Court of Appeal File Nos. M46272, M46263 and M46282
Court File No. CV-14-10695-00CL

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 A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

RESPONDING FACTUM OF UNITED STATES STEEL CORPORATION
(Consolidated Motion for Leave to Appeal)

May 27, 2016

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street
Suite 4000, Commerce Court West
Toronto, ON M5L 1A9

Michael E. Barrack LSUC #21941W
Email: michael.barrack@blakes.com

Jeff Galway LSUC #28423P
Email: jeff.galway@blakes.com

Kiran Patel LSUC #58398H
Email: kiran.patel@blakes.com

Tel: 416-863-2400
Fax: 416-863-2653

Lawyers for United States Steel Corporation

TO: **KOSKIE MINSKY**
20 Queen Street West, Suite 900
Toronto, ON M5H 3R3

Andrew J. Hatnay
Email: ahatnay@kmlaw.ca
Tel: 416-595-2083
Fax: 416-204-2872

Barbara Walancik
Email : bwalancik@kmlaw.ca
Tel: 416-542-6288
Fax: 416-204-2906

Representative Counsel to the non-USW employees and retirees of U.S. Steel Canada Inc.

AND TO: **MCCARTHY TÉTRAULT LLP**
Toronto Dominion Bank Tower
66 Wellington Street West, Suite 5300
Toronto, ON M5K 1E6

Paul Steep
Email: psteep@mccarthy.ca
Tel: 416-601-7998

Sharon Kour
Email: skour@mccarthy.ca
Tel: 416-601-8305
Fax: 416-868-0673

Lawyers for U.S. Steel Canada Inc.

AND TO: **BENNETT JONES LLP**
One First Canadian Place
Suite 3400
Toronto, ON M5X 1A4

Rob Staley
Email: staleyr@bennettjones.com
Tel: 416-777-4857
Fax: 416-863-1716

Kevin Zych
Email: zych@bennettjones.com

Lawyers for the Monitor, Ernst & Young Inc.

AND TO: **GOODMANS LLP**
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Alan Mark
Email: amark@goodmans.ca
Tel: 416-597-4184

Peter Ruby
Email: pruby@goodmans.ca
Tel: 416-597-4184
Fax: 416-979-4264

Tamryn Jacobson
Email: tjacobson@goodmans.ca
Tel: 416-597-4293

Jesse-Ross Cohen
Email: jcohen@goodmans.ca
Tel: 416-849-6903

Lawyers for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario)

AND TO: **PALAIRE ROLAND ROSENBERG ROTHSTEIN LLP**
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Gordon Capern (LSUC #32196H)
Email: gordon.capern@paliareroland.com

Kristian Borg-Olivier (LSUC #53041R)
Email: kris.borg-olivier@paliareroland.com

Denise Cooney (LSUC #64358R)
Email: denise.cooney@paliareroland.com
Tel: 416-646-4300
Fax: 416-646-4301

Lawyers for United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (USW)

AND TO: **INCH HAMMOND, Professional Corporation**
500 – One King Street West
Hamilton, ON L8P 4X8

Sharon L.C. White
Email: white@inchlaw.com
Tel: 905-525-4481
Fax: 905-525-0031

Lawyers for USW Local 1005

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RESPONDING FACTUM OF UNITED STATES STEEL CORPORATION (Consolidated Motion for Leave to Appeal)

PART I - FACTS

1. United States Steel Corporation accepts as correct the facts set out in paragraphs 9, 10, 13, 16, 17 and 29 of the factum filed by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union ("USW"), USW Local 8782 and USW Local 1005 (collectively, the "Union"). Except as set forth below, United States Steel Corporation denies all other facts as set out in the Union's factum.

2. United States Steel Corporation accepts as correct the facts set out in paragraphs 12, 13, 27, 29, 30, 32 and 33 of the factum filed by Her Majesty The Queen in Right of Ontario and the Superintendent of Financial Services (Ontario) (collectively, the "Province"). Except as set forth below, United States Steel Corporation denies all other facts as set out in the Province's factum.

3. As used in this factum, "USS" refers to United States Steel Corporation and/or one or more of its wholly-owned subsidiaries (excluding USSC) as applicable.

4. USS is an integrated steel producer with major operations in North America and Central Europe. USS is a publicly-traded Delaware corporation and its shares are listed for trading on the New York Stock Exchange.

> Endorsement of Justice Wilton-Siegel dated February 29, 2016 ("Reasons"), para. 9, USS Compendium, Tab 1, p. 3

5. USSC is an indirect, wholly-owned subsidiary of USS. It is an integrated steel manufacturer and operates from two principal facilities: Hamilton Works and Lake Erie Works. Prior to its acquisition by USS, USSC was known as Stelco Inc.

> Reasons, paras. 6 and 7, USS Compendium, Tab 1, p. 2

6. U. S. Steel Canada Limited Partnership ("Canada LP") is a limited liability partnership formed under the laws of Alberta. Canada LP is an indirect wholly-owned subsidiary of USS.

> Reasons, para. 11, USS Compendium, Tab 1, p. 3

7. 1344973 Alberta ULC ("ABULC") was an Alberta corporation. ABULC was the acquisition vehicle for USS's acquisition of Stelco.

> Reasons, para. 10, USS Compendium, Tab 1, p. 3

8. Canada LP and USSC,[1] are parties to a loan agreement dated October 29, 2007 (the "Term Loan"), pursuant to which Canada LP made advances to USSC. The relevant provisions of the Term Loan and the history of advances and repayments under the Term Loan are set out at paragraphs 33 to 41 of the Reasons.

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[1] The original parties to the Term Loan were Canada LP and ABULC. ABULC and USSC amalgamated on December 31, 2007 to continue as USSC. As a result of the amalgamation, the obligations of ABULC under the Term Loan became the obligations of USSC.

Term Loan, USS Compendium, Tab 2, pp. 84-93

9. As of the date USSC filed for protection under the CCAA (the "Filing Date"), the total amount outstanding under the Term Loan, including accrued interest, was C$1,847,169,934.

Reasons, para. 42, USS Compendium, Tab 1, p. 8

10. United States Steel Credit Corporation ("Credit Corp") and USSC are parties to a loan agreement dated May 11, 2010 (the "Revolver Loan"). The relevant provisions of the Revolver Loan and the history of advances and repayments are set out at paragraphs 45 to 58 of the Reasons.

Revolver Loan, USS Compendium, Tabs 3A, 3B, 3C and 3D, pp. 94-111

11. As at the Filing Date, the total amount outstanding under the Revolver Loan, including accrued interest, was US$193,089,318.

Reasons, para. 59, USS Compendium, Tab 1, p. 10

12. Pursuant to a security agreement dated January 28, 2013, as amended by agreement dated October 30, 2013 (the "Security Agreement"), USSC granted Credit Corp a general security interest over all of its personal property.

Reasons, paras. 51 and 56, USS Compendium, Tab 1, pp. 9-10

Security Agreement, USS Compendium, Tabs 4A and 4B, pp. 112-119

13. Subsequent to the grant of security by USSC, USSC made further advances under the Revolver Loan of US$71,000,000.

Reasons, para. 59, USS Compendium, Tab 1, p. 10

14. On November 12, 2013, Credit Corp, USSC, USS and two other USS affiliates entered into a further amendment and restatement of the Security Agreement providing security to USS and the two USS affiliates in respect of the provision of intercompany goods and services on credit by any of them to USSC.

Reasons, para. 426, USS Compendium, Tab 1, p. 77

November amendment to Security Agreement, USS Compendium, Tab 4C, pp. 120-125

15. As of the Filing Date, USS asserted a secured claim for the provision of intercompany goods and services and the payment of other credit obligations of USSC in the amount of US$49,533,135.

Reasons, paras. 3 and 64, USS Compendium, Tab 1, p. 2 and 11

16. USSC sought protection under the CCAA on September 16, 2014.

Reasons, para. 8, USS Compendium, Tab 1, p. 2

17. USS filed claims in the CCAA proceedings including unsecured claims (the "Debt Claims", which included amounts owing under the Term Loan and amounts accrued under the Revolver Loan prior to the grant of security) for C$1,847,169,934 and US$120,150,928 and secured claims (the "Secured Claims") in the amount of US$122,471,575.

Reasons, para. 3, USS Compendium, Tab 1, p. 2

PART II - ISSUES & ARGUMENT

ONE ISSUE OR TWO

18. The proceeding below and the proposed appeal raise two distinct issues, as evidenced by the separate facta filed by the Province and the Union (collectively, along with Representative Counsel to the non-USW employees and retirees of USSC, the "Objectors") for each issue, namely:

- Should leave to appeal be granted from the decision of the CCAA Judge accepting the Secured Claims as Proven Claims and
- Should leave to appeal be granted from the decision of the CCAA Judge accepting the Debt Claims as Proven Claims?

19. It is appropriate for the Court to separately consider and determine the issue of leave with respect to each issue.

20. As noted by Brown in *Civil Appeals*:

> Subject to legislation to the contrary, a judge or court granting leave has an unfettered discretion as to how the grant of leave is fashioned. Accordingly an order can be general, or it can be limited to certain questions or issues, or subject to specified conditions…
>
> Brown, *Civil Appeals* (Toronto: Thomson Reuters, 2013) (loose-leaf updated 2016, release 1), vol. 2 at para 4.02.12, USS Book of Authorities, Tab 9

21. USS submits that leave to appeal should be denied on both issues.

22. In the alternative, however, if the Court concludes that the test for leave to appeal has been satisfied in respect of one of the two issues raised by the Objectors, leave to appeal should

be restricted to that issue. There is no reason that any appeal should be made more or unduly complex, lengthy and expensive by the inclusion of issues which do not, standing alone, justify leave to appeal.

ANY APPEAL IS OF DECISION NOT REASONS

23. As in any appeal, the appeal lies, with leave, from the order of Justice Wilton-Siegel and not his Reasons for judgment. An appellate court will not review conclusions drawn by a judge that were not a necessary part of his final decision and were not reflected in his order.

> *Re Bearcat Exploration Ltd.*, 2003 ABCA 365, at para. 13, USS Book of Authorities, Tab 1

24. Leave to appeal is granted sparingly in CCAA proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties. In addressing whether leave should be granted, the court will consider whether:

(a) the proposed appeal is *prima facie* meritorious or frivolous;

(b) the points on the proposed appeal are of significance to the practice;

(c) the points on the proposed appeal are of significance to the action; and

(d) whether the proposed appeal will unduly hinder the progress of the action.

> *Nortel Networks Corporation (Re)*, 2016 ONCA 332 [“*Nortel*”], at para. 34, USS Book of Authorities, Tab 2

25. In this case, the proposed appeals lack sufficient merit to meet this stringent test.

26. In their facta, the Objectors seek to parse particular passages of Justice Wilton-Siegel's Reasons to identify narrow issues which they argue give their proposed appeal the semblance of *prima facie* merit.

27. Although USS disputes that Justice Wilton-Siegel erred in any of the inconsequential ways alleged by the Objectors, that is not the issue on this application. To demonstrate that the appeal is meritorious, the Objectors must show that there is a "realistic possibility of success on the appeal". In determining whether to grant leave to appeal, the issue presently before the Court is whether there is sufficient likelihood of the result below being overturned so as to give the appeal *prima facie* merit.

> *Re Ravelston Corp.*, [2005] O.J. No. 5351 (C.A.), at paras. 28-29,
> USS Book of Authorities, Tab 3

28. For the reasons set out below, the ultimate order of Justice Wilton-Siegel is firmly founded on findings of fact which are not susceptible to a successful appeal. The peripheral issues sought to be raised by the Objectors, even if potentially meritorious in isolation (and in the submission of USS, they are not), provide no basis for reversing Justice Wilton-Siegel's disposition of the two issues before him and thus provide no basis for concluding that the proposed appeal has *prima facie* merit.

USS'S SECURED CLAIMS

Introduction

29. The key relevant facts in respect of the Secured Claims are uncontentious:

- USS as lender and USSC as borrower were parties to the Revolver Loan which was governed by Pennsylvania law and which provided:

> 11. Events of Default: If any of the following events of default shall occur:
>
> …
>
> c. Borrower consents to the appointment of a receiver, trustee or liquidator of all or substantially all of its assets, is unable to meet debts, or files bankruptcy;
>
> …
>
> then, the Maturity Date shall be accelerated, and the Lender shall have the right to demand payment by the Borrower, of all sums due pursuant to this Loan Agreement. [Underlining added]
>
> Revolver Loan, section 11, USS Compendium, Tab 3A, pp. 95-96, Tab 3B, pp. 99-100, Tab 3C, pp. 103-104, Tab 3D, pp. 108-109
>
> Reasons, paras. 47 and 121, USS Compendium, Tab 1, pp. 8 and 23

- In 2013, USS concluded that it would not make further advances under the Revolver Loan unless it was provided with security.

> Reasons, para. 346, USS Compendium, Tab 1, p. 64

- USSC granted security pursuant to a security agreement dated January 28, 2013 which was amended on October 30, 2013 (the "October Amendment"). Pursuant to the October Amendment, USSC granted a general security interest over all of its personal property in favour of USS. The October Amendment contained a recital to the effect that Credit Corp "is willing to continue to provide Loans pursuant to [the Revolver Loan], only if [USSC] enters into this Amendment".

October Amendment to Security Agreement, USS Compendium, Tab 4B, p. 117

Reasons, paras 52 and 56, USS Compendium, Tab 1, pp. 9-10

- As at October 30, 2013, the liabilities of USSC exceeded its assets.

Reasons, para. 57, USS Compendium, Tab 1, p. 10

- Subsequent to October 30, 2013, USS made advances under the Revolver Loan to USSC in the amount of US$71,000,000.

Reasons, para. 59, USS Compendium, Tab 1, p. 10

- On November 12, 2013, the Security Agreement was further amended to cover the provision of intercompany goods and services on credit.

November amendment to Security Agreement, USS Compendium, Tab 4C, pp. 120-125

Reasons, para. 424, USS Compendium, Tab 1, pp. 76-77

- Subsequent to November 12, 2013, USS also provided goods and services to USSC with a value of US$45,790,656 and paid other credit obligation of USSC in the amount of US$3,742,479.

Reasons, para. 3, USS Compendium, Tab 1, p. 2

- USSC sought CCAA protection on September 16, 2014.

Reasons, para. 8, USS Compendium, Tab 1, p. 2

- In these CCAA proceedings, USS has advanced Secured Claims in the amount of US$122,471,575 representing the above amounts (with accrued interest on the Revolver Loan advances up to the Filing Date) which are contested by the Objectors.

Reasons, paras. 3 and 59, USS Compendium, Tab 1, p. 2 and 10

30. Justice Wilton-Siegel upheld virtually all of USS's Secured Claims. In doing so, he concluded that USS provided actual valuable consideration in exchange for the security granted to it by USSC.

31. That conclusion necessarily followed from his finding of fact that under governing Pennsylvania law, USS was not obliged to provide further advances under the Revolver Loan when USSC was insolvent on a balance sheet basis. It necessarily followed from that finding of fact that by agreeing in such circumstances to make further advances in exchange for the grant of security, USS provided valuable consideration for the grant.

32. The Objectors raise three alleged legal errors in respect of Justice Wilton-Siegel's disposition of USS's Secured Claims. In each case, the alleged error is founded upon the premise that Justice Wilton-Siegel committed a reviewable error in concluding that USS provided valuable consideration for the grant of security. Specifically:

- The argument that Justice Wilton-Siegel erred in holding that consideration is required for the creation of a valid security interest (even if tenable, which is disputed) is of no import to the final disposition of the secured claim if the finding that valuable consideration was in fact provided is not disturbed;

- The argument that Justice Wilton-Siegel erred in concluding that recital clauses can constitute consideration (even if tenable, which is disputed) is of no import to the final disposition of the secured claim if the finding that valuable consideration was in fact provided is not disturbed; and

- The argument that the Security Agreement was void as a fraudulent preference is necessarily premised on the position that the advances made after the grant of security (which are the only advances in respect of which security is asserted) did not constitute fresh consideration for the grant of security.

33. As addressed in paragraphs 35 to 39 below, there is no basis for disturbing Justice Wilton-Siegel's finding of fact that under Pennsylvania law USS was not obliged to provide further advances under the Revolver Loan when USSC was insolvent on balance sheet basis. As such, the advances provided by USS after the grant of security constituted good and valuable consideration for the grant of security. For this reason, the Objectors' proposed appeal is not *prima facie* meritorious and leave to appeal in respect of the Secured Claims should be denied.

34. As further addressed in paragraphs 40 to 43 below, none of the other peripheral issues raised by the Objectors are sufficient to make the proposed appeal *prima facie* meritorious.

Proposed Appeal of Finding of Fact re Consideration Not *Prima Facie* Meritorious

35. As at October 30, 2013, the liabilities of USSC exceeded its assets. Given that the Revolver Loan is governed by Pennsylvania law, expert evidence was led at trial as to whether, as a matter of Pennsylvania law, such circumstances constituted an Event of Default. Clause 11(c) of the Revolver Loan provided that an event of default occurred if USSC was "unable to meet debts".

> Revolver Loan, section 11, USS Compendium, Tab 3A, pp. 95-96, Tab 3B, pp. 99-100, Tab 3C, pp. 103-104, Tab 3D, pp. 108-109

36. At paragraph 127 of his reasons Justice Wilton-Siegel wrote:

> **127** The Court finds that, under the laws of Pennsylvania, the words "unable to meet debts" in the Revolver Loan Agreement mean that the fair market value of the assets of USSC are less than the total of its liabilities, that is, that the words connote a balance sheet solvency test.
>
> Reasons, para. 127, USS Compendium, Tab 1, p. 24

37. In reaching his conclusion Justice Wilton-Siegel considered not only the plain meaning of the relevant contractual language, but also the contextual arguments advanced by the Objectors, the fact that the alternative interpretation advanced by the Objectors and their expert "requires reading in language that is neither present nor customary" and the fact that the interpretation advanced by the Objectors and their expert would result in "an unreasonable result from a commercial perspective".

> Reasons, paras. 128, 129, 130, 132-136, USS Compendium, Tab 1, pp. 24-25

38. Findings of foreign law are findings of fact and are subject to appellate review only on the standard of palpable and overriding error.

> *Friedl v. Friedl*, 2009 BCCA 314, at para. 29, USS Book of Authorities, Tab 4
>
> *Schlotfeldt v. Schlotfeldt*, 2011 BCCA 82, at para. 19, leave to appeal refused [2011] S.C.C.A.No. 281, USS Book of Authorities, Tab 5
>
> *See contra General Motors Acceptance Corp. of Canada, Ltd. v. Town and Country Chrysler Ltd. et al* (2007), 88 O.R. (3d) 666,

> USS Book of Authorities, Tab 6 (but where, as noted in *Freidl*, the trial judge had erred in law in failing to make a finding of fact based on the expert evidence of foreign law which is not the case here)

39. In any event, whether the standard is palpable and overriding error or reasonableness, there is no *prima facie* merit to the Objectors' attempt to appeal this finding by Justice Wilton-Siegel.[2]

Other Alleged Issues re Secured Claim

40. If the attack on the finding of valuable consideration is not *prima facie* meritorious, all of the proposed grounds of appeal in respect of the Secured Claims are necessarily for that reason alone without *prima facie* merit since unless that finding is overturned the appeal cannot succeed.

41. However, even in isolation, the Objectors' submission that the creation of a valid security interest under a security agreement depends upon the existence of contractual consideration is not *prima facie* meritorious because:

- Section 2 of the subject Security Agreement provides:

> In order to secure the payment and performance in full of all Secured Obligations the Debtor hereby pledges and assigns to and grants a security interest in the Collateral to the Secured Party. (Emphasis added.)
>
> Security Agreement, section 2, USS Compendium, Tab 4A, p. 114

[2] Under the principles set out in *Sattva Capital Corp v. Creston-Moly Corp.*, 2014 SCC 53 [USS Book of Authorities, Tab 7], the standard of review would be reasonableness if the CCAA Judge were seen as interpreting the contractual provisions under the relevant law, having regard to the factual matrix.

- This grant of security was not a promise to do something in the future (which under the law of contract could require consideration to be enforceable). It was, rather, an act of USSC intended to immediately create and transfer to USS a proprietary security interest in the collateral at a time when USSC was indebted to USS. Since the grant is not in the form of a promise, the issue is not its enforceability as a matter of contract law but its effectiveness as a matter of property law in creating an immediate proprietary security interest in the collateral. While a contractual promise can require consideration to be enforceable and give rise to a remedy under contract law in the event of a future breach, consideration is not a precondition to the effective immediate creation and transfer of a proprietary interest. For example, gifts and declarations of trust are unquestionably effective to create proprietary interests in the recipient or beneficiary despite the absence of any consideration.

- Although contract consideration is not a requirement for the creation of a valid security interest, under subsection 11(1) of the PPSA, a security interest can only be enforced against third parties if it has attached. Pursuant to subsection 11(2), a security interest attaches to collateral "only when value is given". However, "value" for the purposes of the PPSA is defined as:

  > any consideration sufficient to support a simple contract and includes an antecedent debt or liability. (Emphasis added)
  >
  > *Personal Property Security Act*, R.S.O 1990, c. P. 10, section 1(1)

- As noted by Richard McLaren in *Secured Transactions in Personal Property in Canada*:

> Value is defined by the Act as "any consideration sufficient to support a simple contract and includes an antecedent debt or liability". This definition resolves the problems of antecedent debts as value, which were not included in the definition of value under the prior Ont. Act. The reason for the confusion is related to the fact that under the common law of contracts, an antecedent debt cannot be consideration for a new contract. However, in the commercial world, is frequently the case that a lender who is unsecured and wishes to become secured will rely upon the antecedent debt in the course of entering into the security agreement by which a security interest is taken. The Act definition is intended to eliminate any doubt which might otherwise arise through the application of the common law of contracts.
>
> Richard McLaren, *Secured Transactions in Personal Property in Canada* (WestlawNext Canada), §4.01, p. 2, USS Book of Authorities, Tab 10

- As a result, any requirement for "value" to support the valid attachment of the security interest created by the grant was satisfied by USSC's existing debt obligations to USS. In addition, the subsequent advances of funds and services provided by USS to USSC would also constitute "value" for the purposes of attachment under the PPSA.

- The Province incorrectly conflates the concepts of the enforceability of contractual promises and the effectiveness of a grant of security. The effectiveness of an immediate grant of security is not dependent upon contract consideration and the statutory requirement for "value" as a pre-condition to attachment under the PPSA was clearly satisfied. Thus even if disposition of this issue could affect the outcome of the appeal (which it cannot), it does not have prima *facie merit*.

42. To the extent the Province argues that USS waived its ability to treat USSC's inability to meet debts as an event of default which relieved USS from its contractual obligation making further advances, Justice Wilton-Siegel fully answered such argument:

> **404** This argument is rejected for three reasons. First, as a practical matter, the last advance which could have given rise to such a waiver took place in early January 2013. There is no evidence that USS knew that USSC was insolvent, and therefore that an event of default had occurred, at or prior to the time of any such advances. Second, as a legal matter, the language of the Revolver Loan Agreement excluded the operation of a waiver in October 2013 based on previous conduct on two grounds. The provisions of section 7 of the Revolver Loan Agreement require that, to be effective, any waiver must be in writing, which would exclude entirely the possibility of an unwritten waiver based on a course of conduct. In addition, section 7 expressly negates the operation of a waiver based on the granting of a previous waiver. Third, in any event, as a practical matter, there can be no doubt that, as between USS and USSC, USSC would have understood that no course of conduct by USS could have given rise to a waiver of USS' rights to determine the availability of funding under the Revolver Loan Agreement, as described above.
>
> Reasons, para. 404, USS Compendium, Tab 1, p. 73
>
> Security Agreement, section 7, USS Compendium, Tab 4A, pp. 115-116[3]

43. To the extent the Province argues that even if USS was not required to advance further under the Revolver Loan it would have done so anyway, such argument is fully answered by Justin Wilton-Siegel in his Reasons:

> **408** Lastly, the Objecting Parties say that, as a practical matter, USS was never going to stop advancing funds in October 2013 for

[3] The applicable waiver provisions appear in section 7 of the Security Agreement [USS Compendium, Tab 4, p. 115-116].

> reasons relating to the operational impact on USS and USSC as well as the potential triggering of cross-default provisions on the USS public debt. Whether or not this is true, I do not think it demonstrates an absence of legal consideration for the following reasons. First, the absence of a legal obligation to advance further funds is by itself sufficient to give rise to consideration. Second, the grant of security by USSC forecloses this argument as it become entirely speculative. The position of the Objecting Parties requires the Court to make a determination that, in the hypothetical situation in which USSC refused to provide the required security, USS would necessarily have advanced the monies comprising the Second Tranche Indebtedness. I do not think the Court could make such a determination on the limited evidence before it. Among other things, in order to make such a determination, the Court would need to address the other options that would have been available to USS in such circumstances, including a filing under the CCAA and DIP financing, which was raised at the time by the financial advisors to USS.
>
> Reasons, para. 408, USS Compendium, Tab 1, p. 74

RE-CHARACTERIZATION ISSUE

44. There is no basis in Justice Wilton-Siegel's detailed Reasons to support the Objectors' assertion that in addressing the Debt Claim he favoured form over substance or failed to conduct a rigorous analysis. Justice Wilton-Siegel's Reasons encompass 452 paragraphs and he specifically held:

> **167** Where, however, as in the present circumstances, the parties are not at arm's length, the issue is not what the parties say they intended regarding the substance of the transaction as a matter of contractual interpretation. The expressed intention of the parties is clear. However, given the absence of any arm's length relationship, there can be no certainty that the language of the agreements reflects the underlying substantive reality of the transaction. Accordingly, the issue for a court is whether, as actually implemented, the substance of the transaction is, in fact, different from what the parties expressed it be in the transaction documentation.

> **168** In other words, the task of a court is to determine whether the transaction in substance constituted a contribution to capital notwithstanding the expressed intentions of the parties that the transaction be treated as a loan. It is therefore not appropriate to limit the inquiry into the intentions of the parties to a review of the form of the transaction documentation. Such an exercise reduces to a "rubber stamping" of the determination of a single party to the transaction, i.e., the sole shareholder, and it does not address the substance of the transaction as it was actually implemented. In such circumstances, the determination of whether a particular claim is to be treated as debt or equity must address not just the expressed intentions of the parties as reflected in the transaction documentation but also the manner in which the transaction was implemented and the economic reality of the surrounding circumstances.
>
> Reasons, paras. 167 to 168, USS Compendium, Tab 1, p. 30-31

45. Contrary to the Objectors' submission, Justice Wilton-Siegel cannot be criticized for lack of rigour in his re-characterization analysis or for having elevated form over substance in such analysis.

46. In arguing that their proposed appeal on the re-characterization issue is *prima facie* meritorious, the Objectors again fail to face up to the fundamental findings of fact made by Justice Wilton-Siegel, including:

(a) The relevant documentation "unequivocally" evidenced loan transactions on their face:

> The Term Loan and the Revolver Loan are, on their own terms, loans rather than equity contributions. The terms and conditions of the Term Loan Agreement and the Revolver Loan Agreement unequivocally evidence loan agreements. The Term Loan and Revolver Loan are both documented as loans in contracts entitled "Loan Agreement" in which the parties are described as lender and borrower. Each loan agreement prescribes a term and an interest rate, requires repayment, and has no terms expressly tying any payments to the financial performance of USSC. USS and USSC

> also had very different processes for approval and transmission of loan advances and equity contributions. The financial accounts of Canada LP or Credit Corp, as applicable, and USSC accurately recorded the loan advances separately from equity contributions.
>
> Reasons, para. 148, USS Compendium, Tab 1, p. 27

(b) At the time of the advances under the Term Loan, USS expected that USSC would repay interest on the Term Loan in accordance with the terms of the Term Loan and would repay the principal on or prior to the maturity.

> Reasons, paras. 313 and 333, USS Compendium, Tab 1, p. 59 and 61

(c) USS's expectation that USSC would repay interest on the Term Loan in accordance with the terms of the Term Loan Agreement and would repay the principal on or prior to the maturity date was not unreasonable.

> Reasons, paras. 330 and 333, USS Compendium, Tab 1, p. 61

(d) USS also had a reasonable expectation of repayment with interest of the advances made under the Revolver Loan when such advances were made.

> Reasons, paras. 377 and 388, USS Compendium, Tab 1, pp. 69 and 70

47. In the face of these unassailable findings of fact, the Objectors in pursuing their re-characterization position are effectively left with nothing to argue but that a parent corporation can never have a creditor-debtor relationship with a subsidiary unless the terms of the debt instrument mimic what a bank or other institutional lender would insist upon. Justice Wilton-Siegel found this was the only standard addressed by the Objectors' experts.

> Reasons, paras. 107 and 116, USS Compendium, Tab 1, pp. 20-21 and 22

48. Such a position does not reflect business reality. As Justice Wilton-Siegel observed, in many if not most cases, arrangements between a wholly-owned subsidiary and its parent depart from typical arrangements between third party lenders and borrowers.

> Reasons, para. 215, USS Compendium, Tab 1, p. 40

49. Indeed such a position does not even reflect the position of the line of American re-characterization cases relied upon by the Objectors to advance their claims. In the most recent Circuit Court of Appeal decision on this issue in *In re Alternate Fuels Inc.*, the Tenth Circuit Court of Appeal, which had previously accepted a list of *Autostyle*-like factors, declined to re-characterize notes in favour of a corporation's sole shareholder even though no interest was payable under the terms of the notes for five years and payment was not in fact demanded on the notes when due. The court further noted that:

> We have previously declined to hold broadly that "a dominant shareholder may not loan money to a corporation in which he is the principal owner and himself become a secured creditor."…We have been careful not to "discourage owners from trying to salvage a business" by requiring "all contributions to be made in the form of equity capital." …Indeed, owners may often be "the only party willing to make a loan to a struggling business," …and needlessly punishing their efforts is neither "desirable as social policy" nor required by our precedent.
>
> *In re Alternate Fuels, Inc.*, 789 F3d 1139 (10th Cir. 2015), at 1152-3, USS Book of Authorities, Tab 8

50. Thus, when the essence of the Objectors' proposed appeal on the re-characterization issued is isolated and examined, it does not raise an issue which is *prima facie* meritorious warranting leave to appeal.

The points on the proposed appeal are not of significance to the practice

51. The issue of whether the security granted on the USS secured claims is valid relies heavily on the interpretation of the relevant loan agreements under Pennsylvania law and whether there was an obligation to make further advances. This is not an issue which has broader significance to the practice in Ontario. Unique and exceptional cases fail to meet this test.

Nortel at para. 93, USS Book of Authorities, Tab 2

52. The issue of whether the amounts advanced are debt or equity may have a wider significance to the practice but fail to meet the other branches of the test for leave to appeal.

The points on the proposed appeal are of significance to the action

53. Given the size of both the secured and unsecured claims, the determination of these claims is of significance to the action. This factor alone is insufficient to warrant granting leave to appeal.

Nortel at para. 95, USS Book of Authorities, Tab 2

The proposed appeal will unduly hinder the progress of the action

54. The current state of the USSC proceeding is that a sales and investment process ("SISP") is underway. In order to attempt to deal with bids and determine if a transaction can be completed the stay of proceedings has been extended to July 28, 2016.

> Order of Justice Wilton-Siegel re Stay Extension, April 29, 2016,
> USS Compendium, Tab 5, pp. 126-128

55. In the context of the complex negotiations which are required to complete the SISP, introducing uncertainty as to the status of the USS claims has the real potential to substantially hinder the progress of the action.

56. For all of these reasons, leave to appeal should be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of May, 2016.

Blake, Cassels & Graydon LLP

Michael E. Barrack / Jeff Galway / Kiran Patel

Blake, Cassels & Graydon LLP
Lawyers for United States Steel Corporation

SCHEDULE "A"

LIST OF AUTHORITIES

Cases

1. *Re Bearcat Exploration Ltd.*, 2003 ABCA 365
2. *Nortel Networks Corporation (Re)*, 2016 ONCA 332
3. *Re Ravelston Corp*., [2005] O.J. No. 5351 (C.A.)
4. *Friedl v. Friedl*, 2009 BCCA 314
5. *Schlotfeldt v. Schlotfeldt*, 2011 BCCA 82
6. *General Motors Acceptance Corp. of Canada, Ltd. v. Town and Country Chrysler Ltd. et al* (2007), 88 O.R. (3d) 666
7. *Sattva Capital Corp. v Creston-Moly Corp.*, 2014 SCC 53
8. *In re Alternate Fuels, Inc.*, 789 F3d 1139 (10th Cir. 2015)

Secondary Sources

9. Donald J.M. Brown, *Civil Appeals* (Toronto: Thomson Reuters, 2013) (loose-leaf updated 2016, release 1), vol. 2
10. Richard McLaren, *Secured Transactions in Personal Property in Canada* (WestlawNext Canada)

SCHEDULE "B"

RELEVANT STATUTES

***Personal Property Security Act*, R.S.O 1990, c. P. 10, sections 1(1) and 11**

DEFINITIONS AND INTERPRETATION

1. (1) In this Act,

"value" means any consideration sufficient to support a simple contract and includes an antecedent debt or liability. ("contrepartie") R.S.O. 1990, c. P.10, s. 1 (1); 1991, c. 44, s. 7 (1); 1998, c. 18, Sched. E, s. 193; 2006, c. 8, s. 123 (1-8); 2006, c. 34, Sched. E, s. 1; 2010, c. 16, Sched. 5, s. 4 (1).

…

PART II – VALIDITY OF SECURITY AGREEMENTS AND RIGHTS OF PARTIES

Attachment required to enforce security interest

11. (1) A security interest is not enforceable against a third party unless it has attached. 2006, c. 8, s. 129.

When security interest attaches to collateral

(2) Subject to section 11.1, a security interest, including a security interest in the nature of a floating charge, attaches to collateral only when value is given, the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party and,

(a) the debtor has signed a security agreement that contains,

(i) a description of the collateral sufficient to enable it to be identified, or

(ii) a description of collateral that is a security entitlement, securities account or futures account, if it describes the collateral by any of those terms or as investment property or if it describes the underlying financial asset or futures contract;

(b) the collateral is not a certificated security and is in the possession of the secured party or a person on behalf of the secured party other than the debtor or the debtor's agent pursuant to the debtor's security agreement;

(c) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under section 68 of the *Securities Transfer Act, 2006* pursuant to the debtor's security agreement; or

(d) the collateral is investment property and the secured party has control under subsection 1 (2) pursuant to the debtor's security agreement. 2006, c. 8, s. 129.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE AND ARRANGEMENT OF U. S. STEEL CANADA INC.

Court of Appeal File Nos. M46272, M46263 and M46282
Court File No. 14-10695-00CL

COURT OF APPEAL FOR ONTARIO

Proceedings commenced at Toronto

RESPONDING FACTUM OF UNITED STATES STEEL CORPORATION (Consolidated Motion for Leave to Appeal)

BLAKE, CASSELS & GRAYDON LLP
199 Bay Street
Suite 4000, Commerce Court West
Toronto, ON M5L 1A9

Michael E. Barrack LSUC #21941W
Email: michael.barrack@blakes.com

Jeff Galway LSUC #28423P
Email: jeff.galway@blakes.com

Kiran Patel LSUC #58398H
Email: kiran.patel@blakes.com

Tel: 416-863-2400
Fax: 416-863-2653

Lawyers for United States Steel Corporation