

**ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST**

BETWEEN:

G.E. CANADA EQUIPMENT FINANCING

Applicant

- AND -

NORTHERN SAWMILLS INC.

Respondent

APPLICATION UNDER SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY
ACT, R.S.C. 1985, c. B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF
JUSTICE ACT, R.S.O. 1990, c. C.43, AS AMENDED

**SECOND REPORT OF
PRICEWATERHOUSECOOPERS INC.
AS RECEIVER OF
NORTHERN SAWMILLS INC.**

July 14, 2011

BACKGROUND

1. On January 4th, 2011 (the “**Appointment Date**”) pursuant to an Order of this Honourable Court (the “**Northern Receivership Order**”) PricewaterhouseCoopers Inc. (“**PwC**”) was appointed as receiver (the “**Northern Receiver**”) pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, (the “**BIA**”) and Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the “**CJA**”) over all the assets, undertakings and properties (the “**Northern Property**”) of Northern Sawmills Inc. (“**Northern**”).
2. On the same date, pursuant to an Order of this Honourable Court (the “**Atikokan Receivership Order**”), PwC was also appointed as receiver (the “**Atikokan Receiver**”) pursuant to section 243(1) of the BIA and Section 101 of the CJA over all the assets, undertakings and properties (the “**Atikokan Property**”) of Atikokan Forest Products Ltd. (“**Atikokan**”).
3. Pursuant to an Order of this Honourable Court also made on January 4th, 2011 (the “**Northern Sale Process Order**”), the Northern Receiver was authorized and directed to carry out and conduct a sale process in respect of the Northern Property, or any material portions thereof, substantially in accordance with the sale process (the “**Northern Sale Process**”) outlined in the Report of PwC as Proposed Receiver of Northern Sawmills Inc. dated December 30, 2010 (“**Proposed Northern Receiver's Report**”).
4. On the same date, pursuant to an Order of this Honourable Court also made on January 4th, 2011 “**Atikokan Sale Process Order**” and together with the Northern Sale Process Order, the “**Sale Process Orders**”), the Atikokan Receiver was authorized and directed to carry out and conduct a sale process in respect of the Atikokan Property, or any material portions thereof, substantially in accordance with the sale process (the “**Atikokan Sale Process**”) outlined in the Report of PwC as Proposed Receiver of Atikokan Sawmills Inc. dated December 30, 2010 (“**Proposed Atikokan Receiver's Report**”, and collectively with the Proposed Northern Receiver's Report, the “**Proposed Receivers' Reports**”).
5. The purpose of this second report (the “**Second Report**”) of the Northern Receiver is to seek this Honourable Court’s advice and direction with respect to the applicability of the *Wage*

Earners Protection Program Act (“**WEPPA**”) to Northern’s former unionized employees, and in particular regarding:

- a) the determination of the applicable employment termination date (the “**Employment Termination Date**”) of Northern’s former unionized employees who claim or may claim entitlements under WEPPA, and specifically:
 - i) the impact, if any, of the deemed termination of the former unionized employees under section 56(2) of the Ontario *Employment Standards Act* (the “**ESA**”);
 - ii) the impact, if any, and duration of, recall rights of the former unionized employees under the applicable collective bargaining agreement;
 - iii) the impact, if any, of the Termination Letters (as hereinafter defined) executed by certain former unionized employees; and
- b) if any Employment Termination Date occurred prior to July 4, 2010, being more than six months prior to the Appointment Date, seek an order from the Court that the Northern Receiver has no responsibilities or obligations under WEPPA with respect to such former employee.

EMPLOYEE INFORMATION

- 6. During the fall of 2008, after earlier temporary closures, Northern permanently ceased operations at its sawmill and virtually all of its former unionized employees were indefinitely laid off.
- 7. Following its appointment, the Northern Receiver established that a number of Northern’s former unionized employees, were laid off as early as December 2006. However, most were laid off between June and November 2007. Thereafter, some unionized employees were recalled by Northern in the summer of 2008 for a short period of time, and were again laid off by September 2008.
- 8. Pursuant to Northern’s payroll records, the only amounts owed to Northern’s former unionized employees are for statutory termination pay and severance pay, and no

amounts are outstanding for other wages, including vacation pay. As a result, no amounts are owed to any of Northern's former unionized employees pursuant to section 81.4 of the BIA.

WEPPA INFORMATION

9. WEPPA was proclaimed into force on July 7, 2008, and amended on January 27, 2009 and was enacted to provide a timely payment, by Service Canada (the government agency responsible for evaluating, administering and paying employee claims under the program), to eligible employees for eligible wages (as hereinafter defined) owed to them by their former employer within six months of the employer's bankruptcy or receivership.
10. In order to assess the application of WEPPA to Northern's former employees, for whom either their Employment Termination Date is unclear, the Northern Receiver has reviewed WEPPA and relevant employment standards legislation, with a particular focus on the following sections of WEPPA:

Section 2 (1) "eligible wages" means:

"(a) wages other than severance pay and termination pay that were earned during the 6 month period ending on the date of bankruptcy or the first day on which there was a receiver in relation to the former employer; and

(b) severance pay and termination pay that relate to employment that ended during the period referred to in paragraph (a)."

Section 5

"An individual is eligible to receive a payment if:

(a) the individual employment ended for a reason prescribed by regulation;

(b) the former employer is bankrupt or subject to a receivership; and

(c) the individual is owed eligible wages by the former employer."

Section 21 (1)

“For the purposes of this Act, a trustee or receiver, as the case may be, shall:

(a) identify each individual who is owed eligible wages;

(b) determine the amount of eligible wages owed to each individual;

(c) inform each individual other than one who is in a class prescribed by regulation of the existence of the program established by section 4 and of the conditions under which payments may be made under this Act;

(d) provide the Minister and each individual other than one who is in a class prescribed by regulation with the information prescribed by regulation in relation to the individual and with the amount of eligible wages owing to the individual; and

(e) inform the Minister of when the trustee is discharged or the receiver completed their duties, as the case may be.”

11. Service Canada’s website¹ notes that employees laid off (as opposed to terminated) more than 6 months prior to a bankruptcy or receivership may still have entitlements under the program:

“There is a distinction between lay-offs and terminations. An individual who is laid-off with a right of recall may be eligible for the WEPP only when the lay-off becomes a termination. The determination of when a lay-off becomes a termination may be found in relevant provincial, territorial or federal employment/labour standards legislation, in relevant collective agreement or employment contracts. It may also be triggered by bankruptcy or receivership. Once a termination date is determined for a laid-off employee, if that termination date falls within the six month period ending on the date of bankruptcy or receivership, the individual may be entitled to termination and severance pay

¹ <http://www.servicecanada.gc.ca/eng/sc/wepp/trustees/faq.shtml>.

under WEPP.”

12. As such, to determine whether Northern’s former unionized employees are eligible for a WEPPA claim, and therefore, whether the Northern Receiver is obligated to provide Service Canada with the prescribed information relating to such employees, it is necessary to establish the unionized employees’ Employment Termination Date, and, in particular whether the Employment Termination Date occurred in the six month period prior to the Appointment Date, being July 4, 2010 or later. This in turn requires consideration of the impact, if any, of:

- (i) relevant provincial employment standards legislation;
- (ii) the collective bargaining agreement (the “CBA”) between the Communication, Energy and Paperworkers Union, Local 38X (the “CEP”) and Northern and any recall rights thereunder; and
- (iii) any agreements between Northern and the union or employees, including the Termination Letters.

13. This motion does not concern Northern’s former non-union employees as such workers each have a clear Employment Termination Date. The former unionized employees were indefinitely laid-off (rather than terminated) because the CBA does not permit the summary termination of unionized employees other than for just cause.

ONTARIO EMPLOYMENT STANDARDS ACT

14. The employees were located in Ontario. The *Ontario Employment Standards Act, 2000* (the “ESA”) deems laid-off employees to be terminated if their lay off exceeds a “temporary layoff”. Section 56(2) defines a temporary lay-off as:

Section 56(2)

“...a temporary layoff is,

- (a) a lay-off of not more than 13 weeks in any period of 20 consecutive weeks;*

(b) a lay-off of more than 13 weeks in any period of 20 consecutive weeks, if the lay-off is less than 35 weeks in any period of 52 consecutive weeks [and certain prescribed conditions are met]; or

(c) in the case of an employee represented by a trade union, a lay-off longer than a lay-off described in clause (b) where the employer recalls the employee within the time set out in an agreement between the employer and the trade union.

15. Section 67 of the ESA provides for an election regarding termination pay and recall rights in defined circumstances:

Section 67(1) - This section applies if an employee who has a right to be recalled for employment under his or her employment contract is entitled to,

a) termination pay under section 61 because of a lay-off of 35 weeks or more; or

b) severance pay.

...

(3) - The employee may elect to be paid the termination pay or severance pay forthwith or to retain the right to be recalled.

16. The Northern Receiver is aware of the Court of Appeal decision in *London Machinery Inc. v. CAW-Canada* which it believes to be instructive on the interplay between Section 67 and Section 56(2)(c).

17. Pursuant to Section 56(5) of the ESA, once a termination is triggered by a lay-off that exceeds the period of a temporary lay-off, the termination is deemed to have occurred on the very first day of the lay-off.

COLLECTIVE BARGAINING AGREEMENT

18. The Northern Receiver obtained and reviewed with its counsel a copy of the CBA between Northern and CEP, a copy of which is enclosed as Appendix A hereto. Unfortunately, the general seniority and recall rights provisions contained in the CBA are ambiguous and do not provide clear guidance on the expiry date of member's recall rights. Pursuant to:

Section 5.05 (4)(a) of the CBA:

“If an employee is not recalled to his regular classification within one year of the date of layoff from that classification, his recall rights to that classification will expire and he will be deemed to have a new regular classification which will be the classification he is in at the one year date; and

Section 5.05 (4)(b) of the CBA:

“... if the employee is not actively working on the anniversary date of the lay off from his regular classification he will be deemed to hold a labourer classification. This does not apply to tradesmen and apprentices.”

19. The CBA also contains a Letter of Understanding regarding recall rights, which states:

1. Regular full-time employees as of the date of ratification will have general recall rights until August 31, 2008. An agreed upon list of such employees will be prepared.

2. If such employees have not been recalled to a permanent vacancy before August 31, 2008, their seniority will be lost and their employment terminated at that time.

Ratified at Thunder Bay, Ontario, this 31st day of October, 2004.

20. In addition, pursuant to Section 5.02(1)(e) of the Northern CBA, employees lose their seniority if absent from work “for a period of 12 months for any reason other than military leave, prolonged illness or absence, with further [sic] twelve months if requested in writing by the employee affected”. This ‘hard-stop’ loss of seniority after 24 months is consistent with discussions the Northern Receiver held with Ms. Jane Ann Gericke, the former Controller of Northern, who advised the Northern Receiver that recall rights of the Northern employees expire after 24 months of lay-off.

TERMINATION LETTERS & THE MEMORANDUM OF SETTLEMENT

21. Pursuant to Northern's books and records, a number of Northern's former employees executed termination letters (the "**Termination Letters**"), 66 of which were executed more than six months prior to the Appointment Date. Pursuant to the Termination Letters individual employees specifically elected to waive their recall rights in order to receive the termination pay and severance pay owed to them pursuant to the following statement therein:

"I am waiving any recall rights to which I might be otherwise entitled and that my employment with Northern Sawmills Inc. will be terminated effective immediately."

A copy of the Termination Letters provided to the Northern Receiver by Ms. Gericke is attached as Appendix B hereto.

22. On February 15, 2011, the Northern Receiver provided copies of the Termination Letters to counsel to the CEP.

23. Pursuant to a Memorandum of Agreement and Release between Northern and CEP dated July 6, 2010 (the "**Memorandum**"), the parties agreed that all listed employees had their employment terminated and had no recall rights and Northern acknowledged its obligations to pay the employees the amounts set out in Schedule "A" to the Memorandum. A copy of the Memorandum is attached as Appendix C hereto.

24. Pursuant to paragraph #1 of the Memorandum:

"The parties agree that the Employees are employees whose employment has terminated and who have no recall rights either because:

(a) they are employees whose recall rights expired and whose employment terminated on the date they lost their recall rights; or

(b) they are employees who forfeited their right to recall and elected to terminate their employment and claim termination and severance pay, whose employment terminated on the date of their election.

25. Pursuant to paragraph #2 of the Memorandum:

“...as all of the Employees have been laid off for in excess of one year, the Union hereby agrees to relieve NSI (i.e. Northern) of its obligations, if any, to personally serve the Employees with written notice of termination or provide or post any other notice or notices”

26. The Memorandum appears to show Northern’s and the CEP’s shared understanding that certain former unionized employees’ employment ended prior to the execution of the Memorandum on July 6, 2010. In particular, the reference to employees whose employment “has terminated” and whose recall rights had previously expired or had been waived appears to recognize that the employment of certain unionized employees ended before July 6, 2010.

COMMUNICATIONS WITH SERVICE CANADA

27. Due to the complexities in determining whether Northern’s former unionized employees were eligible for a WEPPA claim, the Northern Receiver sought and obtained an initial extension of the timeline for providing information to Service Canada with respect to Northern’s employees from 45 days to 75 days, which has further been extended to July 31, 2011.

28. In addition, due to the ambiguity of the CBA, the Northern Receiver contacted Service

Canada, who referred the Northern Receiver to the Canada Industrial Relations Board (“CIRB”), in an effort to have CIRB provide advice and direction to the Northern Receiver regarding the applicable employment termination dates of Northern’s former unionized employees, in order to enable the Northern Receiver to establish whether the former employees were eligible to make a WEPPA claim.

29. After several telephone calls with both Service Canada and the CIRB, neither Service Canada nor the CIRB were prepared to advise the Northern Receiver on the application of WEPPA as it relates to Northern’s former unionized employees, particularly as to the determination of the employees’ employment termination dates, other than to advise the Northern Receiver to make its best determination on the potential eligibility of Northern’s former employees to a WEPPA claim, on the information available to it, and to provide Service Canada with the prescribed information relating to such employees. In addition, all former unionized employees of Northern would be responsible for making their own individual WEPPA claim directly with Service Canada, who would make the ultimate determination of the individual employee’s eligibility under the program.
30. In order to comply with its obligations prescribed by WEPPA and its related regulations, the Northern Receiver reviewed, with advice and direction from its legal counsel, the Memorandum, the Termination Letters, the CBA and Ontario labour relations and employment standards legislation.
31. The Northern Receiver’s analysis has failed to yield a clear, definitive answer to the Employment Termination Date of Northern’s former unionized employees. For example, the Employment Termination Date differs depending on whether one considers the ESA, the CBA recall provisions (which themselves yield different answers), or the Termination Letters. In the result, given the remedial nature of

WEPPA, the Northern Receiver attempted to determine the latest reasonable Employment Termination Date for the affected employees. As such, based on the information available to the Northern Receiver, the Northern Receiver initially considered the employee's Employment Termination Date to be the earlier of:

- (i) the date the employee executed a Termination Letter, if any;
- (ii) 24 months following the last day worked, being the latest date on which recall rights would have expired according to Section 5.02 of the CBA and the information provided by the Controller; or
- (iii) July 6, 2010, the date of the Memorandum.

32. Based on its analysis, the Northern Receiver provided information to Service Canada, on or before February 28, 2011, with respect to 54 former unionized employees it believed to have an Employment Termination Date during the six months prior to the Appointment Date, being former employees:

- (i) who had been laid-off no earlier than July 6, 2008 and who did not execute a Termination Letter; or
- (ii) who had executed a Termination Letter in the period that was six months prior to the Appointment Date.

COMMUNICATIONS WITH UNION

33. During its review of Northern's employee and payroll records, the Northern Receiver contacted the CEP and its legal counsel on a number of occasions.

34. On February 25, 2011, following its analysis of the WEPPA issues, the Northern Receiver contacted CEP's legal counsel, providing details of its reasoning and

conclusions. A copy of the e-mail correspondence with the CEP's legal counsel is attached as Appendix D hereto. Appendix D excludes the employee schedules, which contain personal employee information that has been redacted for the purposes of this report. An unredacted version can be made available to this Honourable Court upon request.

35. On March 15, 2011, at the request of the CEP's legal counsel, the Northern Receiver, issued correspondence to Northern's remaining approximately 180 former employees (both union and non unionized employees) to advise them of WEPPA and its related regulations, providing guidance on the program and to advise such former employees that pursuant to Northern's payroll records no amounts appear to be owed to them within the six month period prior to the Appointment Date. The former employees were also advised by the Northern Receiver to file a claim directly with Service Canada, if they believe they are eligible under the program, and that Service Canada would ultimately determine their individual eligibility. A copy of this correspondence is attached as Appendix E hereto.

36. A copy of correspondence issued by CEP's legal counsel to the Northern Receiver on February 9, 2011 (the "**February Correspondence**") and April 11, 2011 (the "**April Correspondence**") are attached as Appendices F and G hereto.

37. The February Correspondence advised the Northern Receiver that since the cessation of operations, Northern and the CEP had been in regular discussions regarding the state of Northern's operation, which led to the execution of the Memorandum. CEP appears to take the position that, as a result of the Memorandum, the employment of all of Northern's unionized employees in fact "ended" on July 6, 2010 and, as such, all employees are entitled to advance a claim under WEPPA.

38. The April Correspondence advised the Northern Receiver for the first time that Northern appears to have entered into an oral agreement, prior to the receivership proceedings, to extend recall rights, which purported agreement was affirmed in a letter addressed to PricewaterhouseCoopers Inc. and Service Canada executed by Mr. Wolf Gericke, whom the Northern Receiver understands is the former President of Northern, dated April 11, 2011. It does not appear that this purported agreement formed part of the CBA and, in fact, Mr. Gericke's letter confirms that no new CBA has been reached. A copy of the letter executed by Mr. Gericke is attached as Appendix H hereto.

39. In its April Correspondence, CEP requested that the Northern Receiver submit to Service Canada the prescribed information for all former unionized employees of Northern on the basis that CEP believe that all former unionized employees are eligible for payments under WEPPA. CEP's legal counsel also indicated that instructions were received by CEP to schedule a motion for the determination of WEPPA rights and entitlements for all former CEP employees.

40. As a practical matter, the Northern Receiver understands that it is very likely that Service Canada will rely on the Northern Receiver's information and analysis regarding the employees' entitlement to payments under WEPPA. In the circumstances, the Northern Receiver wants to ensure a fair and correct application of its obligations under WEPPA that does not improperly deny any employee payments under the program while at the same time respecting the will of Parliament and the interest of Northern's creditors (as any termination or severance pay paid by Service Canada could attract vacation pay of at least 4% under the ESA, and a super-priority could attach to such vacation pay to the detriment of Northern's secured creditors) as well as Canadian taxpayers generally (as WEPPA does not grant the Government a subrogated super-priority claim for payments under the program in respect of

termination and severance pay).

41. As a result, the Northern Receiver seeks the advice and direction of this Honourable Court with respect to the application of WEPPA to Northern's former employees, in particular:

- a) the Employment Termination Date of Northern's former unionized employees who claim or may claim entitlements under WEPPA, and specifically:
 - i) the impact, if any, of the deemed termination of the former unionized employees under section 56(2) of the Ontario *Employment Standards Act*;
 - ii) the impact, if any, and duration of recall rights of the former unionized employees under the collective bargaining agreement;
 - iii) the impact, if any, of the Termination Letters (as hereinafter defined) executed by certain former unionized employees; and
- b) if any such Employment Termination Date occurred prior to July 4, 2010, being six months prior to the Appointment Date, an order from the Court that the Northern Receiver has no responsibilities or obligations under WEPPA with respect to such former employees.

All of which is respectfully submitted on this 14th day of July, 2011.

PricewaterhouseCoopers Inc.

in its capacity as Receiver of Northern Sawmills Inc.
and not in its personal capacity



Greg Prince
Senior Vice President



Tracey Weaver
Vice President

