



**SUPERIOR COURT OF JUSTICE**  
**COUR SUPÉRIEURE DE JUSTICE**

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## **FAX COVER SHEET**

**Date:** May 13, 2010

**TO:**

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**FROM:** Eartha Reid, Secretary to The Honourable Madam Justice Pepall

**TOTAL PAGES (INCLUDING COVER PAGE):** 23

**MESSAGE:**

**Please see the attached Reasons for Decision of Madam Justice Pepall, dated May 13, 2010.**

**Thank you,**

**er**

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**CITATION:** Smurfit-Stone Container Canada Inc., 2010 ONSC 2606  
**COURT FILE NO.:** CV-09-7966-00CL  
**DATE:** 20100513

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 OTHER APPLICANTS

**BEFORE:** Pepall, J.

**COUNSEL:** *Sean F. Dunphy and Alexander Rose* for the Applicants  
*Robert J. Chadwick and Christopher G. Armstrong* for the Monitor  
*Gavin H. Finlayson* for the Unsecured Creditors Committee  
*Neil Rabinovitch, Dan Dowdall and Jane Dietrich* for the Fund Managers  
*Seema Aggarwal* for Manufacturers and Traders Trust Company as Indenture Trustee  
*Andrew Hatnay and Andrea McKinnon* for Joseph Souccar and other Retirees and the Independent Paperworkers' Union  
*Charles Sinclair* for the United Steelworkers  
*Chris Lee* for Canada Revenue Agency

### **REASONS FOR DECISION**

#### **Introduction**

[1] On January 26, 2009, Smurfit-Stone Container Canada Inc. ("Smurfit Canada") and other Applicants and partnerships (the "Applicants") were granted protection from their creditors pursuant to the *Companies' Creditors Arrangement Act*<sup>1</sup>. Earlier that day, Smurfit-Stone Container Enterprises ("Enterprises") and its parent company, Smurfit-Stone Container Corporation ("SSCC") and certain of its direct and indirect subsidiaries including the Applicants filed for protection from their creditors under Title 11 of Chapter 11 of the *United States Bankruptcy Code* in the United States Bankruptcy Court for the District of Delaware. A Joint Plan of Reorganization for SSCC and its Debtor Subsidiaries and Plan of Compromise and Arrangement for Smurfit Canada and Affiliated Canadian Debtors (the "Plan")<sup>2</sup> has been filed both in this Court and in the U.S. Court. The Plan's effectiveness in both Canada and the United States is conditional upon its sanction and confirmation by this Court and the U.S. Court.

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<sup>1</sup> R.S.C. 1985, c. C-36 as amended.

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[2] With the exception of one class, the Plan was overwhelmingly approved in Canada at a meeting of creditors held on April 6, 2010. The one class that did not approve the Plan was comprised of holders of unsecured 7.375% notes in the principal amount of \$200 million due in 2014 that were issued by Stone Container Finance Company of Canada II ("Finance II"). Approval by that one class is not required to give effect to the Plan as under the terms of the Plan, members of that class are deemed to be Unaffected Creditors holding Excluded Claims. It is contemplated that the stay will be lifted in respect of Finance II and the noteholders will be free to pursue their claim against Finance II as well as Finance II's contribution claim against Smurfit Canada's U.S. parent company, Enterprises. Moreover, the noteholders will receive a distribution of new SSCC common stock pursuant to the U.S. Plan based on Enterprises' guarantee of the notes.

[3] The Applicants now seek, amongst other things, an order sanctioning and approving the Plan. The Monitor, the Unsecured Creditors Committee, certain independently represented retirees, the Independent Paperworkers' Union, the USW, and Canada Revenue Agency all support the sanction request.

[4] The managers of the funds holding a majority of the notes issued by Finance II (the "Fund Managers") and the Indenture Trustee for the noteholders object to the sanction order. In addition to their contribution claim and guarantee claim against Smurfit Canada's U.S. parent company, Enterprises, they also wish to share in the \$19.5 million distribution pool that is available for the unsecured creditors of Smurfit Canada. To that end, they have sought from the Supreme Court of Canada leave to appeal the Ontario Court of Appeal's denial of leave to appeal my decisions of December 11, 2009 and January 28, 2010. As set out in their Notices of Objection filed, they state that the Plan is not fair and reasonable as a distribution under the Plan to the unsecured creditors of Smurfit Canada would render moot their leave to appeal to the Supreme Court of Canada. They also had issues with the language of the releases contained in the Plan but this issue has now been largely resolved.

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<sup>2</sup> Capitalized terms not otherwise defined have the meanings ascribed to them in the Plan. Typically although not invariably, the terms are self-explanatory.

Facts

## (a) The Plan

[5] On February 10, 2010, I granted a Plan Filing and Meeting Order which accepted the filing of the Plan and authorized and directed the Applicants to convene a meeting of their creditors to consider and vote on the Plan.

[6] The Plan is premised upon an offer by Canadian Newco to purchase the assets of Smurfit Canada, Smurfit-MBI, MBI Limited, BC Shipper Supplies Ltd. and Francobec Company (the "Sellers") pursuant to an asset purchase agreement. That agreement contemplates:

- (a) the payment of the cash necessary to repay the principal amount of the pre-petition Canadian revolving loans and the pre-petition Canadian term loans;
- (b) the payment of cash to pay the principal amount of all other secured claims;
- (c) the payment of cash to pay the administrative expense claims, post-filing claims and CCAA charges against the Canadian debtors;
- (d) the assumption by Canadian Newco of certain liabilities of the Sellers including the Canadian collective bargaining agreements, the Canadian pension plans (including all unfunded liabilities thereunder), and the Canadian employee benefit plans; and
- (e) the payment of cash in the amounts necessary to fund the Smurfit Canada \$19.5 million distribution pool and the Smurfit-MBI \$19.5 million distribution pool, which shall be available for distribution to Affected Unsecured Creditors of Smurfit Canada and Smurfit-MBI provided that both classes accept the Plan. Affected Unsecured Creditors do not include Intercompany Claims.

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

[8] The Plan divided Affected Creditors into eight classes for voting purposes; five classes of Affected Secured Creditors; the Affected Unsecured Creditors of Smurfit Canada; the Affected Unsecured Creditors of MBI; and the Affected Unsecured Creditors of Finance II. If: (i) the Plan is approved by the requisite double majority of each class of Affected Secured Creditors and the Affected Unsecured Creditors of both Smurfit Canada and Smurfit-MBI; (ii) the Plan is sanctioned by the Court; and (iii) other conditions are met, the Canadian assets will be transferred to Canadian Newco. If either the class of Affected Unsecured Creditors of Smurfit Canada or of Smurfit MBI failed to approve the Plan, the Debtors could pursue a marketing process for the Canadian assets. In that event, the sale would proceed but Canadian Newco's offer would be modified to exclude the cash necessary to fund the two distribution pools.

[9] The distributions to the Affected Unsecured Creditors of Smurfit Canada and Smurfit MBI are estimated to be 29% and 84% respectively. In addition, creditors with claims up to \$5000 will receive payment in full and those owed in excess of \$5000 could opt to receive \$5000.

(b) The Monitor's Recommendation

[10] The Monitor recommended approval of the Plan noting that in the event that the Plan was not approved, there was a risk that a competing bid may not emerge in a sales process due to the integrated nature of the operations of Smurfit Canada, Smurfit-MBI and the wider Smurfit-Stone organization. If no superior competing bid were received in a sales process, no funds would be available for distribution to Affected Unsecured Creditors of either Smurfit Canada or Smurfit-MBI. Furthermore, intercompany claims of Enterprises and SLP Finance General Partnership against Smurfit Canada (\$421.9 million) and Smurfit-MBI (\$12.8 million) respectively would share *pari passu* with general unsecured claims against each of those entities, thereby significantly reducing the distribution available to arm's length holders of general unsecured claims in a sales process.

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[11] The Monitor also estimated the liquidation values of Smurfit Canada and Smurfit-MBI and concluded that the realizations from the sales of those entities would be insufficient to repay the pre-petition Canadian revolving loans and pre-petition Canadian term loans. It was therefore unlikely that there would be funds available for distribution to the Affected Unsecured Creditors of either Smurfit Canada or Smurfit-MBI in a liquidation scenario.

(c) The Vote

[12] Pursuant to the Plan Filing and Meeting Order, proxies were to be received on or before March 29, 2010 or deposited with the Chair of the meeting before the beginning of the meeting of creditors. A meeting of creditors was held in Toronto on April 6, 2010. No votes were cast in person and therefore the vote was based on the proxies that had already been delivered prior to the meeting. The minutes of the meeting state that Mr. Hatnay, counsel to certain retirees, made an inquiry as to the status of the noteholders' litigation and was advised by counsel to the noteholders that they would be seeking leave to appeal to the Supreme Court of Canada shortly.

[13] At the meeting of April 6, 2010, the Affected Secured Creditors' classes accepted the Plan with 91.46% in number and 95.48% in value voting in favour. The Affected Unsecured Creditors of Smurfit Canada approved the Plan with 98.58% in number and 98.72% in value voting in favour. The Affected Unsecured Creditors of Smurfit-MBI approved the Plan with 99.12% in number and 99.20% in value voting in favour of the Plan. The Affected Unsecured Creditors of Finance II did not approve the Plan with 80.56% in number but only 19.16% in value voting in favour of the Plan. As the Unsecured Creditors of Smurfit Canada and Smurfit-MBI approved the Plan, they elected to forego the sales process contemplated by the Plan and instead accepted the offer made by Canadian Newco which included the two distribution pools of \$19.5 million each. As mentioned, as the class of Affected Unsecured Creditors of Finance II did not approve the Plan, they are deemed to be Unaffected Creditors holding Excluded Claims against Finance II and as such, their approval is not required to implement the Plan.

[14] The sanction motion had been booked in March, 2010, to be heard on April 14, 2010. It was subsequently rescheduled to be heard on May 3, 2010.

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(d) Litigation of the Fund Managers and the Indenture Trustee

[15] The Fund Managers and the Indenture Trustee maintained that Finance II's \$200 million intercompany claim against Smurfit Canada is a debt provable in bankruptcy. In reasons released on January 28, 2010 I rejected their position and concluded that the substance of the parties' relationship was debt and not equity; however, the \$200 million claim was not a debt provable in bankruptcy. Furthermore, Finance II's claim should be valued at zero. The parties refer to this decision as the characterization decision. I also addressed my reasons for refusing the request for an adjournment made by the Fund Managers on the day scheduled for the hearing of the characterization motion. Leave to appeal my characterization decision and my adjournment decision was denied by the Court of Appeal on March 9, 2010. The Plan was approved by the creditors on April 6, 2010. On April 8, 2010 after the creditors' meeting and approval of the Plan, the Fund Managers brought an application for leave to appeal to the Supreme Court of Canada.

[16] The Plan Filing and Meeting Order of February 10, 2010, required anyone who objected to the CCAA sanction order to file a written notice containing a description of its proposed grounds of objection. The Fund Managers and the Indenture Trustee both filed notices of objection. The Fund Managers stated that they objected because the Plan was not fair, reasonable or equitable in that, inter alia, should a distribution be made under the Plan to the unsecured creditors of Smurfit Canada, it may unfairly render moot the leave to appeal motion to the Supreme Court of Canada. They also took issue with the discharge, release, injunction and exculpation provisions of the Plan and complained that no fulsome reports to the analyses of anticipated receipts in liquidation or bankruptcy had been prepared or disclosed to creditors. The Indenture Trustee objected on the same basis but not with respect to the state of the liquidation analysis.

Positions of the Parties

[17] In brief, the Applicants submit that the Plan was overwhelmingly approved by all classes with the exception of the Noteholders. Indeed the Plan has the support of more than 98.5% of the unsecured creditors (by number and value) of Smurfit Canada and Smurfit MBI. The sanction of the Plan will preserve going concern value, approximately 2000 of 2500 jobs in Canada will be maintained, the secured debt will be paid in full, the collective bargaining

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agreements, pension plans and employee benefit plans will be assumed, unsecured creditors of Smurfit Canada and Smurfit MBI will receive distributions from two distribution pools of \$19.5 million each, and creditors owed up to \$5000 will be paid in full. If the Fund Managers were successful with their leave application, the dilution impact of a \$200 million claim on the unsecured creditors of Smurfit Canada and Smurfit MBI would be significant; indeed it would utterly swamp the other unsecured creditors and their recovery would be trivial. If not sanctioned, the Applicants submit that the Plan will fail in Canada and possibly in the United States where sanction by this Court is a condition precedent to the Plan's effectiveness. In addition, if the Debtors do not emerge from court protection by mid-July, the exit financing required to effect the Plan will expire.

[18] The Applicants submit that there has been strict compliance with all statutory requirements and court orders, the materials filed and procedures adopted are authorized by the CCAA, and the Plan is fair and reasonable. They maintain that they are entitled to seek a sanction order and it would be unfair to the creditors of the Applicants to allow the Fund Managers and the Indenture Trustee to hold the insolvency proceedings hostage indefinitely by simply filing an application for leave to appeal. The orders of the Court remain valid and can be enforced and relied upon unless stayed or successfully appealed, neither of which has happened. The Applicants submit that the onus is on the Fund Managers and the Indenture Trustee to establish their entitlement to a stay. To allow the Fund Managers' objections to interfere with the sanctioning of the Plan would effectively grant an indefinite stay of the Plan's implementation pending the determination of their application for leave to appeal without requiring them to secure a stay. They also note that the Smurfit Canada unsecured creditors' proxies had been delivered prior to any suggestion of leave to appeal being sought from the Supreme Court of Canada.

[19] In its Thirteenth Report, the Monitor recommended approval of the Plan. In spite of any shortcomings, in its Sixteenth Report filed on this motion, the Monitor affirmed its view that the Plan is fair and reasonable. It also recommends its sanction by the Court.

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[20] As mentioned, the Unsecured Creditors Committee, certain independently represented retirees, the Independent Paperworkers' Union, the United Steelworkers' Union<sup>3</sup>, and Canada Revenue Agency all support the sanction order requested.

[21] The Fund Managers and the Indenture Trustee reiterate their position set forth in their Notices of Dispute namely, the Plan is not fair, reasonable or equitable. They do not take issue with the sale to Newco. In addition to their contribution and guarantee claims, they wish to share in the \$19.5 million distribution pool for the unsecured creditors of Smurfit Canada. In essence, they state that the Plan is not fair and reasonable because it fails to ensure the establishment of a reserve to protect their claim in the event they are successful with their leave to appeal application.

[22] They submit that the Plan provides that the treatment of claims against the Canadian Debtors in the Chapter 11 case is intended to be consistent with the treatment of Affected Claims against the Canadian Debtors in the CCAA proceedings. They state that section 3.86 of the Plan found under the heading "Classification and Treatment of Claims Against and Interests in the Debtors in the Chapter 11 Cases" provides that Finance II's Intercompany Claim is deemed extinguished unless the Canadian appeals court subsequently determines that Finance II's Intercompany Claim should be treated as a debt provable in bankruptcy. That claim would then be entitled to such distribution that the applicable court determines should be made on account of such Claim. The Fund Managers submit that the Applicants have not provided for a reserve that would ensure that the Applicants have the financial means to comply with this provision of the Plan.

[23] The Indenture Trustee supports the position advanced by the Fund Managers and notes that the only reason not to establish a reserve is delay. The issue of the release provisions of the Plan were largely addressed through amendments to the Plan and proposed changes to the requested order. If counsel are unable to resolve that issue conclusively, they may return before me at a 9:30 appointment. No argument was advanced by anyone with respect to the status of the liquidation analysis of which the Fund Managers complained in their Notice of Dispute nor was this issue raised in their factum.

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<sup>3</sup> The USW wished to advise that it intended to pursue pre-filing grievances before the Labour Board in the event that their subject matter is not assumed by Newco.

Issue

[24] The issue for me to consider is whether the Plan should be sanctioned.

Discussion

[25] Section 6 of the CCAA provides that a court may sanction a plan if it has been approved by the requisite majority of creditors. In this case, the required majorities in each class necessary to approve the Plan voted in favour of it.

[26] The test to be applied on a sanction motion is:

1. There must be strict compliance with all statutory requirements.
2. All materials filed and procedures carried out must be examined to determine if anything has been done [or purported to have been done] that is not authorized by the CCAA.
3. The plan must be fair and reasonable:

*ATB Financial v. Metcalf & Mansfield Alternative Investments II Corp.*<sup>4</sup>

[27] As stated by Farley J. in *Re T. Eaton Co.*<sup>5</sup>, in reviewing the fairness and reasonableness of a plan, the court does not require perfection.

[28] There is really no issue taken with respect to the first two parts of the test and I am satisfied that they have been met. The real question is whether the Plan fails to meet the fair and reasonable part of the test as alleged by the Fund Managers and the Indenture Trustee.

[29] First I must decide whether the Plan fails to mandate the provision of a reserve that would protect the interests of the Fund Managers and the Indenture Trustee. Section 8.17 of the Plan addresses the Distribution Reserves for the purposes of the CCAA proceedings. Because the Plan was approved by the Affected Unsecured Creditors of Smurfit Canada and Smurfit MBI, the Reorganized Debtors are to fund the two \$19.5 Distribution pools. The Monitor is then to

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<sup>4</sup> (2008) 42 C.B.R. (5<sup>th</sup>) 260 (Ont. S.C.J. Commercial List) at para 3. Affirmed by (2008) 296 D.L.R. (4<sup>th</sup>) 135 (Ontario C.A.).

<sup>5</sup> (1999), 15 C.B.R. (4<sup>th</sup>) 311 (Ont. S.C.J. Commercial List) at para. 4.

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disburse the funds in accordance with the terms of the Plan. Prior to that time, the Monitor is to establish a reserve sufficient to distribute to each holder of a "Disputed Claim" the amount of cash the holder would have been entitled to receive if the claim had been a "Proven Claim" as of the Initial Distribution Date.

[30] Section 1.1.103 provides that: "With respect to the CCAA Proceedings, the term "Disputed Claim" means an Affected Claim or any portion thereof that is subject to a Notice of Revision or Disallowance, or a Notice of Dispute, and that has not yet become either a Proven Claim or a Disallowed Claim." Affected Claim is defined as meaning, for the purposes of the CCAA Plan, the Affected Secured Claims and the Affected Unsecured Claims. Of these two, only Affected Unsecured Claims are relevant. They consist of "General Unsecured Claims" against Smurfit Canada and others. A General Unsecured Claim means "a Claim against any Debtor (including any Canadian Debtor) that is not...an Intercompany Claim." "Intercompany Claim" is defined as "any Claim against a Debtor that is held by another Debtor." "Debtor" is defined as including Smurfit Canada but does not mention Finance II. As such, under the technical terms of the Plan, Finance II's claim cannot be considered an Intercompany Claim. The term "Claim" includes a claim by any Person against one or more of the Canadian Debtors. Having travelled through this journey of definitions, I conclude that Finance II's claim is an Affected Claim. Finance II's Affected Claim is not, however, "subject to a Notice of Revision or Disallowance or a Notice of Dispute". As such, it falls outside the definition of a Disputed Claim. Furthermore, read as a whole, it seems to me that the Plan contemplated capturing claims that were part of the initial claims process and that had been disallowed, not intercompany claims that had been unaffected claims until their holders voted against approval of the Plan. Technically therefore, Finance II's claim does not fall within the provisions relating to a reserve. In this regard, the position advanced by the Fund Managers and the Indenture Trustee is correct in that from a technical perspective, the Plan does not establish a reserve for Finance II's claim.

[31] That said, section 3.86 of the Plan, albeit under the heading "Classification and Treatment of Claims Against and Interests in the Debtors in the Chapter 11 Cases", does provide that Finance II's Intercompany Claim is deemed extinguished unless the Canadian appeals court subsequently determines that Finance II's Intercompany Claim should be treated as a debt provable in bankruptcy. That Claim would then be entitled to such distribution that the applicable court determines should be made on account of such Claim. The preamble to the Plan

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calls for consistent treatment of Claims against Canadian Debtors in the Chapter 11 proceedings and Affected Claims in the CCAA Proceedings. In addition, pursuant to section 4.5 of the Plan, the implementation of the Plan may not proceed until the expiry of the applicable appeal periods and, in the event of an appeal or application for leave to appeal, final determination by the applicable appellate tribunal. Even though the Plan does not provide for a reserve for the Finance II Claim, read as a whole, it reflects an intention to maintain rights of appeal generally and should be read in that context. On its face, the Plan is fair and reasonable.

[32] The problem identified by the Fund Managers and the Indenture Trustee, however, is that if the Supreme Court of Canada does grant leave, does allow the appeal, and does determine that Finance II is entitled to a distribution, there may be no funds to distribute as the \$19.5 million will have already been distributed to the unsecured creditors of Smurfit Canada. In this regard, it seems to me that the true issue on this motion is not the sanction of the Plan but its implementation. Only the Supreme Court of Canada will be able to determine whether leave to appeal should be granted and if so, whether the appeal should be allowed. While the Plan may be sanctioned, the relief granted by me should address the pending determination of Finance II's claim so that it is not rendered moot. Given the time constraints and the potential unfairness to Smurfit Canada's unsecured creditors generally that may arise from any delay, the parties are directed to cooperate so that the appellant Fund Managers may pursue this one remaining issue in the CCAA proceedings in an expeditious fashion.

[33] Due to section 4.5 of the Plan and section 14 of the CCAA, the implementation of the Plan may not proceed for 21 days and Applicants' counsel has indicated that they will not waive that condition. In these circumstances, I am sanctioning the Plan but suspending my order for 10 days commencing today. This 10 day period combined with the 21 days will allow the parties a month to pursue the application for leave to appeal. If more time is reasonably required, a 9:30 appointment may be arranged before me to address any extension.

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[34] In conclusion, the Plan is sanctioned but the parties are to cooperate as described. Counsel may attend at a 9:30 appointment before me to finalize the terms of the proposed order.

  
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Repall J.

**Released:** May 13, 2010

**CITATION:** Smurfit-Stone Container Canada Inc., 2010 ONSC 2606  
**COURT FILE NO.:** CV-09-7966-00CL  
**DATE:** 20100513

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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**REASONS FOR DECISION**

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Pepall J.

**Released:** May 13, 2010