

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

B E T W E E N:

AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF BRUCE R. SMITH LIMITED and
JOHN HENRY SMITH LAND INC.

Applicants

**MOVING PARTY'S FACTUM
(Motion returnable September 30, 2010)**

September 27, 2010

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MOVING PARTY'S FACTUM

PART I - INTRODUCTION

1. This motion is brought by the Applicants for an Order sanctioning the plan of compromise and arrangement of Bruce R. Smith Limited ("**BRS**") dated July 7, 2010 (the "**BRS Plan**") and the plan of compromise and arrangement of John Henry Smith Land Inc. ("**Landco**") dated July 7, 2010 (the "**Landco Plan**").

PART II - SUMMARY OF FACTS

2. On October 8, 2009, the Honourable Mr. Justice Morawetz granted BRS' initial application for relief pursuant to the CCAA. On October 16, 2009, the Honourable Mr. Justice Morawetz issued an Amended and Restated Initial Order and The Fuller Landau Group Inc. was appointed monitor (the "**Monitor**").

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 2**

3. On March 10, 2010, the Honourable Mr. Justice Wilton-Siegel added Landco as an Applicant to this proceeding.

Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2, paragraph 3

4. The Amended and Restated Initial Order provides for a stay of proceedings to November 6, 2009, which was extended most recently by the Honourable Mr. Justice Morawetz to October 8, 2010.

Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2, paragraph 4

5. Since the Applicants filed for protection under the CCAA, the Applicants and their financial advisor, KPMG Inc. ("KPMG"), have met with the secured creditors and significant unsecured creditors of each company, including Royal Bank of Canada ("RBC"), Roynat Inc. GE Canada Equipment Finance G.P., CIT Financial Ltd., Volvo Financial Services, Wells Fargo Equipment Finance Company, Ultramar Ltd., Fort Garry Industries Ltd., Bandag Canada Ltd., De Lage Landen Financial Services Canada Inc., and A-1 Personnel Resourced Inc., to develop plans of compromise and arrangement that were acceptable to the Applicants' creditors.

Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2, paragraph 8

6. On July 13, 2010, the Honourable Mr. Justice Morawetz granted the Applicants an Order, *inter alia*, authorizing and directing the filing of the BRS Plan and the Landco Plan and authorizing and establishing the procedure for the Applicants to call, hold and conduct a meeting of their creditors to consider and vote on the Plans.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 5**

7. Unless otherwise specified, all of the capitalized terms not otherwise defined herein have the meanings ascribed to them in the relevant BRS or Landco Plan.

The BRS Plan

8. The BRS Plan provides for 3 classes of affected creditors: (1) the Unsecured Creditor Class, (ii) the Secured Creditor Class and (iii) the GST Class.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 12**

9. Landco, John Henry Smith Holdings Ltd. ("**Holdco**") and John H. Smith ("**Smith**"), the principal of BRS (collectively, the "**Related Parties**") are parties related to BRS. The claims of the Related Parties are treated as Unsecured Creditors for the purpose of the BRS Plan.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 13**

10. The aggregate owed to Landco and Holdco is approximately \$3,700,000. Landco and Holdco are owed approximately \$1,600,000 and \$1,500,000 respectively. Each of Landco and Holdco have agreed to file a Proof of Claim in respect of a reduced amount so that each will receive a distribution in the respective amounts of \$150,000 and \$25,000 under the BRS Plan in satisfaction of their loans. The \$25,000 distribution paid to Holdco will be used by it to pay a deemed trust liability in like amount and the

distribution to be paid to Landco will be used to fund the payments under the Landco Plan.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 13**

11. Although Smith is personally owed approximately \$600,000 by BRS, he has released BRS from any liability with respect to his claim.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 14**

12. The compromise offered to Unsecured Creditors provides for the option of accepting (i) the lesser of the amount of the Proven Unsecured Claim and \$2,000 ("**Option 1**"), or (ii) 15 per cent of the Proven Unsecured Claim ("**Option 2**"). Those unsecured creditors who elect to receive 15 per cent of their Proven Unsecured Claim are to be paid in 5 quarterly instalments with the first payment being made on the last business day of the month in which plan implementation is expected to occur (the "**First Distribution Payment Date**").

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 15**

13. If an Affected Creditor has a Proven Unsecured Claim of \$13,333.33 or less, it is in its interest to choose Option 1. In addition, the BRS Plan provides that if no Distribution Option Notice is received by the Monitor prior to the Distribution Option Deadline, then the Affected Creditor will be deemed to have chosen Option 2.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 17**

14. Four Unsecured Creditors with claims of \$13,333.33 failed to submit a Distribution Option Notice prior to the Distribution Option Deadline. In addition, 2 Unsecured Creditors submitted claims for amounts greater than \$13,333.33 and submitted a Distribution Option Notice choosing Option 2. These 2 Unsecured Creditors were sent a Notice of Revision or Disallowance by the Monitor reducing their Proven Unsecured Claims to less than \$13,333.33

Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2, paragraphs 18 and 19

15. In order to be fair to all of these parties, BRS is seeking an order which deems these parties to have submitted a Distribution Option Notice prior to the Distribution Option Deadline choosing Option 1. This requested relief will not impact the distributions to any other parties under the BRS Plan and will not have a negative impact on BRS because this Applicant had already accounted for such payments in its projections.

Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2, paragraphs 18, 19 and 20

16. Pursuant to the BRS Plan, creditors with a Proven Secured Claim (as defined in the BRS Plan) (excluding Roynat's Proven Secured Claim which will continue to be paid interest at a variable rate) will be paid interest on their principal debt at an amended increased rate equal to 0.66% per annum higher than the weighted average interest rate on such Proven Secured Claim as at the BRS Filing Date.

Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2, paragraph 21

17. Each Secured Creditor with a Proven Secured Claim will receive its pro rata share of the total monthly interest and principal payment in the sum of \$300,000 to be made by BRS to all of its secured creditors based upon the total amount of all Proven Secured Claims. All other terms of the secured creditors' security will remain unaffected (i.e. there will be no change in collateral, guarantees, etc.).

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 21**

18. Claims relating to outstanding goods and service tax ("GST") are to be paid in equal monthly instalments over 60 months beginning on the First Distribution Payment Date for GST that was in arrears as at the BRS Filing Date.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 22**

19. Recognizing RBC's crucial role as BRS' operating lender, RBC is treated as an Unaffected Creditor for the purposes of the BRS Plan as is Ford Credit Canada Limited for the purposes of administrative ease given the de minimis payments which are calculated at 0 per cent interest.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraphs 23 and 24**

20. The BRS Plan is conditional upon BRS principal, Smith, making a capital investment in the minimum amount of \$300,000 and the existing Operating Loan Agreement between BRS and RBC remaining in full force and effect. Smith anticipates making the required minimum capital investment in BRS in October, 2010 and the RBC Operating Loan Agreement remains in full force and effect.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 25**

The Landco Plan

21. Secured creditors, including RBC, G.E., Roynat, and Tepper Holdings Inc., as well as GST Creditors are treated as Unaffected Creditors for the purposes of the Landco Plan.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 26**

22. Distributions to Affected Creditors under the Landco Plan will be funded through the \$150,000 distribution to be paid to Landco under the BRS Plan. Only the claims of the Unsecured Creditors are Affected Claims under the Landco Plan.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 26**

23. Unsecured Creditors with Proven Claims are to receive a dividend equal to the lesser of the amount of their Proven Claim and \$30,000. The Monitor will arrange for distributions under the Landco Plan to be made from the funds provided by Landco in 5 quarterly payments to begin on the First Distribution Payment Date.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 27**

24. The BRS Plan and Landco Plan are each conditional upon the approval and sanctioning of the other because both corporations are economically dependent on the other for their survival.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 29**

Activities of the Applicants

25. The Applicants attempted to contact all Affected Creditors to explain the Plans and encourage creditor supports. At least 33 Affected creditors were successfully contacted.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 31**

26. The Applicants have secured the commitment of an equity investor which is prepared to invest (the "Investment") in the Applicant corporations once they emerge from these CCAA proceedings. The Investment is to be made on condition that that Plans are sanctioned by this Honourable Court. The Investment will enhance the likelihood of the Applicants' future success.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 32**

Results of the Creditors' Meetings

27. The Meetings of each Class of Affected Creditors of BRS and Landco were convened on September 14, 2010 for purposes of considering and voting on the Plans. The Affected Creditors with Proven Claims in each Class overwhelming approved each of the Plans.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 33 and 34**

28. One hundred per cent of the Secured and GST Creditors with Proven Claims voted in favour of the BRS Plan with a total dollar value of accepting votes in the amounts of \$16,444,175.44 and \$486,578.93 respectively. In addition, 94 per cent of the Unsecured Creditors which voted, voted in support of the BRS Plan with a total dollar value of accepting votes of \$4,482,751.90. The 6 per cent of Unsecured Creditors with Proven Claims that rejected the BRS Plan had a total dollar value of \$385,626.90.

**Affidavit of John Henry Smith, Applicant's Motion Record, Tab 2,
paragraph 34**

29. Furthermore, 100 per cent of the Unsecured Creditors with Proven Claims which voted, voted in favour of the Landco Plan with a total dollar value of accepting votes in the amount of \$2,025,800.60.

PART III - STATEMENT OF ISSUES and LAW

Test for Sanctioning a Plan under the CCAA

30. Section 6(1) of the CCAA provides as follow:

6. (1) Compromises to be sanctioned by court – If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be- other than, unless the court orders otherwise, a class of creditors having equity claims, - present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under section 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

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

(b) in the case of a company that has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy

and Insolvency Act or is in the course of being wound up under the Winding-up and Restructuring Act, on the trustee in bankruptcy or liquidator and contributories of the company.

31. Therefore pursuant to section 6 of the CCAA, in order for the BRS Plan and the Landco Plan to be binding, two conditions must be satisfied: (i) approval of the Plans by the creditors, in the requisite majorities and (ii) approval and sanction by the Court¹. The required majorities of Affected Creditors entitled to vote and present at the Creditors' Meetings either in person or by proxy voted in favour of the Plan. Accordingly, the sole issue to be determined is whether this Court should approve and sanction the Plans.

32. Subject to certain limitations described below, the exercise of the Court's statutory authority to sanction a compromise or arrangement under the CCAA is a matter of discretion. The general principles to be applied by the Court in exercising its discretion whether to sanction a plan of compromise or arrangements under section 6 are well established. The Applicant must establish that:

- (a) there has been strict compliance with all statutory requirements and adherence to previous orders of the court;
- (b) nothing has been done or purported to be done that is not authorized by the CCAA; and
- (c) the plan is fair and reasonable.²

¹ *Re: Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.) at para. 23, aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.) [*Re Northland Properties Ltd.*]

² *Re Northland Properties Ltd.*, at para. 24.

(a) Compliance with Statutory Requirements

33. When considering whether the Applicant has acted in compliance with statutory requirements, the Court may consider the following matters:

- (a) the Applicant comes within the definition of “debtor company” in section 2 of the CCAA;
- (b) the Applicant or affiliated debtor companies have total claims within the meaning of section 12 of the CCAA in excess of \$5,000,000;
- (c) the notice calling the meeting was sent in accordance with the order of the Court;
- (d) the creditors were properly classified;
- (e) the meeting of creditors was properly constituted;
- (f) the voting was properly carried out; and
- (g) the plan was approved by the requisite double majority.³

34. The Applicants have met all of these statutory requirements, specifically:

- (a) The Applicants are insolvent companies and thus are “debtor” companies within the meaning of section 2 of the CCAA;⁴

³ *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.) [“*Canadian Airlines*”] at para. 62, leave to appeal denied (2000), 20 C.B.R. (4th) (Alta. C.A.)

⁴ Order of the Honourable Mr. Justice Morawetz, dated October 16, 2009 para. 2 and Order of the Honourable Mr. Justice Wilton-Siegel dated March 10, 2010, para. 1

- (b) The Applicants each have total claims that would be claims provable in bankruptcy within the meaning of section 12 of the CCAA in excess of \$5,000,000;
- (c) In accordance with the Creditors' Meeting Orders, Information Packages and the Creditors' Meeting Notices were sent to all Eligible Voting Creditors on or prior to July 21, 2010;
- (d) The Creditors were classified in accordance with the Creditors' Meeting Orders with no objections from the creditors;
- (e) The Creditors' Meetings were properly constituted;
- (f) The voting was properly carried out; and
- (g) each of the BRS and Landco Plans were approved by the requisite double majorities of creditors present at the Creditors' Meetings in person or by proxy.⁵

35. In addition, the CCAA also provides that the Court may only exercise its statutory authority to sanction a compromise or arrangement under the CCAA if:

- (a) a plan provides for the payment in full, within six months, of all amounts owed to the Crown as of the filing date in respect of source deductions under s. 224(1.2) of the *Income Tax Act*, and any provision of the *Canada Pension Plan* or the *Employment Insurance Act* that refers to s.224(1.2) and provides for the collection of a contribution, as

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defined in the Canada Pension Plan, or equivalent provincial legislation (unless the Crown agrees otherwise) ("**Required Crown Claims**");

- (b) a plan provides for the payment of wages, salaries, commissions or compensation for services rendered on the day that is six months before the filing date (to the extent of \$2,000), and any such amounts owing after the filing date and before the Court sanctions the plan (unless the Court is satisfied that the debtor company can and will make such payments) ("**Required Employee Wage Claims**"); and
- (c) a plan provides for the payment of specific pension obligations outstanding at the date of the hearing to sanction the plan; specifically contributions deducted from employee's remuneration but not remitted to the pension fund and certain other normal cost payments and defined contributions, as applicable (the "**Required Pension Claims**"),⁶

36. Furthermore, no plan is to be sanctioned by the Court if, as of the date of the initial order, the Crown satisfies the Court that the company is in default on any remittances of Required Crown Claims after the filing date.⁷

37. Pursuant to section 6(8) of the CCAA, no compromise or arrangement that provides for a payment of an equity claim may be sanctioned by the court unless all non-equity claims are paid in full.

38. The foregoing requirements are satisfied. Specifically,

⁶ CCAA at s. 6(3), 6(5) and 6(6).

⁷ CCAA s. 6(4).

- (a) Section 3.08(1) of both the BRS Plan and section 3.06(1) of the Landco Plan provide that the Required Crown Claims will be made within six months of sanction;
- (b) Similarly section 3.08(2) of the BRS Plan and section 3.06(2) of the Landco Plan provide that the Required Employee Wage Claims, if any, will be paid immediately following the sanction of the Plans; and
- (c) The Plan does not provide for any payment on account of equity claims.

39. As a result of the foregoing, the Applicants have complied with all statutory requirements.

(b) No Unauthorized Steps

40. All materials filed and procedures taken by the Applicants were authorized under the CCAA and Orders of this Court.⁸

(c) The Plan is Fair and Reasonable

41. Where a plan has been approved by the requisite majority of creditors, there is a very heavy burden on parties seeking to show that the plan is not fair and reasonable.⁹

42. When considering whether a plan is fair and reasonable, the Court is called upon to weigh the equities or balance the relative degrees of prejudice that would flow from

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⁹ *Re Olympia & York Developments Ltd.* (1993), 17 C.B.R. (3d) 1 (Ont. Ct. J. (Gen. Div.)) [*"Olympia & York"*], at para. 39

granting or refusing the relief sought under the CCAA. However, the Court does not require perfection, nor will the Court second-guess the business decision reached by the stakeholders of debtors as a body.¹⁰ As stated by Blair J. (as he then was) in *Olympia & York*:

As other courts have done, I observe that it is not my function to second guess the business people with respect to the “business” aspects of the Plan, descending into the negotiating arena and substituting my own view of what is a fair and reasonable compromise or arrangement for that of the business judgment of the participants. The parties themselves know the best what is in their interest in those areas.¹¹

43. The fairness analysis undertaken by the Courts is an inquiry into fairness to the broad constituency of a debtor company’s creditors and stakeholders. The inquiry is not limited to any single creditor or creditor constituency.¹²

44. In sanctioning a plan that received the support of 65% of creditors in number representing 76% in value,¹³ Madam Justice Paperny of the Alberta Court of Queens Bench (as she then was) identified certain factors as relevant to the Court’s consideration of whether a plan is fair and reasonable. These factors, as applied to this case, are as follows:¹⁴

The composition of the Creditor Classes

- (a) The BRS Plan classifies the Affected Creditors into 3 classes, namely, the Unsecured Creditor Class, the Secured Creditor Class and the GST Creditor Class. The Landco Plan provides for one class of

¹⁰ *Re T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List]) at para. 4

¹¹ *Olympia & York* at para. 37

¹² *Skeena Cellulose Inc., Re.* (2003), 43 C.B.R.(4th) 187 (B.C.C.A.) at para 60.

¹³ *Canadian Airlines*, at para 99.

¹⁴ *Canadian Airlines*, at para 96.

Affected Creditors, namely the Unsecured Creditor Class. Each of the Affected Creditors were grouped in accordance with the Creditors Meeting Orders and established on the basis of a commonality of interest and without objection by any of the Affected Creditors

What creditors would receive on liquidation or bankruptcy as opposed to the plan

- (b) The Monitor has provided its analysis of the Plans as compared to a liquidation scenario. The Monitor's analysis concludes that each of the Plans maximize recovery for the respective Affected Creditors of BRS and Landco;

Alternatives available to the plan and bankruptcy

- (c) The Applicants along with their financial advisor, KPMG, have explored other options and alternatives and concluded that there are no viable alternatives to the BRS and Landco Plans that could result in higher recoveries for Affected Creditors;

Oppression

- (d) The Plans provide for greater recoveries for Affected Creditors than any alternatives; there is accordingly no apparent oppression that would arise from the implementation of the Plans;

Unfairness to Shareholders

- (e) The Smith Family Trust owns all 1000 common shares of BRS. Smith is the sole trustee of the Smith Family Trust. Holdco owns all of the Special Class A voting shares of BRS. Smith owns all of the common shares of Holdings. Smith, personally and as trustee of the Smith Family Trust, consents to the BRS Plan and has released his claim against BRS for payment of a \$600,000 loan advance.

The Smith Family Trust is also the owner of all 100 common shares of Landco whereas Smith owns 516 of the Class B Special shares of Landco. Smith, personally and in his capacity as trustee of the Smith Family Trust consents to the Landco Plan.

The public interest

- (f) The implementation of the Plans are in the public interest: the Plan will preserve approximately 327 jobs and will provide an ongoing benefit to employees, suppliers and customers. Moreover, there is nothing in respect of the implementation of the Plans that is contrary to the public interest.

45. It is respectfully submitted that the Plans are fair and reasonable and ought to be sanctioned for all of the reasons stated herein, including, *inter alia*, the following:

- (a) The Plans were approved at the Creditors' Meetings by the Affected Creditors, in excess of the statutory requirements. This creditor support deserves deference.
- (b) There are no realistic alternatives to the Plans. The bankruptcy or voluntary liquidation of the Applicants would result in no recovery for unsecured creditors, other than employees who may receive WEPPA payments but who stand to gain more from the Plans than they would receive in a bankruptcy/liquidation.
- (c) The Monitor recommends the sanctioning of the Plan.
- (d) The Plan will preserve over 327 jobs and provide ongoing benefit to employees, suppliers and customers.

PART IV - ORDER REQUESTED

46. The Applicants therefore request each of the BRS and Landco Plans be sanctioned by this Honourable Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of September, 2010.



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SCHEDULE A

LIST OF AUTHORITIES

1. *Re: Northland Properties Ltd.* (1988), 73 C.B.R. (N.S.) 175 (B.C.S.C.), aff'd (1989), 73 C.B.R. (N.S.) 195 (B.C.C.A.)
2. *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. Q.B.)
3. *Re Olympia & York Developments Ltd.* (1993), 17 C.B.R. (3d) 1 (Ont. Ct. J. (Gen. Div.) ["*Olympia & York*"],
4. *Re T. Eaton Co.* (1999), 15 C.B.R. (4th) 311 (Ont. S.C.J. [Commercial List])
5. *Skeena Cellulose Inc., Re.* (2003), 43 C.B.R.(4th) 187 (B.C.C.A.)

SCHEDULE "B"

LEGISLATION

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s.6

2. "debtor company"

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

4. Where a compromise or an arrangement is proposed between a debtor company and its unsecured creditors or any class of them, the court may, on the application in a summary way of the company, of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

5. Where a compromise or an arrangement is proposed between a debtor company and its secured creditors or any class of them, the court may, on the application in a summary way of the company or of any such creditor or of the trustee in bankruptcy or liquidator of the company, order a meeting of the creditors or class of creditors, and, if the court so determines, of the shareholders of the company, to be summoned in such manner as the court directs.

6. (1) If a majority in number representing two thirds in value of the creditors, or the class of creditors, as the case may be — other than, unless the court orders otherwise, a class of creditors having equity claims, — present and voting either in person or by proxy at the meeting or meetings of creditors respectively held under sections 4 and 5, or either of those sections, agree to any compromise or arrangement either as proposed or as altered or modified at the meeting or meetings, the compromise or arrangement may be sanctioned by the court and, if so sanctioned, is binding

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

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

Court may order amendment

(2) If a court sanctions a compromise or arrangement, it may order that the debtor's constating instrument be amended in accordance with the compromise or arrangement to reflect any change that may lawfully be made under federal or provincial law.

Restriction — certain Crown claims

(3) Unless Her Majesty agrees otherwise, the court may sanction a compromise or arrangement only if the compromise or arrangement provides for the payment in full to Her Majesty in right of Canada or a province, within six months after court sanction of the compromise or arrangement, of all amounts that were outstanding at the time of the application for an order under section 11 or 11.02 and that are of a kind that could be subject to a demand under

(a) subsection 224(1.2) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

Restriction — default of remittance to Crown

(4) If an order contains a provision authorized by section 11.09, no compromise or arrangement is to be sanctioned by the court if, at the time the court hears the application for sanction, Her Majesty in right of Canada or a province satisfies the court that the company is in default on any remittance of an amount referred to in subsection (3) that became due after the time of the application for an order under section 11.02.

Restriction — employees, etc.

(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Restriction — pension plan

(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament; and

(b) the court is satisfied that the company can and will make the payments as required under paragraph (a).

Non-application of subsection (6)

(7) Despite subsection (6), the court may sanction a compromise or arrangement that does not allow for the payment of the amounts referred to in that subsection if it is satisfied that the relevant parties have entered into an agreement, approved by the relevant pension regulator, respecting the payment of those amounts.

Payment — equity claims

(8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BRUCE R. SMITH LIMITED and JOHN HENRY SMITH LAND INC.
Applicant

Court File No. 09-8399-00CL

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