

CITATION: Fraser Papers Inc., 2011 ONSC 951
COURT FILE NO.: CV-09-8241-00CL
DATE: 20110211

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 ARRANGMENT
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

COUNSEL: *D.J. Miller*, for the Applicants
Robert J. Chadwick and Derek Bulas, for the Monitor
David Chernos and Scott Bomhof, for Brookfield Asset Management
Peter J. Osborne, for the Directors
Jay Swartz, for CSER
Denis Ellickson, for CEP
Andrew Hatnay, for Morneau Pension Plan Administrator and as
Ontario Agent for New Brunswick Superintendent of Pensions
Deborah McPhail, for FSCO
Alex Cobb, for Towers Watson
Michael MacNaughton, for Mercer

PEPALL J.

Endorsement

[1] On June 18, 2009, the Applicants obtained protection from their creditors under the provisions of the *CCAA*. PricewaterhouseCoopers Inc. was appointed as Monitor. A recognition order of these proceedings as foreign main proceedings pursuant to Chapter 15 of the *U.S. Bankruptcy Code* was obtained in the U.S. Bankruptcy Court for the District of Delaware.

[2] The Applicants now seek this court's sanction of the Amended Consolidated Plan of Compromise and Arrangement, approval of the Creditor Trust Agreement, approval of the Transaction Agreement incorporated into the Plan and an associated vesting order.

A. Court Sanction

[3] The original plan that was filed did not achieve the requisite majorities for approval. The Applicants engaged in further discussions with stakeholders which resulted in a Support Agreement dated January 27, 2011 amongst the Applicants, the Directors, Morneau Shepell Inc. in its capacity as administrator of the NB Plans (“Morneau”), the New Brunswick Superintendent of Pensions and the CMAW. The Applicants also sought and obtained a Meeting Order from Morawetz J. dated February 1, 2011.

[4] A meeting was held on February 8, 2011 and the required majorities approved the Amended Plan. 94.7% of the Affected Creditors present and voting representing 75.3% of the value of Proven Voting Claims voted to approve the Amended Plan.

[5] The Applicants have taken approximately 19 months to restructure their business operations and create value for the benefit of their creditors. Sale transactions have resulted in cash proceeds and future employment for the Applicants’ hourly and salaried employees at substantially all locations in Quebec, New Brunswick, and Maine. There is a prospect for future employment in New Hampshire as well. These continued operations also provide economic benefit to trade suppliers and local communities dependent on those businesses. Common shares in Twin Rivers Paper Company Inc. and promissory notes of \$44 million payable by Twin Rivers Paper Company Inc. are available for distribution under the Amended Plan. Two representatives on the five-person board of directors of Twin Rivers will be nominated by CEP and by the Applicants’ other unsecured creditors. Numerous agreements were negotiated to address pension deficits and benefits one of which included a legislative amendment. Secured debt has also been addressed. Counsel for the Applicants confirms that no environmental or employee liabilities are being orphaned as a result of this process. Additionally, I note that the Applicants have made arrangements to pay \$422,389 to the NB Hourly Plan on the Plan Implementation Date. These funds represent current cost contributions based on actuarial calculations performed by Morneau and certified to the NB Superintendent.

[6] At this stage there is a need to distribute the remaining proceeds. The purpose of the Amended Plan is to settle Affected Claims and to achieve a compromise and arrangement of

those claims; complete the Transaction Agreement; and allow for the orderly allocation of the distribution pool to Affected Creditors.

[7] Pursuant to the terms of the Amended Plan, the Applicants' Affected Creditors with proven distribution claims will receive implementation payments and pro rata shares from the distribution pool which will be comprised of promissory notes, the aforesaid common shares and any cash that is available. Subject to certain conditions precedent, it is contemplated that the Amended Plan will be implemented on or about February 14, 2011. The Plan incorporates the Transaction Agreement whereby, amongst other things, the Plan Sponsor will purchase the FPHI shares which include ownership of those U.S. Applicants that own the lumber mills located in Ashland and Masardis, Maine. These mills represent the Applicants' sole remaining operating assets.

[8] Of the many stakeholders who appeared today, only CEP opposed the relief requested. It takes issue with the proposed releases and submits that insufficient consideration is given to pensioners and pension plan participants. I should say that I have some sympathy with CEP's concern with respect to the hardship visited upon pensioners and pension plan participants but this hardship does not spring from the terms of the Amended Plan. Rather it arises from the unfortunate financial circumstances of the Applicants in particular and their industry in general.

[9] To sanction a plan under the CCAA, I must be satisfied that there has been strict compliance with all statutory requirements. In addition, all materials filed and procedures carried out must be examined to determine whether anything has been done or purported to be done which is not authorized by the CCAA. Thirdly, the plan must be fair and reasonable.

(a) Statutory Requirements

[10] With respect to strict compliance with statutory requirements, the Applicants are companies to which the CCAA applies; the notice to Affected Creditors was delivered and published in accordance with the terms of the Morawetz J.'s Meeting Order; a quorum was present at the Meeting and the Chair of the Meeting confirmed that the Meeting was properly constituted; the classification of Affected Creditors was not opposed at the hearing to approve

those claims; complete the Transaction Agreement; and allow for the orderly allocation of the Distribution Pool to Affect Creditors.

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(a) Statutory Requirements

[10] With respect to strict compliance with statutory requirements, the Applicants are companies to which the CCAA applies; the notice to Affected Creditors was delivered and published in accordance with the terms of the Morawetz J. Meeting Order; a quorum was present at the Meeting and the Chair of the Meeting confirmed that the Meeting was properly constituted; the classification of Affected Creditors was not opposed at the hearing to approve

the Meeting Order or thereafter; the voting was properly carried out; and as mentioned the requisite majorities approved the Amended Plan. The prerequisites for the sanction of the Amended Plan as established in section 6 of the CCAA are satisfied.

(b) Unauthorized Steps

[11] As to the absence of unauthorized steps, in general terms, the materials filed and steps taken by the Applicants were authorized by the CCAA and the orders of this court. The Monitor has made regular reports to the court and has made no reference to any conduct or action by the Applicants that is not authorized by the CCAA. On the contrary, the Monitor opines in its most recent Report that the Applicants have complied with all statutory requirements and prior orders and have not done or purported to do anything not authorized by the CCAA. No one has appeared today to complain about any unauthorized steps. In my view, the second element of the test has been met.

(c) Fair and Reasonable

[12] Lastly, I must be satisfied that the Amended Plan is fair and reasonable. I am.

[13] In assessing whether a plan is fair and reasonable, relevant considerations include whether the claims were properly classified and whether the requisite majority of creditors approved the plan. I have already touched on this issue. The Amended Plan was so approved. Another consideration is alternatives available to the Applicants other than the Amended Plan. The Applicants considered a number of alternatives but are of the view that Affected Creditors will derive the greatest benefit from the implementation of the Amended Plan. Absent this Amended Plan, there is no further or other plan of compromise and arrangement that would be presented by the Applicants to their Creditors on a substantively consolidated basis. Delay will reduce the cash available for distribution to creditors. In addition, there is a danger that the promissory notes and common shares would have to continue to serve as security for repayment of the DIP Loan. This could also result in a negative impact on the funded ratio under each of the NB Plans and the pension payment entitlements received by retirees under the NB Plans.

[14] In considering whether a plan is fair and reasonable, one may also ascertain whether there is any oppression of the rights of creditors. There would appear to be none. The Amended Plan achieved broad support and the sanction order requested is unopposed or consented to by all but CEP. Additionally, the Monitor had advised in its 18th Report that it considers the Amended Plan to be fair and reasonable in the circumstances and provides for a higher recovery for Affected Creditors than is otherwise available. The Monitor therefore recommended approval of the Plan by the Applicants' Affected Creditors.

[15] Broad releases are included in the Plan. They have been given in numerous other cases most notably in *ATB Financial v. Metcalfe and Mansfield Alternative Investments 2 Corp.*¹ and *Re: Muscletech Research and Development Inc.*² The Applicants state that the released parties are and have been essential to the restructuring efforts which have culminated in the Amended Plan and without their support and assistance, the Applicants would have been unable to present a plan that provided for the distribution of cash in addition to the allocation and delivery of promissory notes and common shares to the trusts and PBGC. They also state that absent the releases, it is unlikely that the Applicants would have garnered the support of certain released parties who will be releasing priority charges in consideration of the closing of the Transaction Agreement and implementation of the Amended Plan. It should be noted that there are certain parties who are not released, namely, the Non-Released Parties. They consist of Towers Watson, Mercer and Excellerate.

[16] I am prepared to accept the releases for the following reasons. Firstly, I accept the evidence advanced by the Applicants which has not been contested. Secondly, the releases are part of the give and take and the consensus that has resulted in the Amended Plan. In that regard, I also note that a very broad release was already given by CEP in the contractual documents and term sheet relating to the Specialty Papers transaction and a further release was incorporated into

¹ [2008] O.J. No. 2265.

² [2006] O.J. No. 4087.

the court order of April 6, 2010 relating to that transaction on consent of CEP and others. Thirdly, section 5.1(2) of the *CCAA* is not encompassed by the language of these releases. That section does not permit a compromise of claims against directors based on wrongful or oppressive conduct by directors. Fourthly, certainly there is precedent for granting broad releases. Next, the Non-Released Parties were provided with notice of this motion and in the case of Towers Watson and Mercer, have counsel present and are unopposed to the relief requested. Excellerate did not attend at court but advised the Applicants' counsel that it was unopposed to the relief requested. I have considered the factors set forth in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*³ and am satisfied that the releases are appropriate in the circumstances of this case.

[17] In conclusion, I am persuaded that the Amended Plan is fair and reasonable. It makes the best of a difficult situation and is preferable to any other alternative.

B. Creditor Trust

[18] Three trusts will hold the pro rata share of the promissory notes, the common shares and any residual cash for the benefit of Affected Creditors with Proven Distribution Claims: the NB Hourly Trust, the NB Salaried Trust and the Creditor Trust.

[19] PGBC will hold its pro rata share of the Distribution pool directly. The PBGC Claim represents approximately 85% of the total claims filed by US residents and the costs to establish and administer a US creditor trust outweigh the benefit of a separate US creditor trust for these creditors.

[20] The proposed order relating to the Creditor Trust is satisfactory.

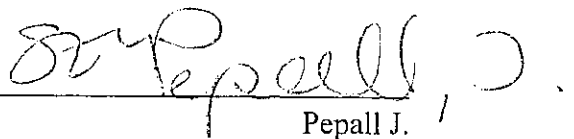
³ [2008] O.J. No. 2265, at para. 66.

C. Court Approval of Transaction Agreement and Vesting Order

[21] The Applicants also seek approval of the Transaction Agreement. I am satisfied that the principles set forth in *Royal Bank v. Soundair Corp.*⁴ have been met. Clearly a sufficient effort to obtain the best price was made and no one acted improvidently. The interests of all parties were considered and there was efficacy and integrity in the process. Lastly, there was no unfairness in the working out of the process. As with the Creditor Trust order, I am satisfied with the proposed approval and vesting order requested by the Applicants.

D. Other

[22] In conclusion, all three orders requested are granted. I would like to express my appreciation to counsel and the Monitor for the assistance they have provided to the court throughout this restructuring. It has been most appreciated.


Pepall J.

Released: February 11, 2011

⁴ 1991 CarswellOnt. 205 (C.A.).

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ORAL REASONS FOR JUDGMENT

Pepall J.

Released: February 11, 2011