

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PROPOSED PLAN OF
COMPROMISE OR ARRANGEMENT WITH RESPECT TO
FRASER PAPERS INC., FPS CANADA INC., FRASER
PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER
PAPERS LIMITED and FRASER N.H. LLC

Applicants

**FACTUM OF THE APPLICANTS
(Motion Returnable December 10, 2009)**

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PART I – RELIEF REQUESTED BY THE APPLICANTS

1. The Applicants seek an order:
 - (a) extending the Stay Period, as defined in the Order of this Honourable Court dated June 18, 2009 as amended (the “Initial Order”) to February 26, 2009;
 - (b) authorizing and directing the Applicants to enter into and to execute an asset purchase agreement among Brookfield Asset Management Inc. (“BAM”) or its designate, as purchaser, and the Applicants as vendors for a sale as a going concern of all of property, assets and undertaking of the Applicants’ relating to the speciality paper business; and

- (c) authorizing and directing the Applicants and the Monitor to implement a process for soliciting any other offers for the sale of the specialty papers business in accordance with the terms outlined in Schedule “A” to the draft Order sought by the Applicants (the “Bid Terms”).
2. All monetary amounts referred to herein are in United States (“U.S.”) currency unless otherwise stated and all capitalized terms used herein and not otherwise defined are as defined in the Initial Order.

PART II – THE FACTS

3. In addition to focusing on their restructuring efforts, the Applicants have continued to maintain and improve their operations for the benefit of their stakeholders. This has included the support of the Government of New Brunswick (“GNB”) through funding provided for the modernization of the Plaster Rock lumber mill, which resulted in the mill restarting on November 16, 2009.

Affidavit of J. Peter Gordon sworn December 3, 2009 (the “Gordon Affidavit”) at paras. 7-16.

4. The Applicants have identified a number of factors that have hampered or inhibited their efforts to restructure, including persistent negative cash flow from operations, limited access to capital, weak and volatile markets for certain of the Applicants’ products, high operating costs, a significant pension deficit and funding obligations and unsustainable terms related to the long-term Power Purchase Agreement covering the sale of electricity from the Applicants’ biomass CoGen Facility in Edmundston, New Brunswick.

Gordon Affidavit at para. 4(b).

5. The Applicants have determined that a restructuring of their business and operations should proceed in two stages, the first involving the establishment of a stand-alone speciality papers business and the second dealing with the Applicants' remaining assets over a longer period of time.

Gordon Affidavit at para. 4(e).

6. The Applicants have determined that a sale of the speciality papers business on a stand-alone basis is the most effective and efficient means of maximizing value for their creditors. Each of the Applicants' three secured lenders and DIP Lenders, namely CIT Business Credit Canada Inc. ("CIT"), BAM and GNB, support a transaction that focuses on the sale of the Applicants' speciality papers business.

Gordon Affidavit at paras. 34-39.

7. In furtherance of this two-stage approach, the Applicants have negotiated the terms of an asset purchase agreement ("APA") for the sale, as a going concern, of the Applicants' speciality papers business. The purchaser under the APA is BAM or its designate ("Newco").

Gordon Affidavit at para. 18.

8. The APA provides for consideration to be received by the Applicants having an aggregate face value of \$185 million, subject to a purchase price adjustment. The consideration will include cash, debt, preferred and common shares of Newco and the assumption of certain existing liabilities of the Applicants.

Gordon Affidavit at paras. 21-22.

9. Based on the Applicants' valuation analysis of the speciality papers business, the transaction contemplated by the APA represents the best proposal for the Applicants' creditors and other stakeholders, subject to receipt of a superior offer through the proposed stalking horse process.

Gordon Affidavit at paras. 27-31.

10. The transaction contemplated by the APA provides:

- (a) certainty to all stakeholders, including creditors, customers, suppliers and employees, that a transaction can be completed;
- (b) an exit for the core specialty papers business from creditor protection at the earliest possible time; and
- (c) a process to ensure the maximum recovery for the creditors, from both the speciality papers business and from the remaining assets.

Gordon Affidavit at para. 41.

11. The Applicants, in consultation with the Monitor, have developed Bid Terms utilizing the APA as a stalking horse bid, that both maximizes the value for the Applicants' creditors and stakeholders received from the sale of the specialty papers business and preserves the integrity of the sales process for the benefit of all parties.

Gordon Affidavit at paras. 55-65.

12. The Monitor has worked closely with the Applicants on both the Bid Terms and the APA, and supports the relief sought by the Applicants.

Monitor's 6th Report to the Court, at paras. 33, 54, 62.

13. The Applicants are continuing discussions with various stakeholders regarding the outstanding conditions precedent to closing the transaction contemplated by the APA, namely the required amendments to the collective agreements and the Power Purchase Agreement.

Gordon Affidavit at paras. 32, 66-78.

14. The Applicants are of the view that if a definitive agreement is not closed following completion of the sales process, no going concern transaction with any purchaser is likely possible.

Gordon Affidavit at para. 6.

PART III – ISSUES AND THE LAW

- A. Does this Honourable Court have jurisdiction to authorize and approve a sale of the Applicants' assets prior to a Plan of Arrangement being filed?
- B. What factors should this Honourable Court consider in determining whether to approve the APA?
- C. Should this Honourable Court approve a "stalking horse process" as a means of testing the terms of the APA for the benefit of all stakeholders?

A. Jurisdiction and Discretion under the CCAA

15. The CCAA is remedial legislation to be liberally construed in accordance with the purposive approach of statutory interpretation. The CCAA is designed to be a flexible instrument, with that very flexibility being the attribute that gives the CCAA its efficacy.

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp., 2008 CarswellOnt 4811 at para. 44 (Ont. C.A.) [*ATB Financial*].

16. The CCAA has been described as “skeletal in nature”, as a “sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest”. As a rough outline, the CCAA “does not contain a comprehensive code that lays out all that is permitted or barred”.

ATB Financial, supra at paras. 44, 61.

17. In order to give effect to the purposes and objectives of the CCAA, judges must “flesh out” the bare bones of the statute. Given its skeletal nature, the statutory scheme of the CCAA is premised on the exercise of judicial discretion and flexibility. As stated by Justice Spence in *Re Collins & Aikman*:

There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case.

Re Collins & Aikman Automotive Canada Inc., 2007 CarswellOnt 7014 at paras. 35-36 (Ont. S.C.J.).

ATB Financial, supra at para. 44.

18. Case law interpreting the CCAA has identified various sources of the court’s jurisdiction, including:

- (a) the power of the court to impose terms and conditions on the granting of a stay under section 11(4) of the CCAA;
- (b) the words in the opening section of section 11(4) which provide that the court may make an order “on such terms as it may impose”; and
- (c) the inherent jurisdiction of the court to “fill in the gaps” of the CCAA in order to give effect to its objects.

Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(4) [CCAA].

Re Canadian Red Cross Society, 1998 CarswellOnt 3346 at para. 43 (Ont. Gen. Div.)
[*Re Canadian Red Cross Society*].

Re PSINet Ltd., 2001 CarswellOnt 3405 at para. 5 (Ont. S.C.J.) [*Re PSINet Ltd.*]

ATB Financial, supra at paras. 43-52.

B. Approval of Asset Sales under the CCAA

19. The preservation of a debtor's business as a going concern has been a key objective of the CCAA from its inception when the nation was crippled by an economic depression:

If there should be such a depression it will become particularly important that an adequate reorganization procedure should be in existence, so that the Canadian economy will not be permanently injured by discontinuance of its industries, so that whatever going concern value the insolvent companies have will not be lost through dismemberment and sale of their assets, so that their employees will not be thrown out of work, and so that large numbers of investors will not be deprived of their claims...

Stanley E. Edwards, "Reorganization Under the *Companies' Creditors Arrangement Act*" (1947) 25 Can. Bar Rev. 587 cited in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, 1990 CarswellBC 394 at para. 23.

20. The purpose of the CCAA is the going concern preservation of businesses for the benefit of all stakeholders or the "whole economic community":

The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees.

Citibank Canada v. Chase Manhattan Bank of Canada, 1991 Carswell Ont 182 at para. 49.

21. In *Re Nortel Networks Corp.*, Justice Morawetz, in accepting that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, stated as follows:

The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity

structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

Re Nortel Networks Corp. 2009 CarswellOnt 4467 at para. 40 (Ont. S.C.J.).

22. The transaction contemplated by the APA proposed by the Applicants involves a going concern sale of a significant portion of their business. The Applicants, the Monitor and the Applicants' three secured lenders support the stand-alone sale of the specialty papers business as a means of maximizing value for those in the Applicants' "economic community".

Gordon Affidavit, at paras. 34-39.

23. Ontario courts have consistently recognized the jurisdiction under the CCAA to approve asset sales in the absence of a Plan of Arrangement, where such sale is in the best interests of stakeholders.

Re Canadian Red Cross Society, supra at para. 38.

Re PSINet Ltd., supra at para. 3.

Re Consumers Packaging, 2001 CarswellOnt 3482 at para. 9 (Ont. C.A.) [*Re Consumers Packaging*].

Re Tiger Brand Knitting Co., 2004 CarswellOnt 1240 at para. 10 (Ont. S.C.J.) [*Re Tiger Brand Knitting Co.*].

24. In *Re Consumers Packaging*, the Ontario Court of Appeal held that a sale of a business as a going concern during a CCAA proceeding in the absence of a Plan of Arrangement is consistent with the objectives of the CCAA:

The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.

... we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose and flexibility of the CCAA

and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered.

Re Consumers Packaging, supra at paras. 5, 9.

25. In *Re Canadian Red Cross Society*, Justice Blair relied upon the express provisions of the CCAA and his inherent jurisdiction thereunder in affirming the Court's jurisdiction to approve a sale of assets in a CCAA proceeding in the absence of a Plan of Arrangement having been approved by creditors:

I cannot accept the submission that the Court has no jurisdiction to make the order sought. The source of the authority is twofold: it is to be found in the power of the Court to impose terms and conditions on the granting of a stay under section 11; and it may be grounded upon the inherent jurisdiction of the Court, not to make orders which contradict a statute, but to 'fill in the gaps in legislation so as to give effect to the objects of the CCAA, including the survival program of a debtor until it can present a plan'.

...

It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy.

Re Canadian Red Cross Society, supra at paras. 43, 45.

26. In *Re PSINet Ltd.*, the court approved a going concern asset sale during a CCAA proceeding in the absence of a Plan being presented to creditors and identified several factors that were persuasive in doing so. The alternative to a sale, a liquidation, would realize significantly less than a going concern sale, increase the amount of unsecured claims and result in significantly greater rates of unemployment.

[If the sale was not approved], there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to

maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecureds, together with the material enlarging of the unsecured claims by the disruption claims of the approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees.

Re PSINet Ltd., supra at para. 3.

C. The Stalking Horse Process in the CCAA

27. In *Re Tiger Brand Knitting Co.*, Justice Campbell approved a sale process involving a stalking horse bid that involved a substantial portion of the debtor's business being sold on the basis that "a sale of assets rather than a restructuring of the Company was the more likely result of the ongoing effort".

Re Tiger Brand Knitting Co., supra at para. 10.

28. As stated by Justice Campbell in *Re Eddie Bauer of Canada Inc.*, stalking horse bids have become "an important feature of the CCAA process" and have been approved with increasing frequency by the courts as part of the process for the sale of a debtor company's assets.

Re Eddie Bauer of Canada Inc., 2009 CarswellOnt 5450 at para. 23 (Ont. S.C.J.).

Re Nortel Networks Corp., 2009 Carswell 4839 at paras. 25-27 (Ont. S.C.J.).


Re Tiger Brand Knitting Co., supra para. 11.

29. The transaction contemplated by the APA and the stalking horse process proposed by the Applicants represents the best opportunity for the greatest value return for the Applicants' creditors and stakeholders. The use of the APA as a stalking horse bid serves not only to ensure that maximum value is obtained for the assets in question but, in combination with the Bid Terms, ensures that the integrity and fairness of the sales process is maintained.

PART IV – ORDER REQUESTED

30. The Applicants request an Order granting the relief set out in the Notice of Motion dated December 3, 2009.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF
DECEMBER, 2009.**



D.J. Miller,
Counsel for the Applicants

SCHEDULE A – AUTHORITIES CITED

1. *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 4811 (Ont. C.A.) .
2. *Re Collins & Aikman Automotive Canada Inc.*, 2007 CarswellOnt 7014 (Ont. S.C.J.).
3. *Re Canadian Red Cross Society*, 1998 CarswellOnt 3346 (Ont. Gen. Div.).
4. *Re PSINet Ltd.*, 2001 CarswellOnt 3405 (Ont. S.C.J.).
5. Stanley E. Edwards, “Reorganization Under the *Companies’ Creditors Arrangement Act*” (1947) 25 Can. Bar Rev. 587 cited in *Hongkong Bank of Canada v. Chef Ready Foods Ltd.*, 1990 CarswellBC 394 (B.C.C.A.).
6. *Citibank Canada v. Chase Manhattan Bank of Canada*, 1991 Carswell Ont 182 (Ont. Gen. Div.).
7. *Re Nortel Networks Corp.* 2009 CarswellOnt 4467 (Ont. S.C.J.).
8. *Re Consumers Packaging*, 2001 CarswellOnt 3482 (Ont. C.A.).
9. *Re Tiger Brand Knitting Co.*, 2004 CarswellOnt 1240 (Ont. S.C.J.).
10. *Re Eddie Bauer of Canada Inc.*, 2009 CarswellOnt 5450 (Ont. S.C.J.).
11. *Re Nortel Networks Corp.*, 2009 Carswell 4839 (Ont. S.C.J.).

SCHEDULE B – RELEVANT STATUTES

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

s. 11(4) Other than initial application court orders

A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

- (a) Staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
- (b) Restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) Prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

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