

Court File Number:

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

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

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

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

Respondents

**APPLICATION RECORD
OF THE APPLICANTS, AURELIUS CAPITAL MANAGEMENT, LP
and COLUMBUS HILL MANAGEMENT L.P.
(together, the "Fund Managers")
(Filed Pursuant to Section 40 of the *Supreme Court Act* and Rule 25(1)(a)
of the *Rules of the Supreme Court of Canada*)**

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NOTICE OF APPLICATION FOR LEAVE TO APPEAL
OF THE APPLICANTS, AURELIUS CAPITAL MANAGEMENT, LP
and COLUMBUS HILL MANAGEMENT L.P.
(together, the "Fund Managers")
(Filed Pursuant to Subsection 40(1) of the *Supreme Court Act* and Rule 25(1)(a)
of the *Rules of the Supreme Court of Canada*)

TAKE NOTICE that the Fund Managers hereby apply for leave to appeal to the Court pursuant to subsection 40(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended and rule 25(1)(a) of the *Rules of the Supreme Court of Canada*, from the Order of the Court of Appeal for Ontario in court of appeal file no. M38445 made March 9, 2010, in respect of an Order made by the Ontario Superior Court of Justice in court file no. CV-09-7966 on December 11, 2009, for its costs of this application and for any further or other order that the Court may deem appropriate;

AND FURTHER TAKE NOTICE that this application for leave is made on the following grounds:

Nature of the CCAA Proceedings and the Procedural History Leading to this Application

1. Stone Container Finance Company of Canada II ("**Finance II**") and Smurfit-Stone Container Canada Inc. ("**Smurfit Canada**") are applicants in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, bearing Ontario Court File no. CV-09-7966

(the “**CCAA Proceedings**”) and debtors in related proceedings under Chapter 11 of Title 11 of The United States Bankruptcy Code (the “**US Proceedings**”).

2. Finance II issued certain 7 3/8% Senior Notes due July 15, 2014 (the “**Notes**”) pursuant to an indenture dated as of July 20, 2004. The Applicants for leave to appeal, Aurelius Capital Management, LP and Columbus Hill Capital Management, L.P. (the “**Fund Managers**”), manage funds that hold a majority of the Notes.
3. Finance II loaned the US\$200 million proceeds from issuance of the Notes to Smurfit Canada (the “**Intercompany Loan**”) under a loan agreement dated July 20, 2004 (the “**Loan Agreement**”). The Loan Agreement is governed by Quebec Law.
4. The CCAA Applicants commenced a motion within the CCAA Proceedings for a determination by the CCAA court as to whether Finance II’s claim (the “**Intercompany Claim**”) against Smurfit Canada under the Loan Agreement should properly be characterized as an equity claim or a debt claim (the “**Characterization Issue**”).
5. Prior to raising this issue, the CCAA Applicants had always treated the Intercompany Loan as debt for all purposes, including for purposes of Canadian tax returns and accounting books and records. The CCAA Applicants received valuable tax benefits from this treatment. However, despite having filed schedules required in the US Proceedings characterizing the Intercompany Loans as debt, the CCAA Applicants then took the position that the Intercompany Loan was extinguished or converted into equity upon insolvency of Smurfit Canada.
6. All of Finance II’s directors are directors or officers of Smurfit Canada.

7. The interests of Finance II are directly adverse to those of Smurfit Canada and the other applicants in the CCAA Proceedings (the “**CCAA Applicants**”) with respect to recovery on all of Finance II’s disclosed assets, including the Intercompany Loan.
8. Finance II and Smurfit Canada are represented by the same counsel in the CCAA proceedings. Finance II and Smurfit Canada’s counsel also acted as counsel for both entities on the Finance II and predecessor Finance I loan transactions.
9. There is no evidence that Finance II’s directors have received independent legal advice, including with respect to the matters in this proceeding. There is also no evidence that the directors have considered whether they and their counsel are conflicted or whether the positions being taken in the CCAA proceedings are in the best interests of Finance II.
10. Immediately prior to the return of the motion to determine the Characterization Issue (the “**Characterization Motion**”), the Fund Managers brought a cross-motion, based on the developing record with respect to the conflicts of the directors of Finance II and the conflicts of Finance II’s counsel and the refusal to produce relevant information and witnesses, requesting among other things that:
- (a) the motions’ judge appoint independent counsel for Finance II, including for the purposes of the hearing of the Characterization Motion; and
 - (b) the motions’ judge adjourn the Characterization Motion to permit new counsel for Finance II to prepare for that motion and to consider whether the motion should proceed by way of a joint hearing with the US Bankruptcy Court.

11. On December 11, 2009, the motions' judge dismissed the cross-motion with reasons to follow (the "**Representation Order**") and allowed the Characterization Motion to continue.
12. As a result, the Characterization Motion proceeded with the same conflicted counsel acting for the legal and economic interests of Smurfit Canada and against the legal and economic interests of its other client Finance II.
13. On January 28, 2010, the motions' judge also released reasons for her decision on the Characterization Motion where she found that (the "**Characterization Order**"):
- (a) the Intercompany Loan claim was debt (and not equity), but was not a debt provable in bankruptcy; and alternatively,
 - (b) the Intercompany Loan claim did not rank *pari passu* with the unsecured creditors of Smurfit Canada and had a value of zero.
14. The Fund Managers brought a motion to the Court of Appeal for Ontario for leave to appeal the Representation Order and argued that the motions' judge erred in law by:
- (a) failing to appoint independent counsel for Finance II in the CCAA Proceedings and the Characterization Motion, and in so doing, failing to follow well-established standards concerning conflicts of interest when a lawyer represents clients whose interests are adverse;
 - (b) holding that the Fund Managers' counsel could represent the interests of Finance II at the Characterization Motion without the Fund Managers' counsel having the benefit of a solicitor-client relationship; and

- (c) allowing the CCAA Applicants' counsel to act as gatekeeper of the information available to the Fund Managers in the CCAA Proceedings and the Characterization Motion, in the face of these conflicts, which resulted in material evidence relating to the Finance I loan transaction being withheld. The withheld evidence was directly probative of the issue under consideration and highlights the significance of the conflicts of interest.

15. The Fund Managers brought a second motion to the Court of Appeal for Ontario for leave to appeal the Characterization Order¹ and argued, *inter alia*, that the motions' judge erred in law by:

- (a) applying common law principles of contractual interpretation in the face of a loan agreement that is governed by the laws of Quebec which requires the principles of contractual interpretation under the *Civil Code of Quebec* S.Q. 1991, c. 64 ("CCQ") to be applied, and finding that:
- (i) the Intercompany Loan was not recoverable by legal process and was therefore not a debt provable in bankruptcy;
 - (ii) Finance II's claim should not rank *pari passu* with the unsecured debt claims against Smurfit Canada; and
 - (iii) the parties to the Loan Agreement contemplated that in an insolvency proceeding the value of Finance II's claim would be zero.

¹ The motions for leave to appeal the Representation and Characterization Orders were brought separately due to the earlier date that the Representation Order was made and the limitation period for bringing motions for leave under section 14(2) of the CCAA.

16. On March 9, 2010, the Court of Appeal for Ontario dismissed the Fund Managers' motions for leave to appeal. As is the practice on such leave applications, no reasons were released.

The Issues of Public and National Importance Justifying Review by this Court

17. The CCAA is federal legislation that applies throughout Canada. Proceedings under the CCAA often involve an international dimension. Many cases, such as this one, have companion proceedings in the US under Chapter 11 of the US *Bankruptcy Act*.

18. Outside of the CCAA context, the jurisprudence of this Court and international precedent have established clear national and international standards for dealing with conflicts of interest for directors and lawyers.

19. In US cases under the US Bankruptcy Act, the US court has taken a strict approach to conflicts of interest in cases where the debtors seek the court's assistance in adjudicating intercompany disputes.

20. The international reputation of Canada's administration of justice requires that Canada adhere to certain minimum standards for addressing conflicts of interest while resolving intercompany claims. It is important that there be clear national standards for dealing with conflicts of interest during CCAA proceedings.

21. Faced with the difficult position of having to assert claims against other companies of which they are also directors, it is unrealistic to expect those conflicted directors to be able to fulfill their fiduciary obligations to each of the corporations they serve.

22. Having an independent fiduciary (whether a court-appointed litigation representative, independent counsel, an independent director, or an independent monitor) is critical to the proper administration of justice. A company that does not share a common legal and economic interest with the other entities in CCAA proceedings should have some level of independent representation to ensure that the intercompany claim is appropriately preserved, protected and pursued.

23. The deleterious effects of failing to have some independent fiduciary in this case manifested themselves as follows:

- (a) The Fund Managers, who were forced into the position of arguing the position of Finance II, were deprived of access to relevant information, including the file relating to the "Finance I" transaction on which the Finance II Intercompany Loan was copied, even though the witnesses proffered on behalf of Smurfit Canada and Finance II described the Finance II Loan Agreement as a "cookie cutter" copy of the Finance I transaction, with only the quantum, interest rate and maturity date being changed.
- (b) The Fund Managers were denied access to interviews with Finance II representatives including officers, directors and former employees.
- (c) The Fund Managers were forced to interview or cross-examine witnesses (including directors of Finance II) under the watchful eye of counsel for the Applicants, who refused numerous questions that ought to have been answered and denied access to relevant information, documents and witnesses (such as lawyers and accountants) to which Finance II would have been entitled if it had

been permitted to argue this motion itself with the benefit of independent representation.

- (d) Even though, Finance II had a fundamental right to have its dispute with Smurfit Canada determined on the basis of Québec law based on the Loan Agreement, counsel for the CCAA Applicants failed to prove Québec law.
- (e) Under the CCQ, the interpretative task is to consider the true common intentions of the parties (*volonté réelle*). An independent fiduciary of Finance II could have waived the right to Québec law on behalf of Finance II. However, in this case, Finance II's counsel gave the very advice that would have been in issue as part of determining the *volonté réelle*.


24. It was unknown whether the information contained in Finance II's counsel's files would have been of assistance to Finance II because Finance II's counsel refused to produce or permit the production of anything (tax, legal, accounting and other files or reports) relating to the Finance I transaction and refused to identify or provide access to interview or examine individuals with knowledge of that transaction, including counsel, employees and accountants.

25. However, as a result of a production order made in the Chapter 11 proceedings additional documents were subsequently produced which demonstrated that the position being advocated by the CCAA Applicants ran contrary to the opinion given by Finance II's counsel in the Finance I transaction and other documentary evidence produced.

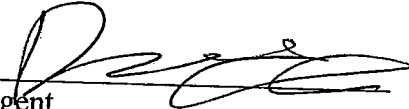
26. The Fund Managers seek costs of this application for leave to appeal.

Dated at Toronto, Ontario this 21st day of April, 2010.

SIGNED BY



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NOTICE TO THE RESPONDENT: A respondent may serve and file a memorandum in response to this application for leave to appeal within 30 days after service of the application. If no response is filed within that time, the Registrar will submit this application for leave to appeal to the Court for consideration pursuant to section 43 of the *Supreme Court Act*.

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

CERTIFICATE (COUNSEL OR AGENT OF THE APPLICANT OR APPELLANT)
OF THE APPLICANTS, AURELIUS CAPITAL MANAGEMENT, LP
and COLUMBUS HILL MANAGEMENT L.P.

(together, the "Fund Managers")

(Filed Pursuant to Section 40 of the *Supreme Court Act* and Rule 25(1)(a)
 of the *Rules of the Supreme Court of Canada*)

I Neil S. Rabinovitch, counsel for the Applicants, hereby certify that

- (a) there is no sealing order or ban on the publication of evidence or the names or identity of a party or witness; and
- (b) there is no confidential information on the file that should not be accessible to the public by virtue of specific legislation.

Dated at Toronto, Ontario this 21st day of April, 2010.

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