Most Negative Treatment: Check subsequent history and related treatments.

2006 CarswellOnt 4857
Ontario Superior Court of Justice

Stelco Inc., Re

2006 CarswellOnt 4857, [2006] O.J. No. 3219, 20 B.L.R. (4th) 286, 24 C.B.R. (5th) 59

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT

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

H.J.W. Siegel J.

Heard: July 17-21, 2006
Judgment: August 9, 2006
Docket: 04-CL-5306

Counsel: Robert W. Staley, Derek J. Bell, Alan Gardner for Debentureholders
Paul G. Macdonald, Andrew J.F. Kent, Brett Harrison for Subordinated Noteholders
Nancy Roberts, Tim Morgan for 2074600 Ontario Ltd.
Kyla Mahar for Monitor of the Applicants

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency

X Priorities of claims
X.7 Unsecured claims
X.7.c Priority with respect to other unsecured creditors

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Effect on subordination agreement — Steel company entered protection under Companies' Creditors Arrangement Act, and plan was approved — Steel company had entered into contract for provision of computer management services, debt for which was held by numbered company — Creditors besides numbered company included noteholders and senior debenture holders — Subordination agreement stated that noteholder debt was subordinate to debt held by senior debt holders — Numbered company claimed that debt it held was also senior debt as contemplated by agreement — Senior debenture holders and numbered corporation brought motion for certain available funds — Senior debenture holders' claim allowed; claim by numbered company dismissed — Debt of noteholders subordinate to debt of senior debt holders, but not debt held by numbered company — Court had authority to determine issue of subordinate debt, regardless of any alleged deficiency in proof of ownership of

debentures — Proposal did not invalidate subordination agreement — Subordination agreement statement of that subject to operation of law not meant to alter agreement.

Bankruptcy and insolvency --- Priorities of claims — Unsecured claims — Priority with respect to other unsecured creditors

Steel company entered protection under Companies' Creditors Arrangement Act, and plan was approved — Steel company had entered into contract for provision of computer management services, debt for which was held by numbered company — Creditors besides numbered company included noteholders and senior debenture holders — Subordination agreement stated that noteholder debt was subordinate to debt held by senior debt holders — Numbered company claimed that debt it held was also senior debt as contemplated by agreement — Senior debenture holders and numbered corporation brought motion for certain available funds — Senior debenture holders' claim allowed; claim by numbered company dismissed — Debt of noteholders subordinate to debt of senior debt holders, but not debt held by numbered company — Interest on debt continued to accumulate, despite filing under Act — "Interest stops" rule not applicable to proceedings under Act — Wording of debt agreement did not limit debenture holders' interest — Senior debenture holders were entitled to take advantage of third party beneficiary rule — Debenture holders were only group to benefit from subordination agreement — Actions of debenture holders were limited to enforcing contract — Senior debenture holders also held trust over turnover proceeds — No need to try deficiencies in claim individually, as aggregate deficiency claim of debenture holders determined by comparison of aggregate value of claims on plan implementation date with aggregate value of distributions received — Valuation of share interests in funds to be determined at date of volume weighted average prices at first week of trading — Securities generally valued at date of entitlement — Valuation would be close to market value as opposed to value in proposal — Debt owed to numbered company was not senior debt — Funds were spent for day-to-day operation of company.

Table of Authorities

Cases considered by *H.J.W. Siegel J.*:

Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd. (1999), 1999 A.M.C. 2840, 1999 CarswellBC 1927, 1999 CarswellBC 1928, [1999] 9 W.W.R. 380, 11 C.C.L.I. (3d) 1, 176 D.L.R. (4th) 257, 245 N.R. 88, [1999] I.L.R. I-3717, 67 B.C.L.R. (3d) 213, 47 C.C.L.T. (2d) 1, 127 B.C.A.C. 287, 207 W.A.C. 287, [1999] 3 S.C.R. 108, 50 B.L.R. (2d) 169, [2000] 1 Lloyd's Rep. 199 (S.C.C.) — followed

Guardian Trust Co. v. Gaglardi (1989), 64 D.L.R. (4th) 351, 1989 CarswellBC 615 (B.C. S.C.) — considered

Kitimat (District) v. Alcan Inc. (2005), 2005 BCSC 44, 2005 CarswellBC 60, 5 M.P.L.R. (4th) 185, 37 B.C.L.R. (4th) 250, 250 D.L.R. (4th) 144 (B.C. S.C.) — distinguished

London Drugs Ltd. v. Kuehne & Nagel International Ltd. (1992), [1993] 1 W.W.R. 1, [1992] 3 S.C.R. 299, (sub nom. *London Drugs Ltd. v. Brassart*) 143 N.R. 1, 73 B.C.L.R. (2d) 1, 43 C.C.E.L. 1, 13 C.C.L.T. (2d) 1, (sub nom. *London Drugs Ltd. v. Brassart*) 18 B.C.A.C. 1, (sub nom. *London Drugs Ltd. v. Brassart*) 31 W.A.C. 1, 97 D.L.R. (4th) 261, 1992 CarswellBC 913, 1992 CarswellBC 315 (S.C.C.) — followed

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Pacific Mobile Corp., Re (1985), [1985] 1 S.C.R. 290, 55 C.B.R. (N.S.) 32, 16 D.L.R. (4th) 319, 57 N.R. 63, 1985 CarswellQue 30, 1985 CarswellQue 106 (S.C.C.) — considered

RDA Film Distribution Inc. v. British Columbia Trade Development Corp. (2000), 2000 BCCA 674, 2000 CarswellBC 2627, 83 B.C.L.R. (3d) 302, [2001] 3 W.W.R. 88, 147 B.C.A.C. 15, 241 W.A.C. 15 (B.C. C.A.) — distinguished

Rowbotham v. Nave (1991), 1 P.P.S.A.C. (2d) 206, 1991 CarswellOnt 621 (Ont. Gen. Div.) — considered

Roynat Inc. v. Ron Clark Motors Ltd. (1991), 1 P.P.S.A.C. (2d) 191, 1991 CarswellOnt 620 (Ont. Gen. Div.) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 6483, 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]) — considered

Stelco Inc., Re (2005), 2005 CarswellOnt 6510, 15 C.B.R. (5th) 305, 18 B.L.R. (4th) 32 (Ont. C.A.) — referred to

Stelco Inc., Re (2006), 2006 CarswellOnt 406, 17 C.B.R. (5th) 78, 14 B.L.R. (4th) 260 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2006), 2006 CarswellOnt 1505 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 12 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 57.01(6) — referred to

DETERMINATION regarding creditors' entitlement to funds.

***H.J.W. Siegel J.*:**

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 (Ont. S.C.J. [Commercial List]). A subsequent appeal to the Court of Appeal was also dismissed [2005 CarswellOnt 6510 (Ont. C.A.)]. 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 (Ont. S.C.J. [Commercial List]) 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");
>
> (b) 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;
>
> (c) 1.1 million new common shares of Stelco (the "Common Shares"); and
>
> (d) 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 [2006 CarswellOnt 1505 (Ont. S.C.J. [Commercial List])] (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 *Nav Canada c. Wilmington Trust Co.*, [2006] S.C.J. No. 24 (S.C.C.) 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 (B.C. S.C.) 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 (S.C.C.) and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 (S.C.C.). 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 (B.C. S.C.) and *RDA Film Distribution Inc. v. British Columbia Trade Development Corp.*, [2000] B.C.J. No. 2550 (B.C. C.A.). 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 *RDA 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 *RDA 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., Re*, [1985] 1 S.C.R. 290 (S.C.C.) 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. 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. 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.

Order accordingly.

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.

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