

**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./PAPIERS FRASER INC., FPS
CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER
TIMBER LIMITED, FRASER PAPERS LIMITED AND
FRASER N.H. LLC (COLLECTIVELY, THE "APPLICANTS")

Applicants

**FACTUM OF THE APPLICANTS
(Motion Returnable July 7, 2010)**

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(MOTION RETURNABLE JULY 7, 2010)**

PART I – RELIEF REQUESTED BY THE APPLICANTS

1. The Applicants seek an Order, *inter alia*:
 - (i) approving the terms of an asset purchase agreement between Fraser N.H. LLC, as vendor ("Fraser Gorham"), and MB Growth Partners II, LP or its designated affiliates, as purchaser ("MB Growth"), dated May 21, 2010 (the "Purchase Agreement"); and
 - (ii) an Order vesting title to the Purchased Assets (as defined in the Purchase Agreement) in MB Growth upon completion.

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 Purchase Agreement.

PART II – THE FACTS

The Gorham Mill – Business and Operations

3. Fraser Gorham owns and operates a paper mill situated at Gorham, New Hampshire (the “**Gorham Mill**”). The Gorham Mill is an operating facility with five paper machines, two of which have been closed since 2008. The Gorham Mill produces specialty printing and commodity free sheet papers and towel products for the “away from home” market segment. Demand for paper products produced at the Gorham Mill has remained stable, albeit at levels below those experienced in 2008, however, order backlogs have been short, requiring intermittent market downtime at the mill.

Affidavit of Glen McMillan, sworn June 30, 2010, at paras. 6 and 77 [the “McMillan Affidavit”].

4. Fraser Gorham employs approximately 240 employees at the Gorham Mill. The Gorham Mill’s Hourly Employees are represented by the United Steel Workers Union (the “**USW**”).

McMillan Affidavit, at paras. 87 and 93.

5. The Gorham Mill is a non-integrated facility meaning that it purchases all of its pulp from third-party suppliers. As pulp prices have increased significantly over the course of the past year due to supply reductions by pulp producers worldwide, there has been an increase in the overall manufacturing costs at the Gorham Mill. These market conditions have made it more difficult for the Gorham Mill to compete against its larger, integrated competitors because it

cannot meet the pricing levels offered by those competitors on many of the Gorham Mill's paper grades.

McMillan Affidavit, at paras. 7 and 78.

6. As a result of these market conditions, the Gorham Mill has intermittently taken market downtime over the course of the last three (3) months to reduce losses. The total market downtime taken during April and May 2010 amounted to approximately 30% of the Gorham Mill's production capacity. Due to the increased pulp prices and the decreased production owing to the market downtime taken, the Gorham Mill has generated an EBIDTA loss of \$1.2 million for the two month period between April and May 2010.

McMillan Affidavit, at paras 6, 8 and 9.

Sales Process

7. During the course of the Applicants' CCAA proceedings, they considered a number of strategic initiatives to restructure operations at the Gorham Mill, including the reduction of energy costs by switching to natural gas and the installation of a new tissue machine, however, each of the initiatives required additional capital which was not available to the Applicants. The Applicants, in turn, engaged in discussions with several parties, a number of whom expressed an interest in conducting further due diligence to determine whether they would submit a letter of intent to purchase the Gorham Mill.

McMillan Affidavit, at paras. 79 and 80.

Monitor's 9th Report to the Court dated February 22, 2010 at para. 49 and Appendix "B" [the "Monitor's Ninth Report"].

8. Based on the interest shown by these parties, the Applicants, in conjunction with the Monitor, engaged in actively marketing the Gorham Mill to prospective purchasers. "Teaser"

letters and confidentiality agreements were sent to forty-five (45) prospective purchasers commencing January 18, 2010. The Applicants received fifteen (15) executed confidentiality agreements and those prospective purchasers were given access to an electronic data room containing detailed financial, operational, human resources, legal, customer and supplier information commencing February 4, 2010 for the purpose of conducting due diligence.

McMillan Affidavit, at para. 81.

Monitor's Ninth Report, at paras. 50-54.

9. Those parties that executed confidentiality agreements were advised that the deadline for the submission of non-binding letters of intent (“LOIs”) was March 16, 2010. The parties were advised that the LOIs were to outline the terms of a proposed offer for the Gorham Mill. After receipt of the LOIs, the Applicants, with the Monitor’s input, would select one or more of the parties that had submitted LOIs to conduct further due diligence to determine whether they would submit a definitive agreement of purchase and sale for the Gorham Mill.

McMillan Affidavit, at para 82.

Monitor's Ninth Report, at paras. 56 and 57.

Monitor's Tenth Report to the Court dated April 1, 2010, at para. 96 [the “Monitor's Tenth Report”].

10. A number of LOIs were submitted to the Applicants and those parties (the “**Interested Parties**”) were invited to conduct further due diligence. Commencing the week of April 5, 2010, draft asset purchase agreements were sent to the Interested Parties . The Applicants, with the Monitor’s assistance, subsequently negotiated the asset purchase agreements with the Interested Parties.

McMillan Affidavit, at para 83.

Monitor's Tenth Report, at paras. 96-98.

Monitor's Twelfth Report to the Court dated July 3, 2010, at para. 25 [the "Monitor's Twelfth Report"].

11. The sales process which the Applicants and the Monitor had originally formulated had a deadline of April 16, 2010 for the submission of a final asset purchase agreement for the Gorham Mill, however, several of the Interested Parties requested an extension of the deadline which was extended until April 21, 2010. The Applicants received a number of final asset purchase agreements and, with the Monitor's assistance, reviewed each of the agreements. Each of the Interested Parties that had submitted final asset purchase agreements was advised of certain important issues that needed to be resolved in their particular agreement before the Applicants would enter into a final asset purchase agreement.

Monitor's Tenth Report, at para. 97.

Monitor's Twelfth Report, at paras. 26 and 27.

12. The Applicants continued further negotiations with the Interested Parties, which negotiations also included other key stakeholders, during the week of April 26, 2010 during which time the Interested Parties conducted further due diligence to address those issues that had been raised by the Applicants and the Monitor. The Interested Parties were given until May 3, 2010 to submit revised asset purchase agreements to the Applicants. Once the revised asset purchase agreements had been submitted, the Applicants continued negotiations with the Interested Parties until the second week of May at which time the Applicants, with the Monitor's assistance, chose one party with whom to work towards finalizing an agreement for the purchase of the Gorham Mill.

Monitor's Twelfth Report, at para. 27.

13. The negotiations between the Applicants and the Interested Parties yielded a superior offer from MB Growth, a limited partnership established by MerchantBanc, an investment fund

based in Manchester, New Hampshire. After consultation with the Monitor, the Applicants executed the Purchase Agreement on May 21, 2010.

Monitor's Twelfth Report, at para. 28- 30.

Terms of the Purchase Agreement

14. The Purchase Agreement provides that Fraser Gorham will receive the following as consideration for the Purchased Assets, subject to certain adjustments:

- (a) cash in an amount equal to:
 - (i) \$1,250,000; plus;
 - (ii) the Accounts Receivable at the Time of Closing; plus
 - (iii) the book value of the Inventory at the Time of Closing; plus
 - (iv) the aggregate dollar amount of the Prepaid Expenses at the Time of Closing; minus
 - (v) the aggregate dollar amount of the Trade Credit; minus
 - (vi) the aggregate dollar amount of the Accrued Pay and Welfare Benefits.
- and
- (b) the assumption of the Assumed Liabilities.

McMillan Affidavit, at paras. 84 and 85.

Monitor's Twelfth Report at paras. 35 and 37.

15. The Assumed Liabilities that are being taken on by MB Growth pursuant to the terms of the Purchase Agreement include the following:

- (a) all obligations and liabilities relating to the ownership, operation and use of the Purchased Assets from and after the Time of Closing;

- (b) all obligations and liabilities under the Purchased Contracts that are required to be paid or assumed by MB Growth as a condition of obtaining any necessary Consent;
- (c) all Environmental Liabilities with respect to the Purchased Assets from and after the Closing Date;
- (d) all obligations and liabilities of Fraser Gorham arising subsequent to the Time of Closing in respect of the Permitted Encumbrances;
- (e) all liabilities for real estate taxes relating to the Purchased Assets for the period subsequent to the Time of Closing;
- (f) the Trade Credit; and
- (g) the Accrued Pay and Welfare Benefits.

McMillan Affidavit, at para 86.

Monitor's Twelfth Report, at para. 33.

16. The Closing of the transaction contemplated by the Purchase Agreement is scheduled to take place on or before August 31, 2010.

McMillan Affidavit, at para 91.

Monitor's Twelfth Report, at para. 40.

PART III – ISSUES AND THE LAW

Issue: What factors should the Court consider in determining whether to approve the transaction contemplated by the Purchase Agreement?

17. There is jurisdiction under the CCAA to approve asset sales in the absence of a Plan of Arrangement where a sale is in the best interests of a debtor company's various stakeholders, particularly where the sale is on a going concern basis.

Re Nortel Networks Corp., 2009 CarswellOnt 4467 at paras. 27-40 (Ont. S.C.J.)
[“*Nortel*”].

18. The Applicants respectfully submit that the sale of the Gorham Mill to MB Growth is the type of sale contemplated by Justice Morawetz in *Nortel*. MB Growth’s acquisition of the Gorham Mill will provide continued employment for 240 employees, direct benefits for the Gorham Mill’s suppliers and additional indirect economic benefits to the greater region surrounding the Gorham Mill.

McMillan Affidavit, at para.93.

Monitor’s Twelfth Report, at paras. 34 and 49.

19. The test uniformly applied by Ontario courts is from the Ontario Court of Appeal’s decision in *Royal Bank v. Soundair Corp.* In *Soundair*, the court established the four “duties” that a court must perform when deciding whether a receiver acted properly in selling property. Ontario courts have consistently recognized that the *Soundair* principles are “equally applicable *mutatis mutandis* in a CCAA sale situation”.

Royal Bank v. Soundair Corp., 1991 CarswellOnt 205 (Ont. C.A.) [“*Soundair*”].

Re Nortel Networks Corp. 2009 CarswellOnt 4838 at paras. 33-35 (Ont. S.C.J.)
[“*Nortel*”].

20. In reviewing a proposed sale of assets, a court should consider:

- (i) whether the person selling has made a sufficient effort to get the best price and has not acted improvidently;
- (ii) the interests of all parties;
- (iii) the efficacy and integrity of the process by which offers are obtained; and

(iv) whether there has been unfairness in the working out of the process.

Soundair, supra at para. 16.

(i) Best Price

21. The Applicants expect that the net proceeds from the sale of the Gorham Mill pursuant to the Purchase Agreement will be substantially in excess of \$5 million. The Applicants, with the Monitor's assistance, made a significant effort to obtain the best price for the Purchased Assets. The Applicants and the Monitor worked together to market the Purchased Assets to a broad spectrum of potential purchasers. Of the forty-five (45) parties that received the "teaser" letter and the confidentiality agreement, fifteen (15) of those parties executed the confidentiality agreement and were provided access to the electronic data room and confidential information with respect to the Gorham Mill. The Applicants ran concurrent negotiations with each of the Interested Parties that submitted an asset purchase agreement. The result of these concurrent negotiations was the superior offer submitted by, and negotiated with, MB Growth.

McMillan Affidavit, at paras 81-83.

Monitor's Twelfth Report, at paras. 24-29, 36 and 45.

(ii) Interest of All Parties

22. The sale of the Gorham Mill on the terms set out in the Purchase Agreement is in the best interests of the Applicants' stakeholders. The terms of the Purchase Agreement:

(a) are expected to provide the Applicants with net cash proceeds substantially in excess of \$5 million (the "Net Proceeds"). The Net Proceeds are greater than the amount the Applicants would receive if they were forced to liquidate the Gorham Mill and its related assets;

McMillan Affidavit, at para. 93.

Monitor's Twelfth Report, at para. 36, 45 and 50.

- (b) ensure that Employees receive certain accrued expenses including specified accrued wages, medical benefits, unused vacation time eligible to be used during 2010 and certain workers compensation claims;

Monitor's Twelfth Report, at para. 33.

- (c) provide for the continued employment of approximately 240 employees of the Gorham Mill and direct benefits to suppliers and indirect economic benefits to the region surrounding the Gorham Mill; and

McMillan Affidavit, at para. 93.

Monitor's Twelfth Report, at paras. 34 and 49.

- (d) provide for the assumption by MB Growth of all Environmental Liabilities with respect to the Purchased Assets from and after the Time of Closing, thereby relieving the Applicants from those liabilities and reducing the total number of claims that could be made against the Applicants.

McMillan Affidavit, at para. 86.

Monitor's Twelfth Report, at para. 33.

(iii) and (iv) Integrity of Sales Process and Fairness

23. The process to market and sell the Gorham Mill was conducted in a fair and open manner whereby all potentially interested parties were contacted and provided with the opportunity to purchase the Gorham Mill and related business. In establishing the sales process, the Applicants and the Monitor worked together to market and sell the Gorham Mill. The Monitor provided input on the negotiations related to the Purchase Agreement and supports the sale of the Gorham Mill in accordance with the terms set out in the Purchase Agreement.

McMillan Affidavit, at para 81-83 and 95.

Monitor's Twelfth Report, at paras. 24-28, 43-45 and 50.

24. The record before this Honourable Court establishes, and the Applicants respectfully submit, that the *Soundair* principles have been satisfied.
25. The recent amendments to the CCAA address the disposition of a debtor company's business assets. Section 36(1) of the CCAA provides as follows:

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 36(1) [“CCAA”].

26. According to the Industry Canada Briefing Book, section 36 “is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse”.

Industry Canada, “Bill C-55: Clause by Clause Analysis – Bill Clause No. 131 – CCAA Section 36” [“Industry Canada”].

Re Canwest Global Communications Corp., 2009 CarswellOnt 7169 at para. 32 (Ont. S.C.J.) [“Canwest”].

27. A debtor company must give notice to those secured creditors who are likely to be affected by its application to the court for authorization to dispose of assets outside of the ordinary course of business.

CCAA, supra at s. 36(2).

28. The separate service list for this motion includes, among others, those parties with registered security interests pursuant to the United States' *Uniform Commercial Code*, those parties with statutory and registered liens on all real property that is to be purchased under the

Purchase Agreement and any parties claiming possessory liens on account of inventory held by those parties that forms part of the Purchased Assets or who have otherwise notified the Applicants or the Monitor of such interest.

McMillan Affidavit, at para. 96.

Affidavit of Service of Annette Fournier sworn June 30, 2010.

29. In deciding whether to grant authorization to the debtor company to dispose of its assets, the court is to consider, among other things:

- (i) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (ii) whether the Monitor approved the process leading to the proposed sale or disposition;
- (iii) whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (iv) the extent to which the creditors were consulted;
- (v) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (vi) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

CCAA, supra at s. 36(3).

(i) Reasonable Sales Process in the Circumstances

30. It is respectfully submitted that the process leading to the sale of the Gorham Mill was reasonable in the circumstances. The Applicants and the Monitor developed and implemented an offer solicitation and negotiation process that thoroughly canvassed the market for interested parties and maximized the net proceeds upon the sale of the Purchased Assets.

McMillan Affidavit, at paras. 81-83.

Monitor's Twelfth Report, at paras. 24-28, 43 and 44.

(ii) and (iii) Monitor Approval and Court Report in Support

31. The Monitor supports the sale contemplated by the terms of the Purchase Agreement.

Monitor's Twelfth Report, at paras. 45 and 50.

(iv) Consultation of Creditors

32. The Applicants' principle secured creditors, namely CIT Business Credit Canada Inc. and Brookfield Asset Management Inc., are aware of and have consented to the sale of the Gorham Mill.

McMillan Affidavit, at para. 94.

Monitor's Twelfth Report, at para 46 and 48.

33. The Applicants' creditors were not generally consulted on the sale of the Gorham Mill to MB Growth, however, the Monitor provided updates on the sales process in its reports to the Court. The Monitor provided updates on the offer solicitation and negotiation process related to the sale of the Gorham Mill in its 9th and 10th Court Reports dated February 22, 2010 and April 1, 2010, respectively.

Monitor's Ninth Report, at paras. 43-48.

Monitor's Tenth Report, at paras. 95-98.

(v) Effect of Sale on Stakeholders

34. It is respectfully submitted that if approved, the sale of the Gorham Mill to MB Growth on the terms and conditions set out in the Purchase Agreement presents the best possible outcome for the Applicants' stakeholders. As stated in paragraph 22 above, the Purchase Agreement contemplates that the interests of various stakeholders will be beneficially addressed, both directly and indirectly. The Purchase Agreement also contemplates the transfer of potential environmental liabilities out of the estate, thereby reducing the total number of claims that might be made against the Applicants' estate.

McMillan Affidavit, at paras. 86 and 93.

Monitor's Twelfth Report, at paras. 33, 36, 45, 49 and 50.

(vi) Fair Consideration When Considering Market Value

35. It is respectfully submitted that the value received in exchange for the Gorham Mill is fair and reasonable, taking into account its market value. Of the 45 potential purchasers initially contacted by the Applicants and the Monitor, 15 executed confidentiality agreements and conducted further due diligence. The Applicants received a number of LOIs and asset purchase agreements and engaged in negotiations with a number of Interested Parties. After negotiating with the Interested parties, it was determined by the Applicants, in conjunction with the Monitor, that the MB Growth offer represents the superior offer. It is expected that the Net Proceeds from the sale of the Purchased Assets will substantially exceed of \$5 million which is greater than the amount the Applicants could expect to receive if they were forced to liquidate the Purchased Assets.

McMillan Affidavit, at para 93.

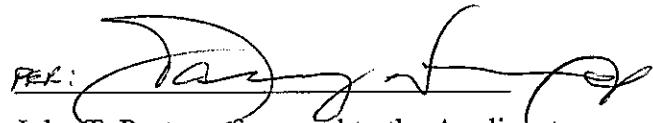
Monitors' Twelfth Report, at para. 29, 36 and 45.

36. The Applicants respectfully submit that the record before this Honourable Court not only establishes that the Soundair principles have been satisfied, but also establishes that the transaction contemplated by the Purchase Agreement satisfies the factors enumerated in recently amended Section 36 of the CCAA.

PART IV – ORDER REQUESTED

37. The Applicants request an Order granting the relief set out in the Notice of Motion dated June 30th, 2010.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5TH DAY OF JULY,
2010.**


REF: _____
John T. Porter, of counsel to the Applicants


Danny M. Nunes, of counsel to the Applicants

SCHEDULE A – AUTHORITIES CITED

Tab	Document
1.	<i>Re Nortel Networks Corp.</i> , 2009 CarswellOnt 4467 (Ont. S.C.J.).
2.	<i>Royal Bank v. Soundair Corp.</i> , 1991 CarswellOnt 205 (Ont. C.A.).
3.	<i>Re Nortel Networks Corp.</i> , 2009 CarswellOnt 4838 (Ont. S.C.J.).
4.	Industry Canada, “Bill C-55: Clause by Clause Analysis – Bill Clause No. 131 – CCAA Section 36”.
5.	<i>Re Canwest Global Communications Corp.</i> , 2009 CarswellOnt 7169 (Ont. S.C.J.).

SCHEDULE B – RELEVANT STATUTES

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

36(1) Restriction on disposition of business assets - A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) Notice to creditors - A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) Factors to be considered – In deciding whether to grant the authorization, the court is to consider, among other things,

- (a) Whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) Whether the monitor approved the process leading to the proposed sale or disposition;
- (c) Whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) The extent to which the creditors were consulted;
- (e) The effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) Whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

(5) Related persons – For the purpose of subsection (4), a person who is related to the company includes

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

(6) Assets may be disposed of free and clear – The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) Restriction – employers – The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and 5(a) if the court had sanctioned the compromise or arrangement.

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IN BANKRUPTCY AND INSOLVENCY

Proceedings commenced at Toronto

FACTUM OF THE APPLICANTS
(MOTION RETURNABLE JULY 7, 2010)

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