Olympia & York Developments Ltd. v. Royal Trust Co.

Ontario Court of Justice (General Division) | July 26, 1993 | 1993 CarswellOnt 212

Document Details

All Citations:	1993 CarswellOnt 212, 20 C.B.R. (3d) 165, 41 A.C.W.S. (3d) 992

Search Details

Search Query:	Olympia & York Developments " the approval of this Court to a Protocol negotiated amongst them, and initiated byOrder of the Honourable Judge"
Jurisdiction:	Canada

Delivery Details

Date:	October 7, 2020 at 3:12 PM
Delivered By:	
Client ID:	NOCLIENTID

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Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36; Re plan of arrangement of OLYMPIA & YORK DEVELOPMENTS LIMITED and all other companies set out in Schedule "A" attached hereto

R.A. Blair J.

Judgment: July 26, 1993
Docket: Doc. B125/92

Counsel: *Frank J.C. Newbould, Q.C.*, and *Geoffrey B. Morawetz*, for Coopers & Lybrand, OYDL Inc., administrator of Olympia & York Developments Limited.
I. Berl Nadler, for O&Y 25 Realty Company, L.P. and O&Y Realty Company.
Peter F.C. Howard, for Citibank N.A.
Jack B. Berkow and *Melvyn P. Rubinoff, Q.C.*, for Cyrus R. Vance, examiner.
A.J. Kent and *Paul G. Macdonald*, for monitoring committee.

Subject: Corporate and Commercial; Insolvency

Table of Authorities
Cases considered:
Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd., [1971] 4 W.W.R. 542, 21 D.L.R. (3d) 75 (Man. C.A.) — *referred to*
Westar Mining Ltd., Re, 14 C.B.R. (3d) 88, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331 (S.C.) — *referred to*
Statutes considered:
Bankruptcy Code, 11 U.S.C.
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.
Rules considered:
Ontario, Rules of Civil Procedure.

Application for approval of protocol negotiated by parties under order of U.S. Bankruptcy Court.

R.A. Blair J. **(orally):**

1 In this Hearing the parties seek the approval of this Court to a Protocol negotiated amongst them, and initiated by Order of the Honourable Judge James L. Garrity of the United States Bankruptcy Court (Southern District of New York). The purpose of the Protocol, in Judge Garrity's words, is "to bridge the gap between [the] U.S. creditors and [the] Canadian equity [holders]", and "to harmonize" matters arising in the Canadian CCAA proceedings, on the one hand, and the U.S. "Chapter 11" proceedings, on the other hand, respecting the corporate governance of the Olympia & York group of companies. Exercising his powers under the U.S. Bankruptcy Code, he appointed an "Examiner" with a mandate to conduct negotiations between the parties for the purpose of implementing such a Protocol.

2 Cyrus R. Vance was subsequently chosen as the Examiner, and under the skilful guidance of Mr. Vance, a Protocol has been successfully — and no doubt tortuously — negotiated by the parties. It has now been approved by Mr. Vance, as Examiner, by the Administrator and the Monitoring Committee — each established under the *CCAA Plan* and Sanctioning Order of this Court — , by Citibank, N.A., and by the Debtor companies. On July 15, 1993, Judge Garrity gave final approval to the Protocol in the U.S. Court.

3 The Protocol deals with issues concerning the "corporate governance" of three corporations, known as the "Tier One Corporations" and certain other corporations which hold assets directly or indirectly in real estate located in the United States. The issues deal primarily with matters concerning the directors of such corporations, including:

i) the appointment of boards of directors;

ii) procedures governing the functioning of the boards;

iii) indemnity and immunity protections afforded to such directors and certain officers;

iv) judicial review procedures in connection with removal of directors;

v) the replacement of directors; and

vi) recognition and confirmation of certain rights of the Administrator including the right to receive information in respect of corporations.

4 Like most other accomplishments in this multi-national corporate re-organization of the Olympia & York companies, the Protocol is the product of intense — even herculean — efforts on the part of all concerned. Mr. Vance and everyone involved are to be commended for what is yet another triumph in these proceedings of the oldest of all "alternative dispute resolution" techniques: negotiation.

5 The Olympia & York re-organization involves proceedings in three different jurisdictions: Canada, the United States, and the United Kingdom. Insolvency disputes with international overtones and involving property and assets in a multiplicity of jurisdictions are becoming increasingly frequent. Often there are differences in legal concepts — sometimes substantive, sometimes procedural — between the jurisdictions. The Courts of the various jurisdictions should seek to co-operate amongst themselves, in my view, in facilitating the trans-border resolution of such disputes as a whole, where that can be done in a fashion consistent with their own fundamental principles of jurisprudence. The interests of international co-operation and comity, and the interests of developing at least some degree of certitude in international business and commerce, call for nothing less.

6 Like Judge Garrity, I am satisfied that the Protocol represents a hard fought, but fair and reasonable resolution of a number of very contentious issues arising because of a clash, or at least a potential clash, between the corporate governance provisions of the CCAA Plan, as sanctioned by this Court, and the legitimate concerns of U.S. creditors regarding real estate assets located in the United States. The Protocol is a creative way, as Judge Garrity said, of "bridging the gap between U.S. Creditors and Canadian equity" and of "harmonizing" the proceedings between the two jurisdictions. It fulfills his criterion, set out in his Reasons establishing the position of Examiner, of "[being] faithful to the corporate governance provisions of the CCAA Plan while striking the balance necessary to achieving a Board of Directors that will be able to function independently".

7 I have no hesitation in concluding, as I do, that this Court has the jurisdiction to approve a vehicle such as the Protocol, negotiated and agreed to by all of the affected parties, and designed to facilitate the implementation of a re-organization Plan by providing some certainty regarding cross-jurisdictional issues. Such jurisdiction can be founded on the principles of international comity between nations, or, if necessary upon the Court's inherent jurisdiction "to ensure the observance of the due process of law ... [and] ... to do justice between the parties": see

Montreal Trust Co. v. Churchill Forest Industries (Man.) Ltd. (1971), 21 D.L.R. (3d) 75 (Man. C.A.), at p. 81. As Mr. Justice B.D. Macdonald put it, in *Re Westar Mining Ltd.* (1992), 14 C.B.R. (3d) 88 (B.C. S.C.), at p. 93:

> Proceedings under the C.C.A.A. are a prime example of the kind of situations where the court must draw upon such powers to "flesh out" the bare bones of an inadequate and incomplete statutory provision in order to give effect to its objects.

8 There are two provisions in the Protocol which cause me some concern from a jurisdictional perspective, however.

9 Firstly, paragraph 3 deals with the Implementation of the Protocol. Directors are to have immunity from liability in certain respects in their capacity as directors. Para. 3(c) provides for such immunity, and concludes with the following passage:

> ... It is understood that the actions of the Directors and officers of the Debtors in the course of performance of their roles in the management of the U.S. Operations are, as between the Bankruptcy Court and the Court of Justice, the primary concern of the Bankruptcy Court and, therefore, in any proceeding involving a determination of the entitlement of any Director or officer of a Debtor to the immunity contemplated by this section 3(a), the Court of Justice *shall*, on grounds of comity, defer to the decision of the Bankruptcy Court. (emphasis added)

10 The references to the "Bankruptcy Court" and to the "Court of Justice" in the foregoing quotation are to the U.S. Bankruptcy Court and to this Court, respectively.

11 The Protocol is, in essence, an agreement between the parties, and binding upon them. It requires the approvals of this Court and the U.S. Bankruptcy Court, by its terms, but, in spite of the use of the word "shall", I do not take its approval to be binding upon the Court in the sense of committing it unequivocally to an ouster of its jurisdiction in the future without regard to the circumstances. The "understanding" expressed in the passage quoted above is sensible, understandable, and indeed commendable, and I should think that in the circumstances envisaged therein, the Canadian Court would likely be inclined to defer to the jurisdiction and decision of the U.S. Bankruptcy Court. I do not think that I have the jurisdiction, however, to bind this Court to an ouster of its jurisdiction in the future.

12 Paragraph 6 of the Protocol deals with the removal of directors, a particularly contentious issue between the parties. The Administrator is entitled to remove a director, but subject to a number of stringent requirements and procedures. Para. 6(d) raises the second concern to which I have referred. Under that provision, a creditor of OYDL or any other party in interest has the right to appear before this Court on any matter related to the decision of the Administrator to seek the removal of a director. It also provides for the eventuality that in that context an issue may arise as to "whether the Administrator's decision to seek removal is in accordance with United States law related to the duties of controlling shareholders acknowledged in the Acknowledgement and this Protocol". In those circumstances, the Protocol says, "then the Court of Justice *shall consult with* and defer to the decision of the Bankruptcy Court" (emphasis added). This language is repeated several times, and, indeed, there is a similar reciprocal provision, should the reverse situation arise involving the U.S. Court.

13 The very sensible purpose of the provision is stated at the end of para. 6(d), as follows:

> ... Given the foregoing provisions which contemplate deference to the Bankruptcy Court on matters of United States law and deference to the Court of Justice on matters of Canadian law, parties in interest are urged in connection with matters related to removal to institute in the Bankruptcy Court with respect to matters of United States law and the Court of Justice with respect to matters of Canadian law.

14 The mechanism for the resolution of such issues is not clearly set out in the Protocol, however. The concept of this Court and the U.S. Bankruptcy Court "consulting" with each other raises awkward and difficult questions. It is not an exercise which is generally undertaken. How it should be accomplished is not articulated explicitly, although there is a passage that suggests that there will be some sort of a hearing. That passage states:

> ... If either the Bankruptcy Court or the Court of Justice is consulted on a matter in accordance with this Section 6(d), the party having requested a hearing before the Court seeking such consultation shall provide notice to all parties in interest of the hearing to be held before such consulted Court so that such parties in interest shall have an opportunity to be heard at such hearing.

15 This does not answer the question of what role the "consulting" Court is to play. Is it contemplated that there will be written or telephonic communication between the Courts? What about the input of the parties in that process? What about the rights of the parties if there is no such input? Is the consulting Court to hire counsel in the other jurisdiction and "move for directions", in effect, from the "consulted court"? These and other questions arise. I have serious reservations that the provisions of para. 6(d) are workable as between the two Courts in this respect, and I am not prepared to approve the "mechanics" of that provision, to the extent they exist, if approval means that this Court is to assume some sort of pro-active role in the process.

16 The intent of para. 6(d) is relatively clear, I think. It is to require that matters involving U.S. law and U.S. assets and U.S. creditors and (probably) U.S. directors, be determined in the U.S. Courts, and that any decision in that regard be applied in the contemplated Canadian proceedings regarding the removal of the director. I am satisfied the concept makes sense in this context, even though it may involve "farming out" a portion of the Court's decision making functions to another Court and the application of that other Court's decision within this Court's proceedings. In essence, all that will be happening under the proposed scheme, is that the "foreign law" question — normally determined in the domestic forum on the basis of evidence regarding the foreign law — will be determined by the foreign court which is familiar with that law. In the context of the kind of international trans-border insolvencies such as this O & Y re-organization, I see nothing wrong in principle with that process, for the reasons articulated earlier. I am not satisfied with the mechanism proposed, however.

17 In argument, I suggested that the problem might be addressed by creating a mechanism analogous to the "stated case" or "special case" provisions of the Ontario Rules of Civil Procedure. That is, the parties, in conjunction with an order of this Court, would articulate the issue of foreign law to be determined by the U.S. Court; there would then be a hearing before the U.S. Court (or the Canadian Court, if the situation were reversed), on proper notice to all concerned and on the basis of whatever evidence and materials are appropriate. The results of that determination would then be brought back to the Canadian (or U.S.) Court for application. Counsel expressed some agreement with this concept, but there were some reservations because, apparently, there may not be the equivalent kind of "stated case" procedure in the U.S. Court. Nevertheless, perhaps it could be implemented on the basis of the same "sua sponte" jurisdiction to which Judge Garrity resorted in appointing the Examiner in the first place.

18 I do not propose to require that such a procedure be adopted as a condition of approval of the Protocol. In the end, the provision in the Order to be granted whereby the two Courts retain jurisdiction in aid of the implementation of the Protocol will leave open the ability for an appropriate procedure to be worked out when, and if, the need arises.

19 Subject to the foregoing reservations, and for the foregoing reasons, the Protocol is approved and the Order sought granted. Once again, I congratulate the parties and Mr. Vance in their successful negotiation of this most useful vehicle for the harmonization of proceedings between the two international jurisdictions.

R.A. Blair J. **(Order):**

20 THIS MOTION made by Coopers & Lybrand OYDL Inc., the Administrator (the "Administrator") of Olympia & York Developments Limited ("OYDL") appointed pursuant to the provisions of the Sanction Order (the "Sanction Order") of this Court dated February 5, 1993 was heard this day at Toronto, Ontario.

21 ON READING the affidavit of Paul Currie sworn July 9, 1993 and the supplementary affidavit of Paul Currie sworn July 21, 1993 and on hearing submissions of counsel for the Administrator,

22 1. THIS COURT ORDERS that the corporate governance protocol among:

is hereby approved in its entirety substantially in the form attached hereto as Exhibit "A" (the "Protocol").

23 2. THIS COURT ORDERS that the Administrator is hereby authorized to enter into and to take all steps necessary or advisable to immediately implement and give effect to the Protocol and to take all steps necessary or advisable to cause OYDL, as shareholder of Realty, Development and Equity, to cause each of Realty, Development and Equity to immediately implement and give effect to the Protocol.

24 3. THIS COURT ORDERS that further to the Orders of this Court dated June 1, 1992 and December 23, 1992, US$16,000,000 of the Net Proceeds (within the meaning of the aforesaid Orders) received and held by or on behalf of SF Holdings from the sale of Santa Fe Pacific Corporation shares and Santa Fe Energy Corporation shares, shall be pledged by SF Holdings as collateral security to secure the indemnification obligations of Realty, SF Holdings, Development, Equity, O&Y (U.S.) Development General Partners Corp., O&Y Equity General Partner Corp. and Olympia & York Real Estate (U.S.A.) Inc. under indemnification agreements to be delivered by the, all in the manner and to the extent set forth in the Protocol and the schedules and exhibits thereto and the Administrator, Realty and SF Holdings and hereby authorized and directed to take all steps which are necessary or advisable to authorize and to give effect thereto.

25 4. THIS COURT ORDERS that each Director (as identified in the Protocol) and the senior officers listed on Schedule 2 to the Protocol and their respective successors shall have the benefit of the immunities set forth in the Protocol and the schedules and exhibits thereto all in the manner and to the extent provided therein.

26 5. THIS COURT ORDERS that in entering into, implementing and giving effect to the Protocol, the Administrator, its officers and directors shall, subject to the terms of the Protocol, have all the powers, protections, and duties of the Administrator, its officers and directors under the Sanction Order and the plan of arrangement and compromise (the "Plan") sanctioned thereunder and that the Administrator may apply to this Court from time to time during the Plan Period (within the meaning of the Plan) for advice and direction concerning the aforesaid powers and duties or any other relevant matter.

27 6. THIS COURT ORDERS that in entering into, implementing and giving effect to the Protocol, the Monitoring Committee and its members shall, subject to the terms of the Protocol, have all the powers, protections, and duties of the Monitoring Committee and its members under the Sanction Order and the plan of arrangement and compromise (the "Plan") sanctioned thereunder.

28 7. THIS COURT ORDERS that this Court shall retain jurisdiction in aid of the implementation of the Protocol and this Court seeks and requests the recognition and aid of any court or administrative body in any Province of Canada and any Canadian Federal Court and any Federal or State Court in the United States of America, including the United States Bankruptcy Court (Southern District of New York) which shall also retain jurisdiction in aid of implementation of the Protocol, to act in aid of and to be complementary to this Court in the carrying out of the terms of the Protocol and this Order.

29 8. THIS COURT ORDERS that all those served with Notice of this Hearing are to be served with a copy of this Order by facsimile transmission, such service to be effective 72 hours after such transmission.

Exhibit "A"

Examiner's Governance Protocol

30 The governance of the Corporations listed on Schedule 1 (each herein called a "*Corporation*") and their corporate subsidiaries, which together with O & Y (U.S.) Development Company, L.P. ("*Devco*"), O & Y Equity Company, L.P. ("*Equityco*") and entities that are wholly owned, directly or indirectly, by any one or more of the Corporations, Devco, Equityco, their corporate subsidiaries or O & Y (US) Holdings Company, constitute the United States operations of the Olympia & York enterprise (the "*U.S. Operations*") shall be established in accordance with the following:

1. Composition of Board of Directors

31 a. Upon approval of this Protocol by the United States Bankruptcy Court for the Southern District of New York (the "*Bankruptcy Court*") on motion by Cyrus Vance, as Examiner (the "*Examiner*") appointed in the Chapter 11 cases of Olympia & York Realty Corp., Olympia & York SF Holdings Corporation ("*SF Holdings*"), O&Y (U.S.) Development Canada Ltd. and O&Y Equity (Canada) Ltd. (collectively sometimes herein called the "*Debtors*") and the Ontario Court of Justice (the "*Court of Justice*") on motion by Coopers & Lybrand OYDL, Inc., as Administrator pursuant to the Revised Plans of Compromise and Arrangement pursuant to the Companies' Creditors Arrangement Act (Canada) of Olympia & York Developments Limited and Other Corporations (the "*CCAA Plan*") (Coopers & Lybrand OYDL, Inc., together with its successors, if any, appointed by the Court of Justice under the CCAA Plan or otherwise succeeding to the powers of the present Administrator in accordance with the CCAA Plan being herein called the "*Administrator*"), the Board of Directors of each Corporation shall be reconstituted in accordance with this Protocol.

32 b. The Directors of each Corporation will be as follows:

33 c. The term of each member of the Board of Directors of each Corporation shall be three (3) years, subject to Sections 6 and 7(a) hereof. The Administrator, as agent for the controlling shareholder of the Debtors excluding SF Holdings (such three Debtors being herein called the "*Tier One Corporations*") shall, at the annual meetings of the Tier One Corporations in 1994 and 1995, elect the foregoing nine Directors, subject to any changes effected pursuant to Sections 6, 7(a) or 8 hereof, as the Board of Directors of each Tier One Corporation. Immediately upon the election in 1994 and 1995 of the Boards of Directors of the Tier One Corporations, each such Board, as the controlling shareholder of one or more of the remaining Corporations, shall elect the foregoing nine Directors, subject to any changes effected pursuant to Sections 6, 7(a) or 8 hereof, as the Board of Directors of each such Corporation.

34 d. In order to permit the Board of Directors described above to be elected, the Corporations currently incorporated under the laws of Ontario shall be continued under the laws of New Brunswick immediately upon approval of this Protocol by the Bankruptcy Court and the Court of Justice.

Execution of the Acknowledgement; Status of U.S. Operations

35 a. The Administrator shall have executed and filed with the Bankruptcy Court and the Court of Justice an Acknowledgement in the form of Exhibit A annexed hereto.

36 b. The parties whose signatures appear at the end of this Protocol hereby stipulate and agree, solely for purposes of establishing the nature of the duties of the Directors and controlling shareholder of the Corporations and not to constitute a judicial admission that may be used in any other context in the Debtors' proceedings pending before the Bankruptcy Court or the Court of Justice or otherwise, that the entities constituting the U.S. Operations are either in bankruptcy proceedings or insolvent or operating in the vicinity of insolvency.

Implementation

37 a. Immediately upon approval of this Protocol by the Bankruptcy Court and the Court of Justice, the Boards of Directors of each Tier One Corporation described above shall be elected by the Administrator and each Board of Directors of the Tier One Corporations so elected shall elect the same nine (9) Directors as the Board of Directors of the remaining Corporation or Corporations of which such Tier One Corporation is the controlling shareholder. The Directors and certain officers of the Corporations and their successors in such Directorships and officerships shall each have the indemnity and immunity protections that are contemplated by this Section 3.

38 b. Immediately upon approval of this Protocol by the Bankruptcy Court and the Court of Justice, each Corporation shall execute in favor of each Director and each officer listed on Schedule 2 (and their successors) an Indemnification Agreement, substantially in the form of Exhibit B annexed hereto (an "*Indemnification Agreement*").

39 c. Immediately upon approval of this Protocol by the Bankruptcy Court and the Court of Justice, each Director and each officer listed on Schedule 2 (and their successors) shall have immunity from any liability which may otherwise attach to any Director or any such officer in exercising such Director's or officer's power and authority as a Director or officer of a Corporation and any direct or indirect subsidiaries to which they are elected or appointed; *provided* that (i) the immunity being extended hereby by the Court of Justice with respect to actions in that Court shall be limited to Directors and officers in their capacities as Directors and officers of the Debtors, (ii) the immunity being extended hereby by the Bankruptcy Court with respect to actions in that Court shall cover Directors and officers in their capacities as Directors and officers of the Corporations and other corporations constituting a part of the U.S. Operations, and (iii) with respect to any challenged action in either such Court, the immunity granted hereby shall only attach if such Director or officer is disinter ested under law applicable to directors or officers of corporations and has acted in good faith, and for all purposes such Director or such officer shall be presumed to be so disinterested and acting in good faith absent a finding by the Bankruptcy Court or the Court of Justice to the contrary. It is understood that the actions of the Directors and officers of the Debtors in the course of performance of their roles in the management of the U.S. Operations are, as between the Bankruptcy Court and the Court of Justice, the primary concern of the Bankruptcy Court and, therefore, in any proceeding involving a determination of the entitlement of any Director or officer of a Debtor to the immunity contemplated by this Section 3(a), the Court of Justice shall, on grounds of comity, defer to the decision of the Bankruptcy Court.

40 d. Immediately upon approval of this Protocol by the Bankruptcy Court and the Court of Justice, the Administrator shall have immunity from any liability for money damages which may otherwise attach to the Administrator acting as agent for the controlling shareholder of the entities constituting the U.S. Operations; *provided* that with respect to any challenged action, such immunity shall only attach if the Administrator has acted in good faith and in a manner consistent with its fiduciary duties, and for purposes of any such action seeking to impose liability for money damages (and not for any other purpose) the Administrator shall be presumed to be acting in good faith and in a manner consistent with its fiduciary duties absent a finding to the contrary by the Bankruptcy Court as to its fiduciary duties and by a court of competent jurisdiction as to its good faith. Nothing contained in this Section 3(d) shall be construed to limit, increase or otherwise affect (i) the right of any party to seek to enjoin or obtain other equitable or non-monetary relief with respect to any action proposed to be taken or already taken by the Administrator on any cognizable legal or equitable ground or (ii) any right of the Corporations to sue in a court of competent jurisdiction OYDL, O&Y 25 Realty Company or O&Y 25 Realty Co. L.P. for any purpose at any time and adding the Administrator as a necessary named party, as the agent for OYDL; it being understood that the only limitation intended to be effected hereby is a prohibition on monetary recovery against the assets of the Administrator, its shareholders, officers and directors.

41 e. Each Corporation will use reasonable efforts to obtain such D&O insurance as may be available on commercially reasonable terms.

42 f. Each Debtor shall execute and deliver to each Director (and his successors), each officer listed on Schedule 3 (and their successors) and the Administrator, as agent for the controlling shareholder, and the Administrator, as agent for the controlling shareholder, shall execute and deliver to each Director and each such officer (and their successors), a covenant not to sue, substantially in the form of Exhibit C annexed hereto [omitted by the court], which shall not preclude any legal proceedings in the Bankruptcy Court or the Court of Justice contemplated under Section 6 hereof or any legal proceedings against the Administrator as to which the Administrator has not been granted immunity as contemplated by Section 3(d) hereof. Execution by creditors of the U.S. Operations and by creditors of OYDL of a covenant not to sue shall be encouraged. The Monitoring Committee shall have authorized the Administrator to execute the foregoing covenants not to sue and it is understood that the Monitoring Committee has no independent right as such Committee to commence legal actions of the type limited by such covenants not to sue.

43 g. The use of $16 million of the cash on hand at SF Holdings as collateral security for the indemnity obligations described above in the manner described in Exhibit D annexed hereto [omitted by the court] is approved. Immediately upon approval of this Protocol by the Bankruptcy Court and the Court of Justice, the parties thereto shall execute the agreements constituting said Exhibit D. The U.S. Operations will use its good faith efforts to cause the Outside Directors to become Additional Indemnitees under the existing trust established in the original amount of $2 million for the purpose of providing indemnity to the officers of the U.S. Operations, it being understood that the claims of the Outside Directors against such trust will be subordinated to the claims of the Existing Indemnitees under such trust.

44 h. The entitlement of any officer of a Corporation to the indemnity and immunity protections set forth in Sections 3(b), (c) and (f) hereof shall be conditioned upon the execution by such officer of a certificate in the form of Exhibit E annexed hereto [omitted by the court] and the delivery of such certificate to the Corporations and each party who executes and delivers to such officer a covenant not to sue, *provided* that the execution and delivery of such certificate shall not provide an independent basis for litigation against the executing officer or otherwise expand the exceptions to the indemnity, immunity and non-suit protections set forth in this Section 3.

45 i. Among the matters that the Examiner believes that the Boards of Directors should address upon their election are (i) the initial composition of the boards of directors of corporations comprising the U.S. Operations that are not Corporations, (ii) the employment arrangements for John Zuccotti, in his capacity as the Chief Executive Officer of the U.S. Operations, and of other senior officers as the Board of Directors shall determine as contemplated by Section 5(b) hereof, and (iii) continued implementation of the restructuring of the U.S. Operations in accordance with the best interests of the U.S. Operations taken as a whole.

4. Action and Procedures by a Board of Directors

46 a. A quorum for action by the Board of Directors of a Corporation shall be five of its members.

47 b. Action by the Board shall be by majority vote except as required by applicable law or as provided in Sections 6 or 7 hereof, *provided* that (i) any action must have the affirmative vote of at least five (5) Directors and (ii) any determination of the composition of the respective boards of directors of corporations comprising the U.S. Operations that are not Corporations must have the affirmative vote of at least six (6) Directors.

48 c. All Directors will receive six (6) days written notice of all meetings (unless all Directors agree that a shorter notice period is either generally appropriate or appropriate with regard to a particular category of items to be considered by the Board), and all action items must be listed on an agenda distributed with such notice or distributed no later than four (4) days prior to the related meeting unless such requirement is waived by all Directors. In addition to agenda items proposed by management, there shall be added to any meeting agenda any item proposed for Board consideration by a Director in a written notice delivered to the other Directors at least four

(4) days prior to the meeting to which such agenda relates, *provided* that the Board may consider any emergency matter on less than four (4) days notice if the majority of Directors so determine. Delivery of notices shall be by hand or facsimile transmission.

49 d. During the first twelve (12) months after implementation of this Protocol, the Board of Directors shall hold meetings at least monthly, unless this requirement is waived by unanimous vote of all of the Directors. The Board of Directors shall establish procedures to hold telephonic meetings and to allow members to participate in meetings by telephone to facilitate full participation of members in Board activity.

5. Shareholder/Management and Shareholder/Board Relations and Information Flow

50 a. The Administrator, as agent for the controlling shareholder of the U.S. Operations, shall have the rights to information and the status ordinarily enjoyed by a controlling shareholder; *provided* that if any such right or status is in conflict with an express provision of this Section 5, this Section 5 shall be deemed to control.

51 b. Upon approval of this Protocol by the Bankruptcy Court and the Court of Justice and the election of the Boards of Directors of each Corporation as provided in Section 3(a) hereof, the Administrator confirms that the U.S. Operations will continue to be managed exclusively by a management team headed by John Zuccotti, Chief Executive Officer, which management team shall be subject to the direction and control, including dismissal powers, of the Board of Directors. Nothing contained in this Section 5(b) shall be deemed to limit the authority of the Board of Directors to negotiate employment arrangements satisfactory to the Board with Mr. Zuccotti and other members of the management team or to dismiss any member of the management team with whom such arrangements cannot be negotiated.

52 c. The Board of Directors being ultimately responsible for the direction and control of the U.S. Operations, the Administrator shall not, subject to the second sentence of this Section 5(c), use its position as agent or a holder of a power of attorney for OYDL or any other person or entity that is not part of the U.S. Operations where OYDL or such other person or entity is a minority shareholder in, or a general partner or limited partner having a minority economic interest of, entities constituting a part of the U.S. Operations (for example, the Administrator's position as holder of a power of attorney for a general partner with a 20% economic interest in Olympia & York (US) Holdings Company ("*Holdings*")) to block action relating to the restructuring of the U.S. Operations that has been approved by the Board of Directors. The restriction contained in the preceding sentence of this Section 5(c) is intended only to prevent the use by the Administrator of special contractual voting provisions applicable to, or contractual provisions requiring unanimous general partner action of, minority economic positions to block corporate governance decisions properly taken in accordance with this Protocol, but such restriction on the powers of the Administrator is specifically not intended, and may not be utilized in any way, (i) to affect the ratable economic treatment any such minority economic position is otherwise entitled to receive pursuant to any restructuring of the U.S. Operations or (ii) without the prior written consent of the Family Corporations (as defined in the CCAA Plan), to (A) require O&Y 25 Realty Company, L.P. or O&Y 25 Realty Company (collectively, "*25 Realty*") to provide credit support by way of guarantee, indemnity or otherwise of any financing extended to Holdings (or any other person or entity subject to a power of attorney in favor of the Administrator) by the other partners or by any third party lender or to contribute any financing to Holdings (or such other person or entity) or (B) require 25 Realty to suffer any dilution or penalty in relation to its partnership interests in Holdings (or such other person or entity). In furtherance of the foregoing, it is expressly recognized that the fiduciary duty of the Directors and the controlling shareholder of the Corporations that extends to creditors and equity of the entities constituting the U.S. Operations shall extend to the benefit of any such minority economic position. It is understood that if the Administrator determines that its intention to vote the 25 Realty posi tion with respect to a proposed restructuring of, or other proposed transaction involving, the U.S. Operations would conflict with either clause (A) or (B) above, the Administrator shall promptly notify the Board of Directors of its determination that the Administrator cannot, without obtaining the prior consent of the Family Corporations, exercise its rights under the applicable power of attorney to vote its interest in Holdings (or such other person

or entity) with respect to such proposed restructuring or transaction. In such event, the Board of Directors shall provide the Family Corporations with information and financial data (on a confidential basis if such information or financial data is not otherwise publicly available) relating to such proposed restructuring or transaction in order to afford the Family Corporations an opportunity to review and discuss the proposed restructuring or transaction and any available alternatives thereto with the Board of Directors.

53 d. The Administrator, as agent for the controlling shareholder, shall be entitled to receive promptly from management all information and reports (including back up data) reasonably requested by the Administrator; *provided, however*, that:

54 The foregoing information rights of the Administrator, as agent for the controlling shareholder, are in addition to the right of the Administrator's Chief Executive Officer, as a Director, to receive material furnished to members of the Board of Directors. When information is provided to the Administrator, as agent for the controlling shareholder, pursuant to the foregoing, the Directors shall be advised thereof and any Director requesting all or any part of such information shall be entitled to receive it. It shall not constitute sufficient grounds to refuse a request of the Administrator, as agent for the controlling shareholder, for information that is otherwise reasonable that creditors have not yet received the requested information.

55 e. During the first six months after implementation of this Protocol any dispute arising between the Administrator, as agent for the controlling shareholder, and the management of the U.S. Operations with respect to access to information by the Administrator, as agent for the controlling shareholder, may be presented to the Examiner for resolution. The Examiner's resolution of any such dispute, after hearing the positions of each of the parties, shall be final and conclusive with respect to the subject matter of such dispute. At the end of the foregoing six month period the Examiner shall review with the Bankruptcy Court the need to continue such arbitration procedure or a modification thereof in effect for a further period; any party in interest in the Debtors' Chapter 11 cases may be heard at such review hearing.

6. Removal of Directors

56 a. A Director may be removed from the Boards of the Tier One Corporations by the action of the Administrator, as agent for the controlling shareholder, in accordance with the law applicable to the relevant Corporation and as permitted by the CCAA Plan and in accordance with this Protocol and United States law relating to the duties of controlling shareholders as set forth in the Acknowledgement; *provided* that such removal is subject to (i) not less than five (5) business days prior written notice delivered (1) by hand or by facsimile transmission to the Bankruptcy Court, the Court of Justice and each party listed on Schedule 4 and (2) delivered by overnight mail service to all other parties who filed a notice of appearance and remain on the service list in the Chapter 11 cases of the Debtors at the date of such notice and (ii) the right of the subject Director, any other Director, any party in interest listed on Schedule 4 and any other such party in interest to request within such five (5) business day period a hearing conducted in accordance with Section 6(d) hereof before the Bankruptcy Court or the Court of Justice to review such removal. Nothing in this Protocol shall affect the burden of going forward or the burden of proof otherwise applicable in any such hearing concerning removal.

57 b. During the aforesaid notice period, and if a request for a hearing is made, during the extended period until a decision is made in accordance with Section 6(d) hereof with respect to the subject matter of such hearing, the subject Director will remain in place and no action shall be taken by the Board of Directors except (i) with the approval of the Bankruptcy Court on application seeking such approval authorized by a majority of the Directors or (ii) upon the unanimous consent of the Directors, including the subject Director.

58 c. If no hearing conducted in accordance with Section 6(d) hereof by the Bankruptcy Court or the Court of Justice is requested by such Director, any other Director or any such party in interest, removal of the subject

Director shall be effective five (5) business days after such notice is served by the Administrator, as agent for the controlling shareholder.

59 d. Any creditor of OYDL or any other party in interest shall have the right to appear before the Court of Justice on any matter related to the decision of the Administrator, as agent for the controlling shareholder, to seek the removal of a Director, provided that such creditor or other party in interest shall provide notice in the manner and to the parties set forth in Section 6(a) of the hearing to be held before the Court of Justice, and such notice shall state whether any matter of United States law will be raised before the Court of Justice. If recourse to the Court of Justice is had before the Administrator gives the notice of removal referred to in clause (i) of Section 6(a), the Court of Justice shall have the right to determine whether the decision of the Administrator, as agent for the controlling shareholder, to seek removal was proper as a matter of Canadian law or otherwise in accordance with the CCAA Plan, and the Bankruptcy Court in any subsequent proceeding before it related to such removal shall defer to the Court of Justice's decision on such matters; but if in such proceeding before the Court of Justice, the Court of Justice is presented with the issue of whether the Administrator's decision to seek removal is in accordance with United States law related to the duties of controlling shareholders acknowledged in the Acknowledgement and this Protocol, then the Court of Justice shall consult with and defer to the decision of the Bankruptcy Court thereon. If the Court of Justice determines after consultation with the Bankruptcy Court, if appropriate, that the decision of the Administrator, as agent for the controlling shareholder, to seek removal of such Director was not proper then the proposed removal of such Director will not be effectuated. If no creditor or other party in interest requests such a determination by the Court of Justice, or the Court of Justice determines that the decision of the Administrator, as agent for the controlling shareholder, to seek the removal of such Director was proper, and notice of removal is given as provided in Section 6(a) hereof and a hearing is requested before the Bankruptcy Court in accordance with the procedures set forth above, then (i) the Bankruptcy Court shall dismiss such petition if the Canadian Court has already issued a ruling based on the Bankruptcy Court's decision under United States law; (ii) in any other case, the Bankruptcy Court shall have the right to determine whether the proposed removal will be effectuated in accordance with United States law relating to duties of controlling shareholders acknowledged in the Acknowledgement and this Protocol but shall consult with and defer to the decision of the Court of Justice with respect to any question presented as to whether such removal is proper as a matter of Canadian law or in accordance with the CCAA Plan; and (iii) in any hearing commenced in the Court of Justice after such notice of removal is given that presents the issue of whether the attempted removal is in accordance with United States law relating to duties of controlling shareholders, the Court of Justice shall consult with and defer to the decision of the Bankruptcy Court thereon. If either the Bankruptcy Court or the Court of Justice is consulted on a matter in accordance with this Section 6(d), the party having requested a hearing before the Court seeking such consultation shall provide notice to all parties in interest of the hearing to be held before such consulted Court so that such parties in interest shall have an opportunity to be heard at such hearing. If the Bankruptcy Court's or the Court of Justice's decision is that the proposed removal of a Director is not to be disturbed, then the removal of such Director shall be effective upon entry of the Court's order to such effect, unless each Court has rendered a decision regarding removal based solely on the law within its primary competence, in which case, if either decision is that the proposed removal is to be disturbed, such removal will not be effectuated. Given the foregoing provisions which contemplate deference to the Bankruptcy Court on matters of United States law and deference to the Court of Justice on matters of Canadian law, parties in interest are urged in connection with matters related to removal to institute proceedings in the Bankruptcy Court with respect to matters of United States law and the Court of Justice with respect to matters of Canadian law.

60 e. If any Director is removed from the Boards of the Tier One Corporations in accordance with the foregoing provisions of this Section 6, such director shall simultaneously be removed from the Boards of each remaining Corporation by appropriate action of the Board of Directors of the Tier One Corporation that is the controlling shareholder of such Corporation.

7. Filling of Vacancies; Reelection of Directors

61 a. In the event of a vacancy on the Board of a Tier One Corporation, such vacancy shall be filled by an Outside Director (i) proposed by the Administrator (who shall consult with the Directors regarding suitable candidates and shall submit for consideration any candidate proposed by at least three (3) Directors) and (ii) acceptable to each member of the Board of Directors of such Tier One Corporation or approved by the Bankruptcy Court, *provided*, that if such vacancy results from the departure of Mr. Lowe or Mr. Zuccotti, a senior officer of the Administrator (in the case of Mr. Lowe) or of the U.S. Operations (in the case of Mr. Zuccotti), who is reasonably acceptable to the other members of the Board, shall be designated to fill such vacancy. Immediately upon the filling of such vacancy, the Board of Directors of each Tier One Corporation shall elect the same individual to fill the comparable vacancy on the Board of each remaining Corporation controlled by such Tier One Corporation.

62 b. Commencing with the Annual Meeting of Shareholders in 1966, an incumbent Director of a Corporation may be reelected and the controlling shareholder of each Corporation may elect an individual other than an incumbent Director if such individual is an Outside Director.

63 c. From and after the departure of a Director from the Board, such Director shall not (i) become an officer of any entity constituting a part of the U.S. Operations, (ii) invest in the U.S. Operations or (iii) unless the Board of Directors otherwise approves, enter into a business transaction with any entity constituting a part of the U.S. Operations for a period of one (1) year after such departure.

8. Modification of this Protocol

64 The provisions of this Protocol may be modified upon approval of such modification, after notice and hearing, by the Bankruptcy Court and the Court of Justice. It is understood that such modification may take the form of a provision of a confirmed plan of reorganization or a sanctioned plan of arrangement of the Debtors in connection with the proceedings pending before the Bankruptcy Court or the Court of Justice, but such modification shall not be effective as a modification of this Protocol unless it is approved by the Bankruptcy Court and the Court of Justice. No approval of a modification of this Protocol agreed to by the Corporations that are currently Debtors and the Administrator shall be required by the Bankruptcy Court or the Court of Justice, as the case may be, if at the time such modification is agreed to no Chapter 11 case or CCAA proceedings involving the Debtors is pending before such Court; *provided*, that approval of the Court of Justice will be required if the modification is contained in a plan of reorganization that provides for OYDL, acting through the Administrator, to remain the holder of an equity interest in the reorganized Debtors covered by such plan of reorganization only to the extent that the modification relates to the Administrator's corporate governance roles in such reorganized Debtors; it being understood that the foregoing acknowledgement of the Court of Justice's right to approve modifications of the Administrator's corporate governance role shall not be used to block confirmation of a plan of reorganization for any Debtor so long as the equity interest retained by OYDL, acting through the Administrator, is afforded voting rights under such plan of reorganization on a ratable basis with any other equity interests issued pursuant to such plan of reorganization. No modification may adversely affect any rights to indemnification, immunity or other protection contemplated by Section 3 hereof with respect to service prior to such modification.
Application allowed.

APPENDIX "A"

List of Applicants

(i) Olympia & York Developments Limited,

(ii) Olympia & York First Canadian Place Limited,

(iii) Olympia & York ET Limited,

(iv) Olympia & York Exchange Tower Limited,

(v) Olympia & York SP Corporation,

(vi) SPE Operations Ltd.,

(vii) Olympia & York ACC Limited,

(viii) Olympia & York AMCC Limited,

(ix) Olympia & York FAP Limited,

(x) Olympia & York (Fifth Avenue Place) Limited,

(xi) Olympia & York GCS Limited,

(xii) Olympia & York (Gulf Canada Square) Limited,

(xiii) Olympia & York (Shell Centre) Limited,

(xiv) Olympia & York 240 Sparks Street Limited,

(xv) O & Y (CPI) Credit Corp.,

(xvi) Olympia & York Commercial Paper II Inc.,

(xvii) Olympia & York Eurocreditco Limited,

(xviii) Olympia & York European Holdings Limited,

(xix) Olympia & York Realty Credit Corp.,

(xx) Olympia & York Resources Credit Corp.,

(xxi) Olympia & York Resources Corporation,

(xxii) O & Y Energy Holdings Limited,

(xxiii) O & Y Forest Products Holdings Limited,

(xxiv) Olympia & York Realty Corp.,

(xxv) O & Y Equity (Canada) Ltd.,

(xxvi) O & Y (U.S.) Development Canada Ltd.,

(xxvii) Olympia & York SF Holdings Corporation,

(xxviii) GWU Investments Limited, and

(xxix) 857408 Ontario Inc. (formerly Olympia & York CC Limited).

(i) Cyrus Vance as examiner appointed by order of the United States Bankruptcy Court, Southern District of New York;

(ii) Olympia & York Realty Corp. ("Realty");

(iii) Olympia & York SF Holdings Corporation ("SF Holdings");

(iv) O & Y (U.S.) Development Canada Ltd. ("Development");

(v) O & Y Equity (Canada) Ltd. ("Equity");

(vi) the Administrator;

(vii) the Monitoring Committee appointed pursuant to the provisions of the Sanction Order; and

(viii) Citibank, N.A.,

(i) *Robert Lowe*, the Chief Executive Officer of the Administrator. This seat should always be held by a senior officer of the Administrator.

(ii) *John E. Zuccotti*, the Chief Executive Officer of the U.S. Operations. This seat should always be held by the Chief Executive Officer of the U.S. Operations.

(iii) Seven Directors (the "*Outside Directors*") who (1) are not affiliated with or are otherwise beholden to any of the creditors or management of Olympia & York Developments Ltd. ("*OYDL*") or the entities constituting the U.S. Operations, (2) are not actively engaged in or affiliated with any business that is in material competition with the U.S. Operations and (3) are persons of independence, integrity and stature who will be recognized as such by the New York City business and civic communities, it being understood that no such individual need be a resident of New York City.

Upon approval of this Protocol by the Bankruptcy Court and the Court of Justice, the Outside Directors shall be the following, each of whom is disinterested under law applicable to directors of corporations and each of whom, together with Messrs. Lowe and Zuccotti, will have the fiduciary duty of a corporate director to the entities on whose Boards he serves and their subsidiary corporations, and thus, in the event of bankruptcy, insolvency or in the vicinity of insolvency, to the creditors and equity holders alike of such entities and their subsidiary corporations, including to any creditors who have or may have claims against entities in which the Debtors are partners or whose debts the Debtors have guaranteed or agreed to pay in any way:

1. Willard C. Butcher

2. William G. Davis

3. William D. Hassett

4. Richard Ravitch

5. Frederick P. Rose

6. Richard R. Shinn

7. John C. Whitehead

The foregoing persons shall continue to meet the standards of an "Outside Director" at all times during their term as Directors of the Corporations.

(i) With respect to information and reports relating to the restructuring of the U.S. Operations, the Administrator may not share with any creditor of the U.S. Operations or any creditor of OYDL (including any member of the Monitoring Committee, unless such member has delivered to the Corporations certifications

satisfactory to the Board of Directors to the effect that (1) such individual will not share any such information with the institution employing such individual or any affiliate of such institution and (2) such individual will utilize such information solely in the course of its responsibilities as a member of the Monitoring Committee under the CCAA Plan; *provided* that the Board of Directors may determine with respect to particular items of information or reports to waive the foregoing certification requirement), any information that has not been generally made available to the creditors of the U.S. Operations; and

(ii) The Administrator shall exercise its right to receive the foregoing information and reports and to have access to the premises of the U.S. Operations in connection therewith in a manner consistent with the orderly conduct of the business of the U.S. Operations.

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