. 459-462

32. The prerequisites to sanctioning of the Plan set out in section 6 of the CCAA and the Plan Filing and Meeting Order have therefore been met.

CCAA, s. 6

All Materials Filed and Procedures Carried Out Were Authorized by the CCAA

33. In determining whether anything has been done or purported to be done which is not authorized by the CCAA, the Court must rely on the reports of the

Monitor as well as the parties in ensuring that nothing contrary to the CCAA has occurred or is contemplated by the plan.

Canadian Airlines, supra, at para. 64, Applicants' Book of Authorities, Tab 3

34. All materials filed and procedures taken by the Applicants and Partnerships were authorized by the CCAA, and the orders of this Court. The reports filed by the Monitor make no reference to any act or conduct by the Applicants or Partnerships which is not authorized by the CCAA. Rather, in its Sixteenth Report, the Monitor takes the view that the Applicants and Partnerships have complied with all statutory requirements of the CCAA and all prior orders of this Court and have not done or purported to do anything that is not authorized by the CCAA. Similarly, in connection with each request for an extension of the stay of proceedings, the Monitor has reported that the Applicants and Partnerships are acting in good faith with due diligence and this Court has made such findings during the course of these proceedings.

Tenth Report of the Monitor, dated December 8, 2009, at paras. 64-67.

Twelfth Report of the Monitor, dated February 21, 2010, at paras. 55-59.

Sixteenth Report of the Monitor, dated April 29, 2010.

Endorsement of Mme. Justice Pepall dated December 23, 2009, at para. 10.

The Plan is Fair and Reasonable

Affected Unsecured Creditors Elect to Take the Canadian Newco Offer

35. When considering whether a plan is fair and reasonable, the court will consider the relative degrees of prejudice that would flow from granting or refusing the relief sought under the CCAA. However, the Court does not require perfection, nor will the court second-guess the business decision reached by the stakeholders of debtors as a body. Indeed, creditors voting on a plan of compromise or arrangement do so on a business basis. The Court should be reluctant to interfere with the business decisions of creditors reached as a body.

> *Re T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) ("*T. Eaton*"), at para. 4, Applicants' Book of Authorities, Tab 4.
>
> *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont.S.C.J. [Commercial List]) at para. 5, Applicants' Book of Authorities, Tab 5.

36. The Courts have consistently held that the level of approval by the creditors is a significant factor in determining whether a plan is fair and reasonable. As stated by Blair J. (as he then was) in *Olympia & York:*

> One important measure of whether a plan is fair and reasonable is the parties' approval of the Plan, and the degree to which approval has been given.
>
> As other courts have done, I observe that it is not my function to second guess the business people with respect to the "business" aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know best what is in their interests in those areas [Emphasis added].
>
> *Olympia & York, supra,* at paras. 36 and 37, Applicants' Book of Authorities, Tab 2

37. Courts have held that a plan of compromise or arrangement is a contract between the debtor and its creditors, sanctioned by the court, and that the parties should be entitled to put anything into the plan that could be lawfully incorporated into any contract.

> *Olympia & York, supra,* at para. 74, Applicants' Book of Authorities, Tab 2.

38. The Plan proposes to pay Affected Secured Creditors in full. With respect to the Affected Unsecured Creditors of Smurfit Canada and Smurfit-MBI, the Plan offered a choice as to:

(a) Whether they prefer to receive certainty with respect to the recovery of some portion of their claim pursuant to the Plan and the sale to Canadian Newco, or

(b) Whether they prefer to test the value of Smurfit Canada and Smurfit-MBI through a sales process while recognizing the risks inherent in pursuing such a process (including that the Distribution Pools will no longer be available and there could be no recoveries).

39. An overwhelming majority of the Affected Secured Creditors approved the Plan and almost all of the Affected Unsecured Creditors of Smurfit Canada and

Smurfit-MBI indicated that they prefer the certainty associated with the Plan over the uncertainty of a sales process. Such significant support of the Plan by the creditors sets a heavy onus on parties seeking to upset the Plan.

Fifteenth Report at para. 28, Applicants' Compendium, Tab 7, p. 462

T. Eaton, supra, at para. 6, Applicants' Book of Authorities, Tab 4.

40. In its Thirteenth Report, the Monitor advises that the approval of the Plan is a reasonable decision by the Affected Unsecured Creditors and recommends approval of the Plan. In its Sixteenth Report, the Monitor affirms its view that the Plan is fair and reasonable and recommends that the Court sanction the Plan.

Thirteenth Report at paras.7 and 65, Applicants' Compendium, Tab 7, pp. 420 and 453

Sixteenth Report of the Monitor, dated April 29, 2010.

41. No alternative to the Plan was prepared or offered to the Creditors. If the Plan is not sanctioned by the Court, the considerable advantages of the sale to Newco (including the assumption of pension and collective bargaining obligations) may be lost and the Applicants and Partnerships may be placed into bankruptcy. Furthermore, a failure to sanction the Plan may preclude the consummation of the Plan for purposes of the U.S. Bankruptcy Proceedings. Such factors require strong consideration of the courts in determining if a plan should be sanctioned.

T. Eaton, supra, at paras. 7 and 8, Applicants' Book of Authorities, Tab 4

Finance II Intercompany Claim

42. For purposes of the CCAA Proceedings, Article IV of the Plan provides that the Intercompany Claim of Finance II against Smurfit Canada is an Excluded Claim, which is unaffected by the Plan and not entitled to vote or receive a distribution. For purposes of the U.S. Bankruptcy Proceedings, section 3.8.6 of the Plan similarly provides that the Intercompany Claim of Finance II against Smurfit Canada shall be deemed settled, cancelled and extinguished on the Effective Date of the Plan and is not entitled to receive any distribution on account of the Intercompany Claim; provided, however, that if the Canadian appeals court determines that the Finance II Intercompany Claim should be treated as a debt provable in bankruptcy and the Classes of Affected Unsecured Claims of Smurfit Canada and Smurfit-MBI accept the Plan, the Finance II Intercompany Claim shall be entitled to such distribution that the applicable court determines should be made.

43. On December 11, 2009, the Applicants and Partnerships brought a motion for directions regarding the nature of the Intercompany Claim of Finance II against Smurfit Canada, including whether such claim is in the nature of equity and the amount of such claim which is a provable "claim" within the meaning of section 12(1) of the CCAA is $0 (the "**Characterization Motion**"). On the same day, the Fund Managers brought a motion to adjourn the Characterization Motion to allow for the appointment of separate counsel to represent Finance II in arguing the Characterization Motion. The Fund Managers' motion for an adjournment was

dismissed from the bench on December 11th. On January 28, 2010, the Court released its decision on the Characterization Motion, holding that the Finance II intercompany claim was not a debt provable in bankruptcy or, in the alternative, is properly valued at $0.

> Decision of Justice Pepall, dated January 28, 2010 ("Characterization Decision"), at para. 53, Applicants' Compendium, Tab 8, p. 519

44. The Fund Managers brought two corresponding motions for leave to appeal to the Court of Appeal in respect of the Characterization Decision and the adjournment decision. Both motions were dismissed on March 9, 2010.

45. As described above, the meeting of creditors was convened on April 6, 2010 to consider and, if deemed advisable, approve the Plan. Pursuant to the Plan Filing and Meeting Order, proxies were to be received on or before March 29, 2010 or deposited with the Chair before the beginning of the meeting. No votes were cast in person.

> Minutes of the Meeting of Creditors of Smurfit-Stone Container Canada Inc. et al., Appendix B to the Fifteenth Report of the Monitor, ("Minutes of the Creditors' Meeting") Applicants' Compendium, Tab 7, p. 467-471
>
> Plan Filing and Meeting Order, dated February 25, 2010, at para. 23, Applicants' Compendium, Tab 9, p. 546

46. At the meeting, the Monitor advised that the Fund Managers still had appeal rights available to them in Canada and the Fund Managers' counsel confirmed that they would be seeking leave to the Supreme Court of Canada.

> Minutes of the Creditors' Meeting, Applicants' Compendium, Tab 7, p. 467-471

47. On April 13, 2010, the Fund Managers served an application for leave to appeal the Court of Appeal's decisions not to grant leave.

48. The Fund Managers' application for leave has no bearing on the present sanction hearing. No Canadian appeals court has determined that the Finance II Intercompany Claim should be treated as a debt provable in bankruptcy. Unless and until the Supreme Court determines otherwise, this Court's determination on the Characterization Motion remains valid and binding: the Intercompany Claim of Finance II against Smurfit Canada is not a debt provable in bankruptcy. The Supreme Court has held that judicial decisions should generally be conclusive of the issues decided unless and until actually reversed on appeal. Until reversed on appeal or stayed, an order of this Court is final and can be relied upon and enforced, even if there is an appeal pending. In fact, the ability to rely upon a decision that may ultimately be vacated or varied on appeal is recognized by the ability to obtain a stay pending appeal.

> *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, at paras. 18 and 19, Applicants' Book of Authorities, Tab 6.
>
> *Minott v. O'Shanter Development Co*, (1999), 117 O.A.C. 1 (C.A.) at para. 33, Applicants' Book of Authorities, Tab 7.
>
> *Harrison v. Harrison*, 2007 BCCA 120 at para. 25, relying on *Canadian Transport (U.K.) v. Alsbury* (1952), 105 C.C.C. 20 (B.C.C.A.) at para. 60, aff'd [1953] 1 S.C.R. 516, Applicants' Book of Authorities, Tab 8.

49. To allow the Fund Managers' objections to interfere with the sanctioning of the Plan would effectively grant an indefinite stay of the Plan's implementation pending the determination of their application for leave to appeal without requiring

that the Fund Managers meet the stringent test of demonstrating (i) a serious issue to be tried, (ii) irreparable harm, and (iii) a balance of convenience in their favour. In doing so, the Plan may be jeopardized and thousands of creditors in the CCAA proceedings and the US Bankruptcy Proceedings (where the asset sale is a condition precedent to the Plan's effectiveness) who are presently stayed and have been awaiting a distribution for more than a year will be prejudiced.

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, at paras. 78-80, Applicants' Book of Authorities, Tab 9.

Supreme Court Act, R.S., 1985, c. S-26, section 65.1(1)

CCAA, 15(3)

PART IV - ORDER REQUESTED

50. That an order be granted substantially in the form of the Draft Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

April 29, 2010

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SCHEDULE "A"

Smurfit-Stone Container Canada Inc.

3083527 Nova Scotia Company

MBI Limited/Limitée

639647 British Columbia Ltd.

B.C. Shipper Supplies Ltd.

Specialty Containers Inc.

605681 N. B. Inc.

Francobec Company

Stone Container Finance Company of Canada II

SCHEDULE "B"

Smurfit-MBI

SLP Finance General Partnership

SCHEDULE "D"

CASE LAW

1. *Northland Properties Ltd., Re* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.), aff'd (1989), 73 C.B.R. (N.S.) 1995 (B.C.C.A.).

2. *Olympia & York* (1993), 12 O.R. (3d) 500 (Gen. Div.)

3. *Canadian Airlines Corp. (Re)*, (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.)

4. *T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont.S.C.J. [Commercial List])

5. *Sammi Atlas Inc. (Re)* (1998), 3 C.B.R. (4th) 171 (Ont.S.C.J. [Commercial List])

6. *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

7. *Minott v. O'Shanter Development Co*, (1999), 117 O.A.C. 1 (C.A.).

8. *Harrison v. Harrison*, 2007 BCCA 120

9. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

SCHEDULE "E"

LEGISLATION

Companies' Creditors Arrangement Act, **R.S., 1985, c. C-36**

Section 6

6. Where a majority in number representing two-thirds in value of the creditors, or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting or meetings thereof respectively held pursuant to sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court, and if so sanctioned is binding

(a) on all the creditors or the class of creditors, as the case may be, and on any trustee for any such class of creditors, whether secured or unsecured, as the case may be, and on the company; and

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

...

Section 15(3)

15(3). No appeal to the Supreme Court of Canada shall operate as a stay of proceedings unless and to the extent ordered by the Court.

*** ***

Supreme Court Act, **R.S., 1985, c. S-26**

Section 65.1(1)

65.1(1) The Court, the court appealed from or a judge of either of these courts may, on the request of the party who has served and filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on the terms deemed appropriate.

Court File No. CV-09-7966-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36
AND IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SMURFIT-STONE CONTAINER CANADA INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS (RETURNABLE MAY 3, 2010)

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