Most Negative Treatment: Distinguished
Most Recent Distinguished: Nortel Networks Corp., Re | 2014 ONSC 5274, 2014 CarswellOnt 11369, 244 A.C.W.S. (3d) 10 | (Ont. S.C.J. [Commercial List], Sep 11, 2014)

2007 ONCA 483
Ontario Court of Appeal

Stelco Inc., Re

2007 CarswellOnt 4108, 2007 ONCA 483, [2007] O.J. No. 2533, 158 A.C.W.S. (3d) 877, 226 O.A.C. 72, 32 B.L.R. (4th) 77, 35 C.B.R. (5th) 174

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO STELCO INC. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A" APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

D. O'Connor A.C.J.O., S.T. Goudge, R.A. Blair JJ.A.

Heard: March 27, 2007; May 2, 2007
Judgment: June 28, 2007 *
Docket: CA C46248, C46258, C46266, C46916

Proceedings: reversing in part *Stelco Inc., Re* (2006), 24 C.B.R. (5th) 59, 2006 CarswellOnt 4857, 20 B.L.R. (4th) 286 (Ont. S.C.J. [Commercial List]); & affirming *Stelco Inc., Re* (2007), 30 C.B.R. (5th) 233, 2007 CarswellOnt 1256 (Ont. S.C.J.)

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Kyla Mahar for Ernst & Young, in its capacity as Monitor
Sean Dunphy, Ellen Snow for Aurelius Capital Management, LP [representing the Cash-Elect Debentureholders]
Charles F. Scott, M. Paul Michell, Michael J. Sims for Catalyst Capital Group Inc., David Kempner Capital Management LLC [representing the Share-Elect Debentureholders]
Brendan Y.B. Wong for CIBC Mellon Trust Co.

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

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 — Motion by debenture holders and numbered corporation for entitlement to funds remaining after initial distribution of assets resulted in dismissal of debenture holders' claim and dismissal of claim by numbered company — Trial judge found debt of noteholders subordinate to debt of senior debt holders including debenture holders, but not debt held by numbered company — Trial judge found court had authority to determine issue of subordinate debt, regardless of any alleged deficiency in proof of ownership of debentures — Trial judge found proposal did not invalidate subordination agreement — Noteholders and numbered company appealed, certain debenture holders appealed regarding valuation of shares — Appeal by noteholders was dismissed, appeal by numbered company allowed, appeal by debenture holders dismissed — Proposal did not cancel terms of subordination agreement — Senior debtholders did not intend to forego rights of subordination when agreeing to plan — Senior debtholders were entitled to rely on trust principles to enforce turnover provisions — Monitor held funds in trust, and fact that funds were given to monitor not noteholders was irrelevant — Numbered company was senior debtholder and noteholders' debt was subordinate — In calculating deficiency, trial judge erred in attempting to ascertain proper value senior debtholders could have received had they been able to trade securities at effective date, instead of addressing manner in which payments made concurrent with noteholders were to be valued — Value of concurrent payments calculated using value under plan, not market value — Provisions of plan, negotiations which led to plan, and price actually paid per share on effective date favoured value of shares under plan — Using value of payments as set out in plan led to commercial certainty in reorganization — Amount of deficiency in amount paid to debenture holders calculated using dollar value of $5.50 per share — Appeal by debenture holders was moot.

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 computer management services, debt for which was held by numbered company — Other creditors included noteholders and senior debenture holders — Subordination agreement stated that noteholder debt subordinate to senior debt holders — Numbered company claimed its debt also senior debt — Motion by debenture holders and numbered corporation for entitlement to funds remaining after initial distribution of assets resulted in dismissal of debenture holders' claim and dismissal of claim by numbered company — Trial judge found debt of noteholders subordinate to debt of senior debt holders, but not debt held by numbered company — Trial judge found interest on debt continued to accumulate — Trial judge found senior debenture holders were entitled to rely on third party beneficiary rule — Trial judge found no need to try deficiencies individually — Trial judge found valuation of share interests in funds determined at prices during first week of trading — Trial judge found valuation would be close to market value — Trial judge found debt owed to numbered company was not senior debt — Noteholders and numbered company appealed, certain debenture holders appealed regarding valuation of shares — Appeal by noteholders was dismissed, appeal by numbered company allowed, appeal by debenture holders dismissed — Proposal did not cancel terms of subordination agreement — Senior debtholders did not intend to forego rights of subordination — Monitor held funds on trust basis — Trial judge entitled to evaluate deficiency on group, not individual basis — Senior debtholders entitled to post-filing interest on claim — "Interest stops" rule is not applicable in proceedings under CCAA — Numbered company was senior debtholder — Contract was not made in course of business — Agreement was single transaction and was subject of public

announcement — Trial judge made palpable and overriding error in determining nature of contract, and in defining ordinary course of business — Non-ordinary transactions should not be viewed narrowly in determining ordinary course of business — Plan was put in place to give priority to financiers rather than creditors — Purchase required approval of board of directors and was one time only transaction — Trial judge erred by attempting to ascertain proper value senior debtholders could have received had they been able to trade securities at effective date, instead of addressing manner in which payments made concurrent with noteholders' were to be valued in calculation of deficiency — Value of concurrent payments calculated using value under plan, not market value — Using value of payments as set out in plan led to commercial certainty in reorganization — Amount of deficiency in amount paid to debenture holders calculated using dollar value of $5.50 per share — Appeal by debenture holders was moot.

A steel company entered protection under the Companies' Creditors Arrangement Act. A proposed plan was approved. The steel company had entered into a contract for computer management services, the debt for which was held by a numbered company. Other creditors included noteholders and debenture holders. A subordination agreement stated that noteholder debt was subservient to the debt of the senior debt holders. The numbered company claimed its debt was senior debt as understood in the subordination agreement.

The motion by the senior debenture holders and numbered company for certain available funds after the initial distribution resulted in dismissal of the numbered company's claim and and granting of the claim by the senior debenture holders. The trial judge found that the debt of the noteholders was subordinate to the debt of the senior debt holders, but not the debt held by the numbered company. The trial judge found the court had the authority to try the issue of subordinate debt, regardless of any alleged shortcomings in proof of ownership of the debentures. The trial judge found the proposal did not invalidate the subordination agreement.

The trial judge found interest on the debt continued to accumulate, and that the "interest stops" rule is not applicable to proceedings under the Act. The wording of the debt agreement did not did not limit the debenture holders' interest.

The trial judge found the debenture holders were entitled to take advantage of the third party beneficiary rule to enforce the debt agreement. The trial judge found the funds owed to the numbered company were not senior debt. The numbered company was not entitled to recover at the expense of the noteholders.

The trial judge found no need to try deficiencies in the debenture holders claim individually. The aggregate deficiency claim of debenture holders was determined by a comparison of the aggregate value of claims on the plan's implementation date and the aggregate value of distributions received.

The trial judge found the valuation of share interest in the distributed funds should be determined by their value in the first week of trading, rather than their value as set out in the proposal. Securities are generally valued at their date of entitlement.

The noteholders and the numbered company appealed. Certain debenture holders appealed regarding valuation of the shares.

Held: The appeal by the numbered company was allowed and the appeal by the noteholders was dismissed. The appeal by the debenture holders was dismissed.

The trial judge properly found that the proposal did not cancel the subordination agreement. The debenture holders were senior debtholders and were entitled to rely on trust principles to enforce their entitlement to the funds. The funds at issue were held in trust, even though they had been given to the monitor rather than the noteholders. The senior debtholders did not intend to give up their subordination rights when agreeing to the plan.

The senior debtholders were entitled to interest on their claim. The "interest stops" rule is not applicable to proceedings under the Act.

The numbered company was a senior debtholder entitled to priority over the noteholders. The trial judge erred in determining that the contract with the numbered company was made in the ordinary course of business. The contract was a large, single transaction which merited a public announcement and required approval from the board of directors. What constitutes an out of ordinary transaction should not be construed narrowly. The intent of the plan was to favour investors rather than creditors in ordinary course of business.

The trial judge erred in attempting to ascertain the proper value that shareholders could have obtained had the shares been traded on the effective date, instead of addressing the manner in which concurrent payments under the plan were valued when determining remaining deficiency after initial distribution. The deficiency in debt remaining to the senior debtholders should be determined by valuing the shares at the amount set out in the proposal. The terms of the plan, the negotiations which led to the plan, and the price paid per share on the effective date favoured valuing the shares as set out under the plan. This valuation method led to commercial certainty in the agreement. The share value in calculating the deficiency was $5.50 per share.

The appeal by the debenture holders was moot.

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Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd. (2002), 214 D.L.R. (4th) 121, 2002 CarswellOnt 1759, 26 B.L.R. (3d) 180, 35 C.B.R. (4th) 197, (sub nom. *MacDonald v. BF Realty Holdings Ltd.*) 160 O.A.C. 72 (Ont. C.A.) — referred to

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Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — considered

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NAV Canada c. Wilmington Trust Co. (2006), 2006 CarswellQue 4890, 2006 CarswellQue 4891, 2006 SCC 24, (sub nom. *Greater Toronto Airports Authority v. International Lease Finance Corp.)* 80 O.R. (3d) 558 (note), (sub nom. *Canada 3000 Inc., (Bankrupt), Re)* 349 N.R. 1, (sub nom. *Canada 300 Inc., Re)* [2006] 1 S.C.R. 865, 10 P.P.S.A.C. (3d) 66, 20 C.B.R. (5th) 1, (sub nom. *Canada 3000 Inc. (Bankrupt), Re)* 212 O.A.C. 338, (sub nom. *Canada 3000 Inc., Re)* 269 D.L.R. (4th) 79 (S.C.C.) — considered

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Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

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

s. 12(1) "claim" — considered

APPEAL by corporation and creditors from judgment reported at *Stelco Inc., Re* (2006), 24 C.B.R. (5th) 59, 2006 CarswellOnt 4857, 20 B.L.R. (4th) 286 (Ont. S.C.J. [Commercial List]) and *Stelco Inc., Re* (2007), 30 C.B.R. (5th) 233, 2007 CarswellOnt 1256, 32 B.L.R. (4th) 53 (Ont. S.C.J.), regarding distribution of certain assets.

***The Court*:**

I. Overview

1 These reasons concern four appeals arising from proceedings involving Stelco Inc. under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

2 In January 2004, Stelco filed for protection under the *CCAA*. At the time, it owed almost $550 million to various creditors. (With post-filing interest, the amount increases to approximately $640 million.) In January 2006, after two years of efforts to raise capital, sell assets, and negotiate a compromise, a plan of arrangement and reorganization was sanctioned by Farley J. as fair and reasonable, thereby putting in motion the process by which Stelco would emerge from restructuring with its debt reorganized. In simple terms, the creditors agreed to release and discharge all claims against Stelco in exchange for a distribution of cash and new securities. These appeals concern how those assets are to be distributed amongst classes of the creditors, and include disputes over the ranking of priorities, the characterization of debt, and the value to be attributed to the new securities.

3 In these reasons, we summarize the facts most relevant to the appeals. The motion judge reviewed the facts in greater detail in his reasons for judgment released on August 9, 2006, and on March 6, 2007, which are reported at (2006), 20 B.L.R. (4th) 286 (Ont. S.C.J. [Commercial List]) and [2007] O.J. No. 808 (Ont. S.C.J.), respectively.

II. The Noteholders' Appeal (C46248)

(a) Facts

4 When Stelco filed for protection under the *CCAA* on January 29, 2004 (the "Filing Date"), it had two principal debt obligations:

(1) Debentures: There were two classes of senior debentures: 10.4% Debentures issued in 1989 in the principal amount of $125,000,000 and 8% Debentures issues in 1999 in the principal amount of $150,000,000.

(2) Notes: There was one class of unsecured subordinated debentures issued in 2002 in the principal amount of $90,000,000 and bearing an interest rate of 9.5% per annum.

In these reasons the parties representing the holders of the Debentures will be referred to as the "Debentureholders" and the parties representing the holders of the Notes will be referred to as the "Noteholders".

5 In the Note Indenture, the Noteholders agreed to subordinate their entitlement to repayment in full of the "Senior Debt" (the "Turnover Provisions"). It is agreed that the Debentures constitute Senior Debt as defined in the Note Indenture.

6 Article 6.2 of the Note Indenture specifically addresses the operation of the Turnover Provisions in the event of insolvency proceedings. Article 6.2(2) requires any payment or distribution of assets to the Noteholders in such circumstances be paid to the holders of Senior Debt to the extent necessary to result in payment in full of the principal and interest owing to them after giving effect to any concurrent payment or distribution to the holders of Senior Debt. Article 6.2(3) provides that if any payment or distribution is paid to the Noteholders it shall be held in trust for the Senior Debt Holders until the principal of and interest on the Senior Debt shall be paid in full.

7 On January 20, 2006, Farley J. approved a plan of arrangement or compromise (the "Plan") to reorganize Stelco's debt obligations. The Plan became effective on March 31, 2006 (the "Effective Date") at 11:59 p.m. (the "Effective Time").

8 In accordance with the Plan, the Debentureholders filed proofs of claim totalling $342,655,664. On the Effective Date, they received an initial *pro rata* share of the Plan distribution in the form of cash, New Common Shares, New Warrants, and New Floating Rate Notes (the "New FRNs") (collectively, the "Distributed Assets"). The Distributed Assets were comprised of $52,243,533 in cash, US$121,486,000 in New FRNs, 4,004,829 New Common Shares, and 733,311 New Warrants. Pursuant to the terms of the Plan, the New Common Shares were issued at a price of $5.50 per share. Based on that price per share, the New Warrants would be worth $1.44 per warrant using the Black-Scholes Model.

9 The Plan also provided for a distribution of $20,075.359 in cash, US$40,522,000 in New FRNS, 849,325 New Common Shares and 244,528 New Warrants to the Noteholders (the "Turnover Proceeds"). The Plan required that the Turnover Proceeds be held in trust by the Monitor pending the determination of entitlement to the Turnover Proceeds pursuant to the Turnover Provisions.

10 The difference between what the Debentureholders claim to have received from the Distributed Assets and the resulting balance remaining from their claims, if any (the "Deficiency"), is payable to them out of the Turnover Proceeds.

11 On March 7, 2006, Farley J. issued an order as to how the litigation over the Turnover Proceeds was to be conducted. Pursuant to that order, the Debentureholders filed a claim stating that they were entitled to the Turnover Proceeds. 2074600 filed a claim stating that the debt owed to it was Senior Debt and had priority over the amount owing to the Noteholders. (This claim is the subject of a separate appeal and is discussed below.) The Noteholders responded with a counterclaim denying the existence of any Deficiency and insisting that they were entitled to the entire Turnover Proceeds. The hearing took place before the motion judge on July 17 through 21, 2006.

12 In a ruling released on August 9, 2006, and formally entered on October 31, 2006, the motion judge made the following findings that are relevant to the Noteholders' appeal: [1]

> (1) The Senior Debt Holders are entitled to enforce the Turnover Provisions as third-party beneficiaries of the provision. They are also entitled to enforce the Provisions as the beneficiaries of the trust in which the Turnover Proceeds are currently held;
>
> (2) The implementation of the Plan did not cancel the Turnover Provisions in the Note Indenture;
>
> (3) It was not necessary for Senior Debt Holders to prove individually the actual amount of their deficiencies after receiving the Distributed Assets under the Plan; and
>
> (4) The Senior Debt Holders were entitled to be paid post-CCAA-filing interest on their outstanding amounts.

13 The Noteholders appeal each of these findings.

(b) Enforcement of the Turnover Provisions

14 The Noteholders appeal the finding of the motion judge that the Debentureholders as holders of Senior Debt [2] are entitled to enforce the Turnover Provisions contained in the Note Indenture despite the fact that they are not parties to that Indenture.

15 The motion judge found that the Senior Debt Holders are entitled to do so both as third party beneficiaries and as the beneficiaries of the trust established in their favour by the Indenture.

16 For the reasons that follow, we agree with the motion judge that while they are not parties to the Note Indenture between Stelco and the Noteholders, the Senior Debt Holders can rely on trust principles to provide an exception to the

privity of contract doctrine, entitling them to enforce the Turnover Provisions in the Note Indenture that constitutes the Noteholders trustees of the Turnover Proceeds for the Senior Debt Holders once the Noteholders receive those Proceeds. It is therefore unnecessary for us to decide whether the trial judge erred in allowing the Senior Debt Holders to enforce the Indenture as third party beneficiaries by extending to this case the principled exception to privity of contract found in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 (S.C.C.).

17 Needless to say, our approach to this issue is premised on our conclusion, explained below, that the Turnover Provisions of the Note Indenture survive the implementation of the Plan and are not extinguished by it.

18 It is helpful to begin by reproducing the Turnover Provisions in the Note Indenture, noting that they refer to the Indenture as the "Debenture" and the Noteholders as the "Debenture Holders". These are Article 6.1 and Article 6.2(1), (2) and (3), of which the last is the most important for the trust issue. They read as follows:

> **Article 6 — Subordination of Debentures**
>
> ***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 therefore) 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 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 therefore) to the holders of such Senior Debt.
>
> [Emphasis added.]

19 It is also helpful to review a number of the provisions of the Plan approved by the court on January 20, 2006, effective March 31, 2006.

20 Article 2.03 provides that once the Plan is effective, each Affected Creditor (including both the Senior Debt Holders and the Noteholders) will receive in full satisfaction of its claim against Stelco its *pro rata* share of the pool of assets provided by Stelco, consisting of cash, New FRNs, New Common Shares and New Warrants.

21 As noted above, Article 6.01(2) provides that the Turnover Proceeds will be delivered to the Monitor, who will hold the proceeds in trust pending the outcome of this litigation over the Proceeds. The Monitor was to seek directions of the court about the process to be used to determine that entitlement, so that this trust can be fully implemented.

22 The Senior Debt Holders claim that they are entitled to rely on the Turnover Provisions in Article 6.2(3) of the Note Indenture because of the trust exception to the privity of contract doctrine and that they are ultimately entitled to the Turnover Proceeds.

23 In response, the Noteholders assert that the Senior Debt Holders have no right to enforce those Provisions, and that therefore the Monitor holds the Turnover Proceeds in trust for the Noteholders and not for the Senior Debt Holders.

24 At first instance the Noteholders did not contest the trust exception to the privity of contract doctrine. Nor do they do so in this court. They accept the well-known proposition that parties to a contract can constitute one party a trustee for a third party of a right under the contract and thereby confer on the third party a right enforceable by it in equity. See *Greenwood Shopping Plaza Ltd. v. Neil J. Buchanan Ltd. (No. 1)*, [1980] 2 S.C.R. 228 (S.C.C.) at 239.

25 Rather, their principal argument below was that the Senior Debt Holders could not rely on Article 6.2(3) of the Note Indenture because the Turnover Proceeds have been paid to the Monitor under the Plan and have not therefore been "received" by the Noteholders for the purposes of the Article. Thus no trust has arisen and the Senior Debt Holders have no beneficial interest to enforce. The motion judge dismissed this argument as follows:

> 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.

26 The Noteholders raise the same argument in this court. We would give the same response, with the following elaboration.

27 The Plan, approved by court order, creates a trust in which the Monitor holds the Turnover Proceeds in trust pending determination by the court of whether the Senior Debt Holders or the Noteholders are ultimately entitled to them.

28 Subject to any right of subordination available to the Senior Debt Holders, the Noteholders are ultimately entitled to the Turnover Proceeds, pursuant to the terms of the Plan. In other words, the Noteholders hold the beneficial interest in the Turnover Proceeds but that interest is not unfettered. It is subject to the rights of the Senior Debt Holders if the court should so order. As a consequence, the Noteholders cannot be said to have the entire equitable interest in the Turnover Proceeds. The Senior Debt Holders' interest gives them the right to engage the assistance of the court to effect the full implementation of the trust created by the Plan.

29 In relying on Article 6.2(3) of the Note Indenture to accomplish this full implementation, the Senior Debt Holders effectively ask the court:

> (a) to order that the Turnover Proceeds be paid to the Noteholders who, on receipt, are obliged by Article 6.2(3) to hold the proceeds in trust for the Senior Debt Holders and to pay those proceeds over to them until they are paid in full, and
>
> (b) to enforce their right as beneficiaries of the arrangement set up by Article 6.2(3) to this payment.

30 We agree that the court below was correct to so order. The payment to the Noteholders is ordered simply as a step in the full implementation of the arrangement, and once these steps are taken, the Noteholders are to be held to the terms of the trust that results. The Senior Debt Holders are entitled to have the court ensure that the proper beneficial interests in both trusts are respected.

31 On appeal, the Noteholders raise two additional arguments.

32 First, they rely on *Greenwood Shopping Plaza*, *supra*, to argue that unless the Senior Debt Holders can establish that Stelco was contracting as trustee for them in entering into the Note Indenture, they cannot rely on the trust exception to privity of contract so as to enforce Article 6.2(3).

33 We do not agree. As we read *Greenwood Shopping Plaza*, the fundamental question is whether Article 6.2(3) can be shown to create a trust in favour of the Senior Debt Holders once property flows. While evidence that Stelco contracted with that intention would point to that conclusion, here the language of the Article itself is so explicit that it is more than enough to show the establishment of the trust contended for by the Senior Debt Holders.

34 Second, the Noteholders argue that the Indenture could have been amended without notice to or consent from the Senior Debt Holders and that this is inconsistent with Article 6.2(3) providing for the trust contended for by the Senior Debt Holders.

35 Again, we disagree. Not only has there been no such amendment, but Article 6.8 of the Note Indenture provides that Stelco cannot act to impair any subrogation rights of the Senior Debt Holders. Moreover, *Greenwood Shopping Plaza* makes clear that whether the parties can change the contractual terms creating the trust is but one test (although a common one) to determine whether a trust has been created. As we have said, in this case, the language of Article 6.2(3) is enough to make it crystal clear that that has happened.

36 In summary, on this issue we agree with the motion judge. The Senior Debt Holders are entitled to the benefit of the trust established in their favour pursuant to Article 6.2(3) of the Note Indenture.

(c) Cancellation of the Turnover Provisions

37 The Noteholders argue that the motion judge erred in failing to conclude that because the Plan cancelled the Note Indenture on implementation, it necessarily cancelled the Turnover Provisions which were included in the Note Indenture. Thus, the Senior Debt Holders are no longer entitled to enforce their subordination rights that are embodied in the Turnover Provisions.

38 Article 4.01 of the Plan provides for the cancellation on implementation of Stelco debentures which include the Note Indenture. The relevant part of that Article reads:

> [A]ll debentures ... subject to Section 6.01(2) will be cancelled and null and void, and all debentures ... will not entitle any holder thereof ... to any compensation or participation other than as expressly provided for in this Plan[.]

39 The motion judge rejected the Noteholders' argument. He held that section 6.01(2) of the Plan was the complete answer. That section provides as follows:

> [N]othing 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) ... to maintain or pursue claims or other remedies, including any third party beneficiary claims or remedies they may have, against holders of the [Notes].

40 The Noteholders argue that s. 6.01(2) does not preserve the substantive rights of Senior Debt Holders contained in the Turnover Provisions. Rather, they say that the section provides only that the Plan would not preclude the Senior Debt Holders from advancing other claims not based on the Note Indenture or the Noteholders from raising defences to such claims.

41 We do not agree that s. 6.01(2) should be read in this manner. We agree with the motion judge that the most reasonable interpretation of s. 6.01(2) is that implementation of the Plan would not affect the substantive rights and obligations of the Senior Debt Holders and the Noteholders in respect of the Turnover Provisions. While the language of s. 6.01(2) does not explicitly refer to the Turnover Provisions, it does preserve "the ability of [Senior Debt Holders] to maintain or pursue claims or remedies, including any third party beneficiary claims or remedies, they may have against the [Noteholders]". The plain meaning of this language would protect all of the then-existing rights of the Senior Debt Holders against the Noteholders which unquestionably include the rights embodied in the Turnover Provisions.

42 Moreover, there is nothing in the language of s. 6.01(2) or elsewhere in the Plan to suggest that the Senior Debt Holders intended to forego their rights of subordination found in the Turnover Provisions. Indeed, there does not appear to be any commercial basis that would have led the Senior Debt Holders to vote in favour of a Plan that had the effect of removing the priority accorded to them by those provisions.

43 We read s. 6.01(2) as providing a method by which the parties could proceed with implementing the Plan without having to await the resolution of possible disputes between the Senior Debt Holders and the Noteholders with respect to the Turnover Provisions. The potential delay in awaiting such a resolution could be lengthy, as the present litigation has shown, and possibly fatal to the implementation of the Plan. From a commercial and practical standpoint, the approach adopted in s. 6.01(2) made a good deal of sense.

44 We note that this approach of delaying the resolution of inter-creditor disputes is not inconsistent with the scheme of the *CCAA*. In a ruling made on November 10, 2005, in the proceedings relating to Stelco reported at (2005), 15 C.B.R. (5th) 297 (Ont. S.C.J. [Commercial List]), Farley J. expressed this point (at para. 7) as follows:

> The *CCAA* is styled as "An Act to facilitate compromises and arrangements between companies and their creditors" and its short title is: *Companies' Creditors Arrangement Act*. Ss. 4, 5 and 6 talk of compromises or arrangements between a company and its creditors. There is no mention of this extending by statute to encompass a change of relationship among the creditors *vis-à-vis* the creditors themselves and not directly involving the company.

45 Thus, we agree with the motion judge's interpretation of s. 6.01(2). The result of this interpretation is that the Plan extinguished the provisions of the Note Indenture respecting the rights and obligations as between Stelco and the Noteholders on the Effective Date. However, the Turnover Provisions, which relate only to the rights and obligations between the Senior Debt Holders and the Noteholders, were intended to continue to operate.

(d) Proof of Deficiencies

46 The Noteholders submit that the motion judge erred in failing to require each of the Senior Debt Holders to prove by evidence the amount of its actual Deficiency after receiving the distribution under the Plan.

47 The Note Indenture creates the Senior Debt Holders' subrogated rights against the Noteholders. Article 6.2, which is reproduced above, provides that in the event of insolvency or bankruptcy proceedings, the holders of all Senior Debt are entitled to be paid in full before the Noteholders are entitled to receive any payment or distribution. It further provides that any payment or distribution made to the Noteholders will be paid to or held in trust for the Senior Debt Holders to the extent necessary to make payment of all Senior Debt remaining after giving effect to any concurrent payment or distribution to the Senior Debt Holders. The Noteholders argue, therefore, that the motion judge should have required the Senior Debt Holders to prove the amount outstanding on their debts after receiving and disposing, if that is what occurred, of the Distributed Assets.

48 The thrust of the Noteholders' argument is that some Senior Debt Holders sold their securities in the new Stelco during the days or weeks immediately following the Effective Date at prices well in excess of the subscription price paid for those securities under the Plan. Others who did not sell at the higher prices could have done so. Thus the Noteholders argue the motion judge should have required each Senior Debt Holder to call evidence to prove its individual deficiency. In effect, the Noteholders ask for an accounting by each Senior Debt Holder at some point after receipt of their securities in the new Stelco.

49 The Noteholders argue that failure to call this type of evidence resulted in a failure to prove the individual claims of the Senior Debt Holders and for that reason the deficiency claims based on the subrogation right should have been dismissed.

50 The motion judge rejected this argument and proceeded by calculating the amount of the Deficiency on a collective rather than an individual basis. The amount owing to the Senior Debt Holders before implementation of the Plan was not in dispute. From this amount, the motion judge deducted the total amount of cash paid to the Senior Debt Holders together with the value he placed on the securities received by them as of the Effective Time. Below, we deal with the issue of whether or not the motion judge erred in the way that he valued the Distributed Assets. For present purposes, we need only concern ourselves with the general approach adopted by the motion judge, not the actual amounts resulting from that process.

51 In our view, the motion judge adopted the correct approach in calculating the Senior Debt Holders' Deficiency. It was not necessary for him to assess each claim on a collective, rather than an individual, basis. Both the Note Indenture and the Debenture Indentures contemplate claims being made on a collective basis.

52 The evidence about the amount owing to the Senior Debt Holders collectively was not in dispute, nor was the evidence about the distributions made to the Senior Debt Holders under the Plan. The only question was what value should be attributed to the securities being received by the Senior Debt Holders on implementation. The question was not: What did the Senior Debt Holders do with the securities after implementation or what could they have done?

53 Article 6.2(2) of the Note Indenture is clear that in the event of bankruptcy or insolvency proceedings, the Noteholders are required to make payment in full of the Senior Debt remaining unpaid after giving effect to any concurrent payment or distribution to the Senior Debt Holders. The exercise required under this provision is to look at the payment or distribution to the Senior Debt Holders in order to ascertain what remains unpaid. To complete this

exercise it was not necessary for the Senior Debt Holders to call evidence to establish what they did with the securities they received after implementation.

54 The Senior Debt Holders assumed the market risks, benefits and burdens, after they received the securities. The Noteholders are not entitled to benefit in market increases realized by the Senior Debt Holders after the implementation of the Plan.

55 Thus, we agree that the motion judge correctly proceeded with the Senior Debt Holders deficiency claim on a collective rather than individual basis. We also agree that he did not err in not requiring the Senior Debt Holders to prove their individual claims by calling evidence about what securities were sold or at what prices securities could have been sold after implementation.

(e) Post-Filing Interest

56 The Noteholders submit that the trial judge erred in concluding that the Senior Debt Holders were entitled to post-CCAA-filing interest on their outstanding amounts. The Noteholders make two arguments.

57 First, the Noteholders say that under the Plan, interest is only payable to creditors up to and including the filing date. They base this argument on the definition of a claim in the Plan which is as follows:

> [A]ny right of any Person against one or more of the Applicants in connection with any indebtedness, liability or obligation of any kind of any one or more of the Applicants in existence on the Filing Date and any interest thereon and costs payable in respect thereof to and include the Filing Date[.]

58 The Noteholders submit that any claim the Senior Debt Holders have for interest must be based on a "claim" they have against Stelco for such interest. If the Senior Debt does not include post-filing interest, there can be no claim against the Noteholders for such amounts.

59 We do not accept the Noteholders' argument. We note that the Debentures were not cancelled until the implementation of the Plan on March 31, 2006. Section 6.01(2) of the Plan specifically contemplates that the Senior Debt Holders will be able to claim interest against the Noteholders up to the point at which they are paid in full. For convenience, we repeat the relevant language of s. 6.01(2) here:

> [T]he fact that the Plan provides that the calculation of the quantum of Claims and Affected Claim[s] is limited to principal, plus interest accrued to the Filing Date .... 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 for 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 implement, even amounts in excess of their Claims or Affected Claims for purposes of the Plan[.] [Emphasis in original.]

60 In our view, a fair reading of the Plan as a whole indicates that the definition of "claim" in the Plan was not intended to limit the Senior Debt Holders' claims for interest on outstanding debt after the filing date. The definition of a claim relied upon by the Noteholders was intended only to form the basis upon which the amounts of claims against the company can be fixed for voting purposes in order to allow the company's affairs to be administered in the *CCAA* proceedings.

61 The question then becomes whether the Debentures provide that interest would accrue after the institution of the *CCAA* proceedings. We are satisfied that they do. The Debentures specify that Stelco would pay principal and interest accrued thereon, including in the case of default, interest on the amount of the default, so long as any Debentures remain outstanding. The Debentures remained outstanding after the filing in the *CCAA* proceedings until the Plan was implemented on March 31, 2006. Clearly, the Debentures contemplated that interest would continue to accrue post-filing.

62 Moreover, nothing in the Note Indenture limits the Senior Debt Holders' entitlement to interest as of filing under a *CCAA* Plan. Parties to the Note Indenture expressly addressed the possibility of the insolvency of Stelco and established the Turnover Proceeds process. In doing so, the Note Indenture did not limit the Senior Debt Holders to pre-filing interest claims. On the contrary, the Noteholders agreed that they would not receive any payment from Stelco until after all Senior Debt had been paid in full. Senior Debt was defined as "the principal of the premium (if any) and interest ...".

63 Thus, we do not accept the Noteholders' argument that the Plan limited the Senior Debt Holders' claim to pre-filing interest.

64 The Noteholders' second argument is that the Senior Debt Holders are not entitled to post-filing interest because of an "Interest Stops Rule". According to this argument, interest would only be paid up to the filing date in all bankruptcy, winding up and related proceedings, including restructurings under the *CCAA*. The policy reasons for the rule are that one creditor's *pro rata* share of the debtor's filings should not increase faster than another's and also that claims in a *CCAA* proceeding should be fixed and not subject to continual recalculation for interest.

65 The Noteholders point out that the *CCAA* defines a claim as "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." Post-filing interest cannot be claimed under the *BIA*.

66 The trial judge rejected these arguments, correctly in our view.

67 To start, there is no persuasive authority that supports an Interest Stops Rule in a *CCAA* proceeding. Indeed, the suggested rule is inconsistent with the comment of Justice Binnie in *NAV Canada c. Wilmington Trust Co.*, [2006] 1 S.C.R. 865 (S.C.C.) at para. 96, where he said:

> While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the *Bankruptcy and Insolvency Act*.

68 Justice Binnie's comment highlights the point that not all companies emerge from *CCAA* proceedings. Some are converted into *BIA* proceedings. When that happens, claims under the *BIA* include interest up to the date of the bankruptcy and, therefore, could include claims after a *CCAA* filing.

69 In our view, the definition of claim in the *CCAA* is not intended to limit payments to creditors. Indeed, the Noteholders accept that Plans can and sometimes do provide for payments in excess of claims filed in the *CCAA* proceeding. That fact argues against an interpretation of the definition of a claim in the *CCAA* that would limit payments to the creditors.

70 In our view, the definition of claim in the *CCAA* is intended to set a date in order to crystallize a point in time at which claims against the company can be fixed for voting purposes in order that the estate may be administered. It has nothing to do with the amount of payments to the creditors. As we set out above, s. 6.01(2) of the Stelco Plan contemplated the continuation of accrual of interest to the Senior Debt Holders after the *CCAA* filing date. We do not accept that there is a "Interest Stops Rule" that precludes such a result.

(f) Disposition

71 Accordingly, for the reasons set out above, the Noteholders' appeal is dismissed.

III. The 2074600 Ontario Inc. Appeal (C46258)

72 2074600 Ontario Inc. is the assignee of a claim against Stelco by EDS Canada Inc. ("EDS"). The EDS Claim arises out of a Master Information Technologies Services Agreement entered into between Stelco and EDS in February

2002 (the "MITSA"). Under that Agreement, Stelco outsourced and transferred to EDS all of its information technology ("IT") services and needs. Stelco's anticipated costs for operational and project fees over the ten-year period contemplated by the MITSA were approximately $320 million. At the time of the CCAA filing Stelco's indebtedness to EDS was fixed at $48,994,917.

73 The issue before us is whether Stelco's indebtedness to EDS places 2074600, as assignee, amongst the class of Senior Debt Holders and therefore entitles 2074600 to its *pro rata* share of the Turnover Proceeds. The answer to this question depends upon whether the EDS indebtedness falls within the definition of "Senior Debt" in the Note Indenture.

74 "Senior Debt" is defined in the Indenture as follows:

> "Senior Debt" means the principal of, the premium (if any) and interest on: (i) indebtedness, other than indebtedness represented by the [Noteholders], for money borrowed by [Stelco] or for money borrowed by others for the payment of which [Stelco] is liable; (ii) indebtedness incurred, assumed or guaranteed by [Stelco] 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.]
>
> [Emphasis added.]

75 In short — as all counsel agreed the motion judge properly asked himself — the issue is whether the acquisition transaction contemplated by the MITSA was out of the ordinary course of business for Stelco. 2074600 says it was. The Debentureholders and the Noteholders (aligned in interest on this issue) say it was not. The motion judge agreed with the Debentureholders and the Noteholders. He held that the EDS Claim did not constitute "Senior Debt".

76 Respectfully, we disagree.

77 The motion judge began his consideration of the EDS Claim by observing that 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": see *Pacific Mobile Corp., Re*, [1985] 1 S.C.R. 290 (S.C.C.), at 291. He therefore correctly determined that he must interpret the term in the context of the definition of "Senior Debt" and the circumstances of this case.

78 Having reviewed the three-part definition of "Senior Debt", the motion judge set out the substance of his decision as to the approach to be taken:

> 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's 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.

> 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.

79 The motion judge then went on to find that the MITSA did not satisfy his test for essentially three reasons. First, he concluded that the transaction contemplated by the MITSA "will not significantly change the nature of Stelco's business or the scale of its operations. Nor will its change either the products manufactured and sold by Stelco over this period or Stelco's manufacturing or distribution activities". Secondly, he found it necessary to separate the components of the MITSA into its "ordinary course elements" and its "non-ordinary elements", and he decided that the former outweighed the latter. Finally, while the total fees anticipated over the ten-year term of the MITSA were "undoubtedly significant", the motion judge found that the annual expenditures involved were not materially greater than those under other outsourcing arrangements Stelco had entered into and that there was "no evidence that the transaction contemplated by the MITSA was material to the projected annual financial performance of Stelco".

80 The Debentureholders and Noteholders stress that this court has emphasized on a number of occasions that Commercial List judges, particularly those supervising a *CCAA* proceeding, are entitled to considerable deference: see *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.) at para. 63; *Stelco Inc., Re* (2006), 21 C.B.R. (5th) 157 (Ont. C.A.), at 160; and *BNY Capital Corp. v. Katotakis*, [2005] O.J. No. 623 (Ont. C.A. [In Chambers]) at para. 8. They also submit that a determination of whether a transaction falls within "the ordinary course of business" of an enterprise is an issue of fact: see *McDonic v. Hetherington (Litigation Guardian of)* (1997), 31 O.R. (3d) 577 (Ont. C.A.), at 583; and *Ontario (Public Trustee) v. Mortimer* (1985), 49 O.R. (2d) 741 (Ont. H.C.), at 750. Accordingly, they argue that we should not interfere with the findings of the motion judge — an experienced Commercial List judge interpreting a commercial contract — as he made no palpable and overriding error and is entitled to deference.

81 Determining whether a transaction occurs in the ordinary course of business entails more than simply the finding of facts and the drawing of inferences from those facts, although the fact finding exercise is clearly a central part of the process. "Ordinary course of business" is a legal notion and the decision as to whether a certain set of facts falls within that category, or does not, has generally been arrived at by courts through an examination of various factors associated with the notion — about which we will have more to say later. In this sense, we prefer the approach taken by the Alberta Court of Appeal in *369413 Alberta Ltd. v. Pocklington* (2000), 271 A.R. 280 (Alta. C.A.), namely that such a determination is a question of mixed fact and law. As Fruman J.A. noted at para. 23:

> While a reviewing court will defer to a trial judge's fact findings, a determination that a transaction was in the ordinary course of a company's business is a mixed question of fact and law. A failure to consider the appropriate factors constitutes reviewable error.

82 We do not read Justice Doherty's comments in *McDonic Estate*, *supra*, to mandate any different conclusion. There, the court was dealing with whether a law firm was vicariously liable for the actions of a partner who had invested funds deposited in the firm's trust account on behalf of the plaintiffs. The answer depended on whether the partner's actions fell within the scope of his implied authority, which they did if they fell within the ordinary course of business of the law firm. The meaning of the legal norm was not in issue. Doherty J.A. observed that the question was a factual one — without focusing on whether it was a question of fact alone or of mixed fact and law — and noted that the trial judge's finding that the partner's activities did not fall within the scope of the firm's ordinary course of business "must stand unless tainted by an error of law, a serious misapprehension of the evidence, or a failure to consider relevant evidence". This conclusion is not inconsistent with the approach taken by the Alberta Court of Appeal in *Gainers.*

83 The Supreme Court of Canada recognized the importance of "the constant interplay between law and fact" in *Pacific Mobile*, *supra*, at 291, adopting the comments of Monet J.A. in the Quebec Court of Appeal in that case: (1983), 44 C.B.R. (N.S.) 190 (Que. C.A.) at 205. And in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.) at paras. 32-36, the Supreme Court of Canada also recognized that, although the findings of a judge of first instance on issues of mixed fact and law will generally be entitled to deference on the "palpable and overriding error" standard, where the judge has erred in applying a "readily extricable" legal principle in making those findings the review will be conducted in accordance with a less stringent standard. A failure to consider appropriate factors or an error in determining the factors to be applied will fall into this latter category.

84 In our view, the motion judge fell into such error here. We say this for a number of reasons.

85 First, his approach to the resolution of the ordinary course of business issue was grounded in his view that the concept of an "ordinary course" acquisition in the definition of Senior Debt in the Note Indenture should be interpreted broadly and that of a "non-ordinary course" acquisition, narrowly. This approach was driven by his view of the terms of the Note Indenture, particularly the definition of "Senior Debt" and his perception that the reference to the acquisition of "services" in the definition was secondary — included "to reflect the possibility that an acquisition could include a service component, rather than the possibility of a 'services only' transaction." We do not understand why, as the motion judge said (reasons, para. 157), "the reference to '*business, property*, services *or other assets*' [emphasis added by the motion judge] suggests that the principal focus of the clause is the acquisition of businesses [the first item mentioned] or assets [the last mentioned]" rather than on "services" (the third item mentioned). We can see no basis for singling out "services" from the list and assigning it a lower level of significance. These are not matters of fact; they are matters of contractual interpretation.

86 Secondly, while the motion judge acknowledged, and found, that the MITSA transaction "was a *unique* outsourcing transaction" and that it "was both *comprehensive* in terms of the scope of Stelco's IT requirements" and also "*significant* to Stelco, because a failure by EDS to perform adequately would be costly" [emphasis added], he gave these important factors little, if any, consideration in making his ordinary course of business determination.

87 Thirdly, in establishing the criteria that he did for resolving the issue, he set the bar so high that a non-ordinary course of business acquisition in relation to services is practically impossible. This stems, at least in part, from his conclusion that an acquisition in relation to "services" does not rank at the same level as other types of acquisitions. On our reading of the Note Indenture, this interpretation is inconsistent with the intention of the parties to it.

88 Finally, the motion judge erred, in our view, by entirely discarding the factors taken into account in the existing jurisprudence concerning what may constitute a transaction out of the ordinary course of business. He did so on the basis that the cases relied upon by 2074600 "dealt with the disposition of assets, rather than acquisitions, in circumstances in which the applicable covenant or legislation is directed toward fair treatment of, or protection of, creditors", and that "[t]hey do not deal with the concept of non-ordinary course transactions involving the purchase of assets or services by a solvent company". The cases referred to are *Pacific Mobile*, *supra* (a fraudulent preference case); *Roynat Inc. v. Ron Clark Motors Ltd.* (1991), 1 P.P.S.A.C. (2d) 191 (Ont. Gen. Div.) (covenant in a floating charge); and *Rowbotham v. Nave* (1991), 1 P.P.S.A.C. (2d) 206 (Ont. Gen. Div.) (bulk sales legislation). But see also, *Fairline Boats Ltd. v. Leger* (1980), 1 P.P.S.A.C. 218 (Ont. H.C.) (whether sale of a boat by a dealer was in the ordinary course of business); *369413 Alberta Ltd. v. Pocklington*, *supra* (sale of shares of a subsidiary company); *Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd.* (2002), 214 D.L.R. (4th) 121 (Ont. C.A.) (sale of all or substantially all of assets outside of the ordinary course of business in a dissenting shareholder rights context); and *Aubrett Holdings Ltd. v. R.*, [1998] G.S.T.C. 17 (T.C.C.).

89 Respectfully, we do not understand the significance of the distinction drawn by the motion judge between circumstances involving the disposition of assets and those involving acquisitions for these purposes. When the Supreme Court of Canada observed that it is unwise "to give a comprehensive definition of the term 'ordinary course of business'

for all transactions" (*Pacific Mobile*, *supra* at 291), the court did not mean that there were no recognizable indicia or factors to be considered; it simply meant that no single criterion or set of criteria was suitable for all cases. While there may be different considerations in situations involving fraudulent preferences, bulk sales transactions, tax cases or dissenting shareholders' rights cases, the factors taken into account by the courts in such circumstances may nonetheless be of assistance here because they help shed light on what courts have looked to in various contexts in order to decide whether a transaction is one that is in the ordinary course of business.

90 In our view, the foregoing errors by the motion judge moderate the deference to which his decision on a question of mixed fact and law would otherwise be entitled and permit us to reconsider the ordinary course of business analysis afresh.

91 In that regard, we start with the observation that the intention of the Note Indenture is clear: the Noteholders' claims are to be subordinated to *all* Senior Debt, as defined in the Indenture. Article 2.9 (Rank and Subordination) provides that "payment of the principal of and interest on the Debentures is expressly subordinated to the prior payment in full of Senior Debt, as provided in Article 6." Article 6 (Subordination of Debentures) opens with the declaration in 6.1 that:

> [Stelco] covenants and agrees, and each [Noteholder], 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*. [Emphasis added.]

92 The definition of "Senior Debt" is cited above. In substance, it encompasses all borrowings of a general nature and all borrowings for purposes of acquisitions (except acquisitions in the ordinary course of business), together with the refinancing of such borrowings. In our opinion, this concept of Senior Debt is quite broad and is intended to be so.

93 Accordingly, we see no reason why ordinary course acquisitions should be viewed broadly and non-ordinary course acquisitions addressed narrowly. Having regard to the purpose of Article 6.1 of the Note Indenture and the definition of Senior Debt, we think the contrary is the case. The purpose and intent of the Indenture was to ensure that creditors providing financing to Stelco, other than ordinary course of business creditors, would have priority over the Noteholders, who accepted that they were taking subject to such "Senior Debt".

94 It does not advance the case to argue — as the Debentureholders do — that because of the impact on other creditors' rights (namely, those of the Noteholders) the concept of non-ordinary course transactions should be interpreted narrowly and ordinary course transactions broadly. The only issue here is what "creditors' rights" are to be affected? We can see no basis for interpreting the Note Indenture in favour of one group of creditors over another simply because of what group they fall into. A reading of the definition of Senior Debt supports the view that debtholders who were creditors for "moneys borrowed" by Stelco — whether it be free-standing borrowing or indebtedness incurred in connection with the acquisition of business, property, *services* or assets — were to have priority over the Noteholders. The only exceptions were ordinary course of business acquisitions. Given this scheme, it is the exception that ought to be construed narrowly, not the principal provision.

95 The motion judge's opinion that the factors considered by other courts to be pertinent to the determination of what constitutes a transaction in the ordinary course of business, together with his view that non-ordinary course transactions should be narrowly construed in the circumstances of this case, led him to postulate his own test. In doing so, he set the bar very high. To qualify as a transaction out of the ordinary course of business, he concluded that an acquisition must have the effect of *significantly changing* either (a) the nature of the business conducted by Stelco (the goods and services it produced or sold, the scale of its operations, the manner of manufacturing or distributing the products it sold) and/or (b) the financial results of Stelco.

96 The motion judge cited no authority for such a prohibitive test, and we are aware of none. Undoubtedly, an acquisition that met those criteria would be a non-ordinary course of business transaction, but we do not read anything

in the Note Indenture or in the jurisprudence that requires a transaction that is out of the ordinary course of business to be of such a corporate landscape-changing nature.

97 In *Gainers*, *supra*, Fruman J.A. noted (at para. 21) that:

> The analysis is to be achieved through an objective examination of the usual type of activity in which the business is engaged, followed by a comparison of that general activity to the specific activity in question. *The transaction "must fall into place as part of the undistinguished common flow of business carried on, calling for no remark and arising out of no special or peculiar situation*": Aubrett Holdings Ltd. v. Canada [1998] G.S.T.C. 17 (T.C.C.). [Emphasis added.]

98 In *Roynat Inc. v. Ron Clark Motors Ltd.*, *supra*, at 197, Herold J. cited *Bradford Roofing Industries Proprietary Ltd., Re*, [1966] 1 N.S.W.R. 674 (New South Wales S.C.) — a decision of the New South Wales Supreme Court — to the same effect:

> The transaction must be one of the ordinary day to day business activities, having no unusual features, and being such as a manager of a business might reasonably be expected to be permitted to carry out on his own initiative without making prior reference back or subsequent report to his superior authorities such as, for example, to his board of directors.

99 These observations are consistent with dictionary explanations. *The Shorter Oxford English Dictionary*, 3rd ed., defines "ordinary" as being "of common occurrence, frequent, customary, usual" and "of the usual kind, not singular or exceptional". It defines "course" as meaning "habitual or ordinary manner of procedure; way, custom, or practice". *Black's Law Dictionary*, 6th ed., describes "ordinary course of business" in the following fashion:

> The transaction of business according to the common usages and customs of the commercial world generally or of the particular community or (in some cases) of the particular individual whose acts are under consideration. ... *In general, any matter which transpires as a matter of normal and incidental daily customs and practices in business*. [Emphasis added.]

100 Given these parameters, it is hard to appreciate why a transaction that is not in the ordinary course of business should be required to meet such a high threshold as that ascribed to it by the motion judge in the circumstances of this case — particularly keeping in mind the purposes and intent of the Turnover Provisions in the Note Indenture.

101 A number of helpful benchmarks may be gleaned from a review of the authorities and the citations referred to above for purposes of determining whether the MITSA transaction constitutes an acquisition of services in the ordinary course of Stelco's business. They include a consideration of whether the transaction:

> a) is distinguishable from the normal course of the company's operations because of its particular complexity or its far-reaching or otherwise unusual nature;
>
> b) arose out of some special or peculiar situation;
>
> c) required approval from the company's shareholders or board of directors;
>
> d) was given special notice by the company;
>
> e) was an unusual or isolated undertaking as opposed to a routine one; or,
>
> f) is reflective of standard practice in the relevant industry.

102 The motion judge was not unmindful of all of these factors. As we have indicated, however, he weighed those that he did consider against what we take to be an unsuitably high standard.

103 In our view, the transaction envisaged in the MITSA was not a transaction in the ordinary course of Stelco's business. We say that having regard particularly to a number of factors and characteristics.

104 First, as the motion judge found, the MITSA was a uniquely comprehensive and significant transaction for Stelco. The evidence was that no outsourcing transaction in Stelco's history was comparable to it. It contemplated a total amount payable by Stelco over its ten-year term of more than $320 million.

105 The MITSA involved the total transition of Stelco's IT assets and virtually all business applications and IT employees from Stelco to EDS and the complete transfer from Stelco to EDS of all responsibility for Stelco's IT needs. As well as providing for the transfer of IT assets from Stelco to EDS and from EDS to Stelco, and for the provision of all services in relation to Stelco's IT needs, the MITSA provided for the integration, through a series of enterprise resource planning systems ("ERPs"), of all aspects of Stelco's business from procurement or materials to shipping of finished products. The ERPs consisted of three projects: (i) a synchronous manufacturing system, (ii) an asset management system, and (iii) human resources and financial management systems. The effect was to overhaul and change completely Stelco's manufacturing, asset management, human resource and financial management systems.

106 As Mr. Steiner put it in his factum and in oral argument on behalf of 2074600: "If this extraordinary contract for services ... is not out of the ordinary course of business for Stelco, what possible contract for services could be?" [3]

107 Second, the MITSA was a one-time transaction — isolated, unusual, and far from routine in the course of Stelco's business.

108 Third, the MITSA was the subject of a special public announcement by Stelco. The Debentureholders and the Noteholders argue that it is the content — or, rather, what is missing in the content — of the press release that is significant, not the public announcement itself. They say this because the press release made no specific mention of the fact that the MITSA indebtedness would constitute Senior Debt and therefore the market could not be expected to react on the basis that it did. In our view, however, the significant point is that Stelco felt the transaction was sufficiently important and unusual that public disclosure was necessary, a step the company rarely took when entering into a procurement contract. Stelco's indebtedness with regard to the MITSA was treated as long-term indebtedness, and was specifically mentioned on its financial statements. In short, the transaction — to adopt the language of *Aubrett Holdings*, *supra* — was not treated as one "calling for no remark". It received special notice.

109 Fourth, the MITSA entailed complex provisions relating to financing that were unusual to Stelco and to EDS. Because the material and evidence filed on this issue contains confidential information and has been ordered sealed, no more need be said about it.

110 Finally, the transaction was not one that could be carried out on management's own initiative. It required, and received, approval from Stelco's board of directors.

111 The fact that others in the steel industry may be outsourcing their IT needs as well, and the fact that Stelco engaged in other outsourcing transactions itself, are indicative of the increasing popularity of this particular practice, but they are not dispositive of whether the transaction envisaged in the MITSA is an ordinary course of business transaction for Stelco. In the end, the transaction provided for in the MITSA involved a fundamental change to the way in which Stelco carried on its integral IT operations — and through that, its manufacturing operations — at a cost and in a fashion that was considered sufficiently significant to call for public disclosure, and which required and received board of director approval. It was characterized by unusual and complex financial arrangements. Even if the motion judge were correct in his conclusion that the MITSA did not effect a significant change in the nature of the business Stelco conducted — it continued to manufacture and distribute steel products — the transaction was not "one of the ordinary day to day business activities, having no unusual features" (*Bradford Roofing Industries Proprietary Ltd., Re*), or "part of the

undistinguished flow of business carried on, calling for no remark" (*Aubrett Holdings*, as adopted in *Gainers*). It did not transpire "as a matter of normal and incidental daily customs and practices in business" (*Black's Law Dictionary*).

112 The property, services and assets provided for in the MITSA were not acquisitions made in the ordinary course of Stelco's business. Accordingly, the indebtedness incurred by Stelco to EDS (and therefore to 2074600, as assignee of EDS) constitutes "Senior Debt" within the meaning of the Note Indenture.

113 2074600 Ontario Inc. is a Senior Debt Holder and is entitled to its *pro rata* share of the Turnover Proceeds in that capacity. Its appeal in this regard is allowed.

IV. The Debentureholders' Appeal (C46266)

(a) Overview

114 The Debentureholders and the Noteholders disagree on the value of the Distributed Assets. This has an effect on the value of the Deficiency (if any), which in turn determines how the Turnover Proceeds will be distributed amongst the parties. The Debentureholders assign a lower value to the Distributed Assets ($217,215,846) compared to the Noteholders' valuation ($294,497,863). This means that by the Debentureholders' calculation, the Deficiency is $125,439,818 whereas the Noteholders calculate the Deficiency to be much lower ($48,157,801).

(b) The Source of the Disagreement

115 The Debentureholders adduced evidence from different sources that supported a finding that the value of the New Common Shares on the Effective Date was $5.50 per share. They also argued that the New FRNs should be valued at par (face value) and that the New Warrants should be valued at $1.44 per warrant.

116 The Noteholders did not adduce conflicting evidence regarding the value of the shares on the Effective Date; instead, they adduced evidence by way of a report prepared by a derivatives expert who assigned a value to the Distributed Assets based on the volume weighted average price ("VWAP") of the securities during the first week of trading, beginning on April 3, 2006.

(c) The Motion Judge's Reasons

117 The motion judge used a third set of figures and his own methodology to arrive at a different set of valuations. He did not agree with either party's position on valuation. He held 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." The motion judge also held that the definitions of "fair market value", "fair value", and "intrinsic value" were not helpful to determine the definition of "value" to the extent that those terms mean "something other than the price of the securities in an open market", because the issue was not whether the Debentureholders had received "fair" value, but rather what value should be ascribed to the assets.

118 The motion judge rejected the parties' positions on the grounds that neither method of valuation was an appropriate reflection of the value of the securities on the Effective Date. He then determined that the best evidence of the value of the Distributed Assets was the VWAP from the first trading day after the Effective Date. In the case of the New Common Shares and the New Warrants, the first day of trading was April 3, 2006; for the new FRNS, the first trading day was April 5, 2006. The motion judge did not take into account block discounts or a lack of liquidity in the marketplace to alter those values. He valued the Distributed Assets at a total of $276,487,090, leaving a Deficiency of $66,168,574.

119 Both the Debentureholders and 2074600 appeal the motion judge's reasons with respect to his valuation methodology.

(d) Analysis

120 A central issue on this appeal relates to the price to be attributed to the securities distributed by Stelco — in particular, the price of its New Common Shares — as part of the compromise of its debt. The issue arises because of the Subordinated Noteholders' obligation under the Note Indenture to make the Senior Debt Holders whole out of any proceeds they (the Notheholders) receive in an insolvency or reorganization. Only after the Senior Debt Holders have been paid in full are the Noteholders entitled to recover on their own account.

121 Articles 2.9, 6.1 and 6.2 of the Note Indenture, which are cited in full elsewhere in these reasons, set out these obligations on the part of the Noteholders. For present purposes, the provisions that are most relevant are those set out in section 6.2(3)[4] which states that in the event of the insolvency or reorganization of Stelco, any payments received from Stelco by the Noteholders or the Trustee, whether in cash, property or securities, before the Senior Debt is paid in full, are to be held in trust,

> and will be paid over to the holders of such Senior Debt ... for application to the payment of all Senior Debt remaining *until such Senior Debt has been paid in full, after giving effect to any concurrent payment or distribution (or provision therefore) to the holders of such Senior Debt.* [Emphasis added.]

122 There is no dispute about the amount of the Senior Debt remaining unpaid as at the Effective Date ($342,655,664 plus the EDS Claim of $48,994,917). Thus, the central issue for determination is how to "[give] effect to any concurrent payment or distribution ... to the holders of [the] Senior Debt" in order to determine whether the Senior Debt Holders had been "paid in full" and, if not, the extent of the Deficiency to be made up through the Turnover Proceeds ("the Deficiency Claim").

123 That is not the question the motion judge posed for himself, however. Both the Debentureholders and 2074600 argued that the New Common Shares and the New Warrants should be valued using the $5.50 subscription price for the New Common Shares under the Plan. The motion judge rejected this approach. Instead, he focused on the public markets and sought to determine what the "market value" was of Stelco's New Common Shares received in the distribution, as closely as that value could be determined to the Effective Time under the Plan.

124 At paras. 105 and 106 of his Reasons he said:

> The issue before 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, 2006 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.
>
> 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 values of the securities paid to them by selling them in the market. *Accordingly, the Court must determine the market price paid for the securities at the Effective Time*. [Emphasis added.]

Later, the motion judge concluded:

> 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.

125 Respectfully, however, the issue for the Court to determine was not the price the Senior Debt Holders could have obtained had they been able to trade their new securities at 11:59 p.m. on March 31, 2006 — their "market value" at that time. The issue was how to determine the "concurrent payment or distribution" received from Stelco by the Senior Debt Holders at the time of Stelco's emergence from *CCAA* protection at 11:59 p.m. on that date, and how to give effect to that concurrent payment or distribution for purposes of resolving whether the Senior Debt Holders had been paid in full, in the context of the Note Indenture and the Plan documents.

126 To interpret how to give effect to the payment received by the Senior Debt Holders "concurrently" — that is, concurrently with the payments received by, or on behalf of, the Noteholders in the *CCAA* insolvency proceedings — it is necessary to construe the provisions of the Note Indenture in the context of the language of the Plan itself and the negotiations leading up to its approval by the stakeholders and sanction by the Court. That is the factual matrix within which the meaning of this contract must be determined.

127 What, then, was the concurrent payment or distribution received by the Senior Debt Holders in exchange for the compromise of their claims on the emergence of Stelco from *CCAA* protection? The answer to that question is found in Article 2.03 of the Plan. What the Affected Creditors under the Plan — the Senior Debt Holders and the Noteholders included — received was their *pro rata* share of each of:

a) $275 million (U.S.) of the New Secured Floating Rate Notes ("FRNs");

b) the Cash Pool (subject to section 2.07 of the Plan);

c) 1.1 million New Common Shares; and

d) the New Warrants.

128 The argument on the appeal focused on the Senior Debt Holders' *pro rata* share of (b) and (c) above. The creditors were to receive a block of New Common Shares of Stelco as part of the compromise of their debt; they were prepared to invest and to take an equity position in the new Stelco to the extent of 1.1 million shares. They were also to receive a pool of cash which was to vary between $137.5 million and $108.5 million, depending upon the number of shares creditors elected to take up pursuant to Section 2.07 of the Plan, referenced in the caveat to (b) above.

129 Section 2.07 is the "Share Election" provision in the Plan. It does two things. First, it permits each Affected Creditor to "elect to receive all or any part of its distribution from the Cash Pool in New Common Shares at $5.50 per share", [5] thus providing an opportunity for electing Affected Creditors to take a further risk, in effect by engaging in a new transaction and investing part of their cash proceeds in the future of the new Stelco. Second — and significantly from the perspective of resolving what the concurrent payment or distribution received by the Senior Debt Holders was — Section 2.07 makes it clear that the size of the Cash Pool to be received on distribution is to be reduced by $5.50 for each New Common Share that is elected to be taken. Hence, the amount of cash that Stelco would be required to pay to exit from the *CCAA* process varied in the range referred to above, depending upon the number of New Common Shares the creditors elected to acquire.

130 All of this gives rise to the following questions. Viewed in the context of the Plan documentation and the negotiated compromise of the creditors' claims against Stelco, how should the words "give effect to any concurrent payment or distribution to the holders of such Senior Debt" in Articles 6.2(2) and (3) of the Note Indenture be interpreted? Leaving aside the FRNs and Warrants, was it the "concurrent payment or distribution" of cash and a bundle of $5.50 New Common Shares? Or was it the combination of cash and a bundle of shares distributed at the price they would fetch in the open market once trading commenced?

131 These are not questions of fact. They are questions of interpretation of the Note Indenture and the Plan documentation. Importantly, these questions focus on the proper approach to "giving effect to" the distribution of

securities to the Senior Debt Holders as part of the reorganization. The motion judge's decision is therefore entitled to less deference on appeal than would be the case if what was at issue were simply a question of fact or of inferences drawn from the facts. See paragraph 83 above, and *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.) at para. 33.

132 In our opinion — although the motion judge was correct in observing that marketable securities are normally valued on the basis of what they will bring in the open market — he erred in focusing on "market value" and rejecting the "plan value" approach urged upon him by the Debentureholders and 2074600 in the circumstances of this case. By doing so, he lost sight of the real issue for determination which, as mentioned above, is how to give effect to the concurrent payments or distribution received by the Senior Debt Holders in order to establish the extent of the Deficiency Claim. "Plan value" as opposed to "market value" is the touchstone for resolving that issue. Once this is recognized, much of the force in the motion judge's reasons for dismissing the criteria urged on him by the Debentureholders and 2074600 dissipates.

133 On a proper interpretation of Article 6 of the Note Indenture, in the context of the Plan documentation, what was paid or distributed by Stelco to the Senior Debt Holders and Noteholders pursuant to Section 2.03 of the Plan — leaving aside again the FRNs and the Warrants — was cash together with $5.50 New Common Shares (either as part of the Share Elect component or as part of the general New Common Share component of the payment or distribution to Affected Creditors). We say this for several reasons.

134 First, it makes sense that the "concurrent payment or distribution" to the Senior Debt Holders under the Note Indenture be determined by the Plan documents, since the Stelco reorganization is the source of the payment or distribution in question. The indicia of distribution price in the Plan documents point to $5.50 per share. [6]

135 Significantly, the Equity Sponsors under the Plan received 19,737,000 New Common Shares in exchange for their infusion of $108.5 million ($5.50 per share). Sunrise and Appaloosa — the two Noteholders leading this appeal — are two of the three Equity Sponsors. Each contributed approximately $27 million to acquire their roughly 4,950,000 shares at that price. Equally significantly, Senior Debt Holders and Noteholders who elected to take shares pursuant to Section 2.07 of the Plan (the "Share Elects") did so on the basis of accepting one New Common Share in lieu of $5.50 of their *pro rata* share of the Cash Pool.

136 Secondly, other indicia point in the same direction. For instance, Stelco itself publicly valued the New Common Shares issued at $5.50 per share "upon its emergence from *CCAA*": see Stelco's First Quarterly Report, March 2006, at p. 15. In addition, Stelco's board of directors approved a compensation package for its incoming CEO on the Effective Date. This package included a grant of 1 million New Common Shares at a price of $5.50 per share and a grant of options to acquire an additional 1,044,000 New Common Shares at a strike price of $5.50 per share. This transaction was consummated at the Effective Time as well and could not have taken place without the approval of the TSX, which was obtained. [7]

137 In the Amended Plan Sponsor Agreement, the Equity Sponsors (including Sunrise and Appaloosa) agreed (a) to inject new capital into Stelco in exchange for New Common Shares at a rate of $5.50 per share, and (b) to purchase any shares left over from the Share Election process at a price of $5.50. They also had a right to purchase any New Common Shares that a subscriber failed to purchase at the Effective Time for the same price.

138 Finally, it is apparent from the foregoing that the deal which was struck as a result of the negotiations leading up to the Plan and the acceptance and sanctioning of the Plan contemplated the distribution of $5.50 New Common Shares at the Effective Time. The Noteholders, as well as the Senior Debt Holders, were integrally involved in what Farley J. referred to at the Sanction Hearing as the "direct protracted negotiations" and "hard bargaining" of sophisticated parties, [8] and voted in favour of the Plan. In short, everyone knew, understood, and had agreed, that this was to be the case.

139 The notion of the "Effective Time" (11:59 p.m. on the Effective Date) is important. The entitlement of the Senior Debt Holders and the Noteholders to the payment or distribution only arises at that moment, which is when their claims are compromised and their debentures (subject to the Turnover Proceeds dispute) are cancelled. All other transactions relating to the emergence of Stelco from its insolvent state occur at, or as close as possible to, that moment as well.

140 We note this because, in rejecting the "Plan value" approach, the motion judge placed considerable emphasis on the fact that the $5.50 price was negotiated at the time of the creditors' acceptance of the Plan in December 2005, and therefore was not necessarily an accurate benchmark of the value of the shares on March 31, 2006. Similarly, the share election under Section 2.07 had to be made by January 20, 2006. These factors are of little import in assessing the payment or distribution received by the Senior Debt Holders at the Effective Time, however. Those creditors who elected to exercise their option under Section 2.07 and take shares in lieu of $5.50 in cash ("the Share Elect Creditors"), were not entitled to receive and did not have the right to receive those shares prior to the Effective Time. Though these decisions were made prior to the Effective Time, they were made with a view to what everyone agreed was the price of the New Common Shares at the Effective Time. The same is true of others who acquired New Common Shares as part of the reorganization.

141 Stelco distributed its New Common Shares to the Equity Sponsors, the Share Elect Creditors (also including many Noteholders) and its new CEO at a price of $5.50 per share, effective 11:59 p.m. on March 31, 2006. The Equity Sponsors, Share Elect Creditors and the new CEO purchased the shares for that amount at the same time. It makes no sense to say that Share Elect Creditors received those shares — at the same time and for purposes of compromising their claims — at some different distribution price (the average market price three days later), all as part of the same reorganization process. Nor does it make any sense to differentiate between the distribution price of the Share Elect shares and that of the 1.1 million New Common Shares that were distributed generally as part of the payment to Affected Creditors. If all other New Common Shares that were being sold and acquired as part of the reorganization at the same Effective Time were being distributed at $5.50 per share, why would the New Common Share component of the payment to Senior Debt Holders and the other Affected Creditors be distributed at any other price?

142 All of these factors — the provisions of Section 2.03 of the Plan itself; the robust negotiations leading up to acceptance of the Plan; the $5.50 price paid at 11:59 p.m. on the Effective Date by the Senior Debt Holders, the Noteholders and the Equity Sponsors for their New Common Shares, and the price at which the New Common Shares and the options were issued to the new CEO at the same time — demonstrate clearly that the price which was accepted and agreed to by everyone involved in the reorganization for purposes of Stelco's payment or distribution upon emerging from the *CCAA* process was $5.50 per share.

143 This was the payment or distribution price for purposes of "[giving] effect to [the] concurrent payment or distribution to the holders of [the] Senior Debt" called for in section 6.2(3) of the Note Indenture.

144 Moreover, the foregoing interpretation makes commercial sense. Stelco and the Affected Creditors — including the Senior Debt Holders and the Noteholders — needed certainty in order to make the reorganization work. Stelco needed to know, with as much certainty as possible, how much it was going to have to pay to compromise its debt and emerge from the *CCAA* proceedings to start afresh. The Senior Debt Holders and Noteholders needed to know, again with as much accuracy as possible, how much they were going to be paid on account of their claims in order to decide whether to vote in favour of, or against, the Plan. These goals could not be achieved through an interpretation of the language in the Noteholders Indenture that would leave the quantum of the "concurrent payment or distribution" received by the Senior Debt Holders to the vagaries of the market after the distribution was completed.

145 While the Affected Creditors as a whole were prepared to assume the risk of a relatively minor equity investment in the new Stelco — 1.1 million New Common Shares — as part of the price of arriving at a resolution of their claims — the Share Election provisions of Section 2.07 of the Plan provided a different opportunity. They gave creditors who were prepared to take the risk of a successful Stelco recovery a further opening to invest in that recovery by purchasing

additional New Common Shares in what was, in effect, a second transaction following the distribution. The fact that Section 5.04 of the Plan notionally treats the subscriptions for shares pursuant to the Share Election under Section 2.07 as having occurred *after* the distributions to the Affected Creditors, lends support to this "second transaction" concept. For purposes of establishing the extent of the Deficiency Claim, what is distributed to the Senior Debt Holders as the Cash Pool is either cash or the share equivalent of $5.50 in cash.

146 Although the foregoing analysis is limited to the Share Election shares, there is nothing in the Plan documentation or in the circumstances surrounding the reorganization — as we have mentioned above — to suggest that the New Common Shares as a whole should be treated on any different basis.

147 The appeal must therefore be allowed in this regard and the order of the motion judge dated October 31, 2006, varied to provide that the New Common Shares were paid or distributed by Stelco under the Plan at a price of $5.50 per share. Based on the price per share, the New Warrants should be valued at $1.44 per warrant. Given our conclusion that Plan value is to govern, the FRNs should be valued as stated in the Plan.

148 One further observation needs to be made. This decision should not be taken to have determined the value of the securities in the Turnover Proceeds to be used to provide "payment in full" of the Deficiency Claim. That issue was not before us.

V. The Share Elects' Appeal (C46916)

149 We have before us an appeal from the order of the motion judge dated March 6, 2007. This appeal involves a dispute between the Debentureholders who elected to take shares under Section 2.07 of the Plan and those who did not, as to the appropriate method of allocating the Turnover Proceeds amongst themselves.

150 The dispute had its genesis in the motion judge's earlier decision — the subject of the foregoing appeal — to apply a market value approach to the distributions under the Plan for purposes of quantifying the Senior Debt Holders' Deficiency Claim. Using the $17.72 per share market price per share fixed by the motion judge in his earlier decision for purposes of determining the allocation as between the Share Elect and the Cash Elect creditors had the effect of skewing the allocation of the Turnover Proceeds in favour of the Cash Elects and depriving the Share Elects of the benefit of their decision to invest in the new Stelco. The motion judge resolved this issue by concluding that the Turnover Proceeds should be allocated amongst the Senior Debt Holders based upon their respective claims under the Plan using a price of $5.50 per share. He said that this approach was consistent with what would have been the outcome of the earlier motion regarding the quantum of the Senior Debt Holders' Deficiency Claim if that issue had been resolved by determining the distribution price of the shares *before* giving effect to the Share Election, and hinted — none too subtly — that he may have erred in not doing so.

151 All counsel on the second appeal agreed, however, that if the first appeal were allowed with respect to the distribution price of the New Common Shares, and that price were fixed at $5.50 per share, this second appeal becomes moot. At a price of $5.50 per share, the Share Elects and the Cash Elects are treated equally on the allocation of the Turnover Proceeds. It is therefore unnecessary for us to decide the second appeal and it is dismissed as moot.

VI. Costs

152 As to costs, we ask counsel to discuss and resolve the issues if at all possible. If they are unable to do so, those parties seeking costs may make written submissions of no more than five pages each (in addition to their draft bills of costs) before July 31, 2007. Those opposing the requests may respond in writing, again no more than five pages, before August 15, 2007. Brief replies, if necessary, may be filed before August 20, 2007.

Order accordingly.

Footnotes

* A corrigendum issued by the court on July 3, 2007 has been incorporated herein.

1 He made other findings that are addressed below in our reasons relating to the appeals by 2074600 Ontario Inc. and the Debentureholders.

2 The "Senior Debt Holders" include the Debentureholders and, given that we conclude below that the EDS claim constitutes Senior Debt, 2074600 Ontario Inc.

3 Factum of 2074600 Ontario Inc., para 72.

4 Article 6.2(2) contains the identical operative language.

5 Subject to an aggregate of 5,264,000 shares, at which point the Share Elects are entitled to receive a *pro rata* share of that total.

6 While there is provision in the Plan for market liquidation of the shares and distribution of the proceeds to the Affected Creditor, where the Affected Creditor is resident in a jurisdiction where there are restrictions on the distribution of the securities (Article 4.05(1)), we view this provision as simply creating a mechanism for dealing with a potential problem, rather than as an indication of the price of the securities for distribution purposes.

7 TSX approval is significant because TSX issuers may not grant options at less than the market price of the securities at the time the option was granted: see *TSX Company Manual*, s. 613(h)(i).

8 Endorsement of Farley J. at the Sanctioning Hearing, January 20, 2006.

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