Court File No. CV-13-10046-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43 and SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED

BETWEEN:

FREEPORT FINANCIAL LLC

Applicant

- and –

PRACS INSTITUTE CANADA B.C. LTD.

Respondent

BOOK OF AUTHORITIES OF PRICEWATERHOUSECOOPERS INC.
(Motion returnable June 26, 2013)

June 21, 2013

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2009 CarswellQue 14224, EYB 2009-171231, 2009 QCCS 6461, 190 A.C.W.S. (3d) 678

AbitibiBowater Inc., (Re)

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and The other Petitioners listed on Schedules "A", "B" and "C", Petitioners and Ernst & Young Inc., Monitor

Quebec Superior Court

Gascon J.C.S.

Heard: November 9, 2009
Judgment: November 16, 2009
Docket: C.S. Qué. Montréal 500-11-036133-094

Counsel: Me Sean Dunphy, Me Joseph Reynaud, for Petitioners

Me Robert Thornton, for the Monitor

Me Jason Dolman, for the Monitor

Me Alain Riendeau, for Wells Fargo Bank, N.A., Administrative Agent under the Credit and Guarantee Agreement Dated April 1, 2008

Me Marc Duchesne, for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders

Me Frederick L. Myers, for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates

Me Jean-Yves Simard, for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates

Me Patrice Benoît, for Investissement Québec

2009 CarswellQue 14224, EYB 2009-171231, 2009 QCCS 6461, 190 A.C.W.S. (3d) 678

Me S. Richard Orzy, for the Official Committee of Unsecured Creditors of AbitibiBowater Inc. & Al.

Me Frédéric Desmarais, for Bank of Montreal

Me Anastasia Flouris, for Alcoa

Subject: Insolvency

***Gascon J.C.S.*:**

CORRECTED JUDGMENT, NOVEMBER 23 ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING AND FOR DISTRIBUTION OF CERTAIN PROCEEDS OF THE MPCo SALE TRANSACTION TO THE TRUSTEE FOR THE SENIOR SECURED NOTES (#312)

Introduction

1 In the context of their *CCAA*[FN1] restructuring, the Abitibi Petitioners[FN2] present a Motion[FN3] for 1) the approval of a second DIP financing and 2) the distribution of certain proceeds of the Manicouagan Power Company ("*MPCo*") sale transaction to the Senior Secured Noteholders *("SSNs")*.

2 More particularly, the Abitibi Petitioners seek:

1) Orders authorizing Abitibi Consolidated Inc. ("*ACI*") and Abitibi Consolidated Company of Canada Inc. ("*ACCC*") to enter into a Loan Agreement (the "*ULC DIP Agreement*") with 3239432 Nova Scotia Company ("*ULC*"), as lender, providing for a *CDN$230 million super-priority secured debtor in possession credit facility* (the "*ULC DIP Facility*").

The ULC DIP Facility is to be funded from the ULC reserve of approximately CDN$282.3 million (the "*ULC Reserve*"), with terms that will be substantially in the form of the term sheet (the "*ULC DIP Term Sheet*") attached to the ULC DIP Motion;

2) Orders authorizing the distribution to the SSNs *of up to CDN$200 million* upon completion of the sale of ACCC's 60% interest in MPCo and Court approval of the ULC DIP Agreement.

The distribution is to be paid from the net proceeds of the MPCo sale transaction after the payments, holdbacks, reserves and deductions provided for in the Implementation Agreement agreed upon in regard to that transaction; and

3) Orders amending the Second Amended Initial Order to increase the super priority charge set out in paragraph

61.3 (the "*ACI DIP Charge*") in respect of the ACI DIP Facility by an amount of CDN$230 million in favour of ULC for all amounts owing in connection with the ULC DIP Facility.

This increase in the ACI DIP Charge is to still be subordinated to any and all subrogated rights in favour of the SSNs, the lenders under the ACCC Term Loan (the "*Term Lenders*") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (the "*Lien Holders*") arising under paragraph 61.10 of the Second Amended Initial Order.

3 The SSNs and the Term Lenders, the only two secured creditor groups of the Abitibi Petitioners, do not, in the end, contest the ULC DIP Motion. Pursuant to intense negotiations and following concessions made by everyone, an acceptable wording to the orders sought was finally agreed upon on the eve of the hearing. The efforts of all parties and Counsel involved are worth mentioning; the help and guidance of the Monitor and its Counsel as well.

4 Of the unsecured creditors and other stakeholders, only the Ad Hoc Unsecured Noteholders Committee *(*the *"Bondholders")* opposes the ULC DIP Motion, and even there, just in part. At hearing, Counsel for the Official Committee of Unsecured Creditors set up in the corresponding U.S. proceedings pending in the State of Delaware also voiced that his client shared some of the Bondholders' concerns.

5 In short, while not contesting the request for approval of the second DIP financing, the Bondholders contend that the CDN$200 million immediate proposed distribution to the SSNs is inappropriate and uncalled for at this time.

6 Before analyzing the various orders sought, an overview of the MPCo sale transaction and of the ULC DIP Facility that are the subject of the debate is necessary.

The MPCo Sale Transaction

7 The MPCo sale transaction is central to the orders sought in the ULC DIP Motion.

8 Under the terms of an Implementation Agreement signed in that regard, Hydro-Québec *("HQ")* agreed to pay ACCC CDN$615 million (the "*Purchase Price*") for ACCC's 60% interest in MPCo.

9 Of this amount, it is expected that (i) CDN$25 million will be paid at closing to Alcoa, the owner of the other 40% interest in MPCo, for tax liabilities; (ii) approximately CDN$31 million will be held by HQ for two years to secure various indemnifications (the "*HQ Holdback*"); (iii) certain inter-party accounts will be settled; (iv) the CDN$282.3 million ULC Reserve, set up primarily to guarantee potential contingent pension liabilities and taxes resulting from the Proposed Transactions, will be held by the Monitor in trust for the ULC pending further Order of the Court; and (v) the ACI DIP Facility will be repaid.

10 That said, until the sale, ACCC's 60% interest in MPCo remains subject to the SSN's first ranking security. This first ranking security interest has never been contested by any party. In fact, after their review of same, the Monitor's Counsel concluded that it is valid and enforceable[FN4].

11 Accordingly, the proceeds of the sale less adjustments, holdbacks and reserve would normally be paid to the SSNs as holders of valid first ranking security over this asset.

12 To that end, the SSNs' claim of US$477,545,769.53 (US$413 million in principal and US$64,545,769.53 in interest as at October 1st, 2009) is not really contested except for a 0.5% to 2% additional default interest over the 13.75% original loan rate.

13 In that context, on September 29, 2009, the Court issued an Order approving the sale of ACCC's 60% interest in MPCo on certain conditions. Amongst others, the Court:

a) Approved the terms and conditions of the Implementation Agreement;

b) Authorized and directed ACI and ACCC to implement and complete the Proposed Transactions with such non-material alterations or amendments as the parties may agree to with the consent of the Monitor;

c) Declared that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of the ULC, shall constitute and be treated as proceeds of the disposition of ACCC's MPCo shares (collectively, the *"MPCo Share Proceeds"*);

d) Declared that the MPCo Share Proceeds extend to and include (a) ACCC's interest in the HQ Holdback and (b) ACCC's interest in claims arising from the satisfaction of related-party claims;

e) Declared that the MPCo Share Proceeds will be subject to a replacement charge (the *"MPCo Noteholder Charge"*) in favour of the SSNs with the same rank and priority as the security held in respect of the ACCC's MPCo shares;

f) Declared that the ULC Reserve is subject to a charge in favour of the SSNs which is subordinate to a charge in favour of Alcoa (the *"ULC Reserve Charge"*); and

g) Ordered that the cash component of the MPCo Share Proceeds and the ULC Reserve be paid to and held by the Monitor in an interest bearing account or investment grade marketable securities pending further Order of the Court.

14 The Proposed Transactions are not expected to close until the latter part of November or early December 2009. ACI has requested and obtained an extension from Investissement Quebec *("IQ")* to December 15, 2009 for the re-payment of the ACI DIP Facility that matured on November 1st, 2009.

15 Based on the amounts of the significant payments, holdbacks, reserves and deductions from the Purchase Price, and considering that the amount drawn under the ACI DIP Facility presently stands at CDN$54.8 million, the Net Available Proceeds after payment of the ACI DIP Facility would be approximately CDN$173.9 million.

The Ulc DIP Facility

16 Pursuant to the Implementation Agreement, ULC is required to maintain the ULC Reserve. On the closing of the Proposed Transactions, ULC will hold the ULC Reserve in the amount of approximately CDN$282.3 million.

17 This amount may be used for a limited number of purposes (the "*Permitted Investments*") that are described in the Implementation Agreement. Such Permitted Investments include making a DIP loan to either ACI or ACCC.

18 Based on that, the ULC DIP Term Sheet provides that the ACI Group will borrow CDN$230 million from the ULC Reserve as a Permitted Investment.

19 According to the Monitor[FN5], the significant terms of the ULC DIP Term Sheet are as follows:

i) *Manner of Borrowing* — Initially, the ULC DIP Facility was to be available by way of an immediate draw of CDN$230 million. After negotiations with the Term Lenders, it was rather agreed that (i) a first draw of CDN$130 million will be advanced at closing, (ii) subsequent draws for a maximum total amount of CDN$50 million in increments of up to CDN$25 million will be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order, and (iii) the balance of CDN$50 million shall become available upon further order of the Court.

ii) *Interest Payments* — No interest will be payable on the ULC DIP Facility;

iii) *Fees* — No fees are payable in respect of the ULC DIP Facility;

iv) *Expenses* — The borrowers will pay all reasonable expenses incurred by ULC and Alcoa in connection with the ULC DIP Facility;

v) *Reporting* — Reporting will be similar to that provided under the ACI DIP Facility and copies of all financial information will be placed in the data room. Reporting will include notice of events of default or maturing events of default;

vi) *Use of Proceeds* — The ULC DIP Facility will be used for general corporate purposes in material compliance with the 13-week cash flow forecasts to be provided no less frequently than the first Friday of each month (the "*Budget*");

vii) *Events of Default* — The events of default include the following:

(a) Substantial non-compliance with the Budget;

(b) Termination of the *CCAA* Stay of Proceedings;

(c) Failure to file a *CCAA* Plan with the Court by September 30, 2010; and

(d) Withdrawal of the existing Securitization Program unless replaced with a reasonably similar facility;

viii) *Rights of Alcoa* — Alcoa will receive all reporting noted above and notices of events of default. Alcoa's consent is required for any amendments or waivers;

ix) *Rights of Senior Secured Noteholders* — The Senior Secured Noteholders'rights consist of:

(a) Receiving all reporting noted above and any notice of an Event of Default;

(b) Consent of Senior Secured Noteholders holding a majority of the principal amount of the Senior Secured Notes is required for any amendments to the maximum amount of the ULC DIP Facility or any change to the Outside Maturity Date or the interest rate;

(c) Upon an Event of Default, there is no right to accelerate payment or maturity, subject to the right to apply to Court for the termination of the ULC DIP Facility, which right is without prejudice to the right of ACI, ACCC, the ULC or Alcoa to oppose such application;

(d) Entitlement to review draft of documents, but final approval of such documents is in Alcoa's sole discretion; and

(e) Entitlement to request the approval of the Court to amend any monthly cash flow budget which has been filed;

x) *Security* — Security is similar to the existing ACI DIP Facilityand ranking immediately after the existing ACI DIP Charge. There are no charges on the assets of the Chapter 11 Debtors (as defined in the existing ACI DIP Facility).

20 The Monitor notes that the ULC DIP Facility will provide the ACI Group with additional net liquidity (after the retirement of the ACI DIP Facility and after the payment of the proposed distribution to the SSNs) in the amount of some CDN$167 million.

The Questions at Issue

21 In light of this background, the Court must answer the following questions:

1) Should the ULC DIP Facility of CDN$230 million be approved?

2) Should the proposed distribution of CDN$200 million to the SSNs be authorized?

3) Is the wording of the orders sought appropriate, notably with regard to the additions proposed by the Bondholders in terms of the future steps to be taken by the Abitibi Petitioners?

Analysis and Discussion

1) The Approval of the DIP Financing

22 In the Court's opinion, the second DIP financing, that is, the ULC DIP Facility of CDN$230 million, should be approved on the amended terms agreed upon by the numerous parties involved.

23 In this restructuring, the Court has already approved DIP financing in respect of both the Abitibi Petitioners and the Bowater Petitioners.

24 On April 22, 2009, it issued a Recognition Order (U.S. Interim DIP Order) recognizing an Interim Order of the U.S. Bankruptcy Court for a DIP loan of up to US$206 million to the Bowater Petitioners. On May 6, 2009, it approved the ACI DIP Facility, a US$100 million loan to the Abitibi Petitioners by Bank of Montreal (*"BMO"*), guaranteed by IQ.

25 The jurisdiction of the Court to approve DIP financing and the requirement of the Abitibi Petitioners for such were canvassed at length in the May 6 Judgment. The requirements of the Abitibi Petitioners for liquidity and the authority of the Court to approve agreements to satisfy those requirements have already been reviewed and ruled upon.

26 There have been no circumstances intervening since the approval of the ACI DIP Facility that can fairly be characterized as negating the requirement of the Abitibi Petitioners for DIP financing.

27 The only issue here is whether this particular ULC DIP Facility proposal, replacing as it does the prior ACI DIP Facility, is one that the Court ought to approve. As indicated earlier, the answer is yes.

28 At this stage in the proceedings where the phase of business stabilization is largely complete, the Court is not required to approach the subject of DIP financing from the perspective of excessive caution or parsimony.

29 On the one hand, as highlighted notably by the Monitor[FN6], the Abitibi Petitioners have presented substantial reasons to support their need for liquidity by way of a DIP loan. Suffice it to note to that end that:

a) Without an adequate cushion, in view of potential adverse exchange rate fluctuations and further adverse price declines in the market, the Abitibi Petitioners'liquidity could easily be insufficient to meet the requirements of its Securitization Program (Monitor's 19th Report at paragraphs 49, 50 and chart at paragraph 61);

b) Absent a DIP loan, there is, in fact, a "high risk of default" under the Securitization Program (Monitor's 19th Report at paragraph 32);

c) Despite Abitibi Petitioners'best efforts at forecasting, weekly cash flow forecasts have varied by as much as US$26 million. Weekly disbursements have varied by 100%. Each 1¢ variation in the foreign exchange rate as against the US dollar could produce a US$17 million negative cash flow variation. The ultimate cash flow requirements will be highly dependent on variables that the Abitibi Petitioners'cannot control (Monitor's 19th Report at paragraphs 54, 60 and 61);

d) The market decline has eroded the Abitibi Petitioners'liquidity, while foreign exchange fluctuations are placing further strain on this liquidity. Even if prices increase, the resulting need for additional working capital to increase production will paradoxically put yet further strain on this liquidity;

e) Without the ULC DIP Facility, the Abitibi Petitioners would lack access to sufficient operating credit to maintain normal operations. They would be significantly impaired in their ability to operate in the ordinary course and they would face an increase in the risk of unexpected interruptions; and

f) The Abitibi Petitioners have yet to complete their business plan and it is premature to predict the length of the proceedings (Monitor's 19th Report at paragraphs 47 and 48).

30 In fact, based upon its sensitivity analysis, the inter-month variability of the cash flows, the minimum liquidity requirements under the Securitization Program, and the requirement to repay the ACI DIP Facility, the Monitor is of the view that the Abitibi Petitioners need the new ULC DIP Facility to ensure that ACI has sufficient liquidity to complete its restructuring.

31 On the other hand, the reasonableness of the amount of the ULC DIP Facility is supported by the following facts:

a) Only about CDN$168 million of incremental liquidity is being provided and post-transaction, the Abitibi Petitioners will have, at best, about CDN$335 million of liquidity (Monitor's 19th Report at paragraph 68);

b) The Bowater Petitioners, a group of the same approximate size as the Abitibi Petitioners, enjoy liquidity of approximately US$400 million (Monitor's 19th Report at paragraph 69) and a DIP facility of approximately US$200 million;

c) Even with the ULC DIP Facility, the Abitibi Petitioners will be at the low end of average relative to their peers in terms of available liquidity relative to their size;

d) The cash flow of the Abitibi Petitioners is subject to significant intra-month variations and has risks associated with pricing and currency fluctuations which are larger the longer the period examined; and

e) The Abitibi Petitioners are required by the Securitization Facility to maintain liquidity on a rolling basis above US$100 million.

32 In addition, the Court and the stakeholders have all the means necessary at their disposal to monitor the use of liquidity without, at the same time, having to ration its access at a level far below that enjoyed by the peers with whom the Abitibi Petitioners compete.

33 In this regard, it is important to emphasize that the ULC DIP Facility includes, after all, particularly interesting conditions in terms of interest payments and associated fees. Because ULC is the lender, none are payable.

34 Finally, the provisions of section 11.2 of the amended *CCAA*, and in particular the factors for review listed in subsection 11.2(4), are instructive guidelines to the exercise of the Court's discretion to approve the ULC DIP Facility.

35 Pursuant to subsection 11.2(4) of the amended *CCAA*, for restructurings undertaken after September 18, 2009, the judge is now directed to consider the following factors in determining whether to exercise his or her discretion to make an order such as this one:

a) The period during which the company is expected to be subject to *CCAA* proceedings;

b) How the company's business and financial affairs are to be managed during the proceedings;

c) Whether the company's management has the confidence of its major creditors;

d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made;

e) The nature and value of the company's property;

f) Whether any creditor would be materially prejudiced as a result of the security or charge; and

g) The Monitor's report.

36 Applying these criteria to this case, it is, first, premature to speculate how long the Abitibi Petitioners will remain subject to proceedings under the *CCAA*.

37 The Monitor's 19th Report has considered cash flow forecasts until December 2010. The Abitibi Petitioners are hopeful of progressing to a plan outline by year-end with a view to emergence in the first or second quarter of 2010.

38 In considering a DIP financing proposal, the Court can take note of the fact that the time and energies ought, at this stage in the proceedings, to be more usefully and profitably devoted to completing the business restructuring,

raising the necessary exit financing and negotiating an appropriate restructuring plan with the stakeholders.

39 Second, even if the ULC DIP Facility of CDN$230 million is a high, albeit reasonable, figure under the circumstances, access to the funds and use of the funds remain closely monitored.

40 Based on the compromise reached with the Term Lenders, access to the funds will be progressive and subject to control. The initial draw is limited to CDN$130 million. Subsequent additional draws up to CDN$50 million will be in maximum increments of CDN$25 million and subject to prior notice. The final CDN$50 million will only be available with the Court's approval.

41 As well, the use of the funds is subject to considerable safeguards as to the interests of all stakeholders. These include the following:

a) The Monitor is on site monitoring and reviewing cash flow sources and uses in real time with full access to senior management, stakeholders and the Court;

b) Stakeholders have very close to real time access to financial information regarding sources and use of cash flow by reason of the weekly cash flow forecasts provided to their financial advisors and the weekly calls with such financial advisors, participated in by senior management;

c) The Monitor provides regular reporting to the Court including as to the tracking of variances in cash use relative to forecast and as to evolution of the business environment in which the Abitibi Petitioners are operating; and

d) All stakeholders have full access to this Court to bring such motions as they see fit should a material adverse change in the business or affairs intervene.

42 Third, there has been no suggestion that the management of the Abitibi Petitioners has lost the confidence of its major creditors. To the contrary:

a) Management has successfully negotiated a settlement of very complex and thorny issues with both the Term Lenders and the SSNs, which has enabled this ULC DIP Motion to be brought forward with their support;

b) While management does not agree with all positions taken by the Bondholders at all times, it has by and large enjoyed the support of that group throughout these proceedings;

c) Management has been attentive to the suggestions and guidance of the Monitor with the result that there have been few if any instances where the Monitor has been publicly obliged to oppose or take issue with steps taken;

d) Management has been proactive in hiring a Chief Restructuring Officer who has provided management with additional depth and strength in navigating through difficult circumstances; and

e) The Abitibi Petitioners' management conducts regular meetings with the financial advisors of their major stakeholders, in addition to having an "open door" policy.

43 The Court is satisfied that, in requesting the approval of the ULC DIP Facility, management is doing so with a broad measure of support and the confidence of its major creditor constituencies.

44 Fourth, with an adequate level of liquidity, the Abitibi Petitioners will be able to run their business as a going concern on as normal a basis as possible, with a view to enhancing and preserving its value while the restructuring process proceeds.

45 By facilitating a level of financial support that is reasonable and adequate and of sufficient duration to enable them to complete the restructuring on most reasonable assumptions, the Abitibi Petitioners will have the benefit of an umbrella of stability around their core business operations.

46 In the Court's opinion, this can only facilitate the prospects of a viable compromise or arrangement being found.

47 Fifth, there are only two secured creditor groups of the Abitibi Petitioners: the SSNs and the Term Lenders. After long and difficult negotiations, they finally agreed to an acceptable wording to the orders sought. No one argues any longer that it is prejudiced in any way by the proposed security or charge.

48 Lastly, sixth, the Monitor has carefully considered the positions of all of the stakeholders as well as the reasonableness of the Abitibi Petitioners' requirements for the proposed ULC DIP Facility. Having reviewed both the impact of the proposed ULC DIP Facility on stakeholders and its beneficial impact upon the Abitibi Petitioners, the Monitor recommends approval of the ULC DIP Facility.

49 On the whole, in approving this ULC DIP Facility, the Court supports the very large consensus reached and the fine balance achieved between the interests of all stakeholders involved.

2) The Distribution to the SSNs

50 The approval of the terms of the ULC DIP Facility by the SSNs is intertwined with the Abitibi Petitioners' agreement to support a distribution in their favor in the amount of CDN$200 million.

51 The Abitibi Petitioners and the SSNs consider that since the MPCo proceeds were and are subject to the security of the SSNs, this arrangement or compromise is a reasonable one under the circumstances.

52 They submit that the proposed distribution will be of substantial benefit to the Abitibi Petitioners. Savings of at least CDN$27.4 million per year in accruing interest costs on the CDN$200 million to be distributed will be realized based on the 13.75% interest rate payable to the SSNs.

53 Needless to say, they maintain that the costs saved will add to the potential surplus value of SSNs' collateral that could be utilized to compensate any creditor whose security may be impaired in the future in repaying the ULC DIP Facility.

54 The Bondholders oppose the CDN$200 million distribution to the SSNs.

55 In their view, given the Abitibi Petitioners'need for liquidity, the proposed payment of substantial proceeds to one group of creditors raises important issues of both propriety and timing. It also brings into focus the need for the *CCAA* process to move forward efficiently and effectively towards the goal of the timely negotiation and implementation of a plan of arrangement.

56 The Bondholders claim that the proposed distribution violates the *CCAA*. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors'leverage and voting rights.

58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

59 In the interim, they suggest that the Abitibi Petitioners should provide a business plan to their legal and financial advisors by no later than 5:00 p.m. on November 27, 2009. They submit that a restructuring and recapitalization term sheet on terms acceptable to them and their legal and financial advisors should also be provided by no later than 5:00 p.m. on December 11, 2009.

60 With all due respect for the views expressed by the Bondholders, the Court considers that, similarly to the ULC DIP Facility, the proposed distribution should be authorized.

61 To begin with, the position of the Bondholders is, under the circumstances, untenable. While they support the CDN$230 million ULC DIP Facility, they still contest the CDN$200 million proposed distribution that is directly linked to the latter.

62 The Court does not have the luxury of picking and choosing here. What is being submitted for approval is a global solution. The compromise reached must be considered as a whole. The access to additional liquidity is possible because of the corresponding distribution to the SSNs. The amounts available for both the ULC DIP Facility and the proposed distribution come from the same MPCo sale transaction.

63 The compromise negotiated in this respect, albeit imperfect, remains the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners. It follows a process and negotiations where the views and interests of most interested parties have been canvassed and considered.

64 To get such diverse interest groups as the Abitibi Petitioners, the SSNs, the Term Lenders, BMO and IQ, and ULC and Alcoa to agree on an acceptable outcome is certainly not an easy task to achieve. Without surprise, it comes with certain concessions.

65 It would be very dangerous, if not reckless, for the Court to put in jeopardy the ULC DIP Facility agreed upon by most stakeholders on the basis that, perhaps, a better arrangement could eventually be reached in terms of distribution of proceeds that, on their face, appear to belong to the SSNs.

66 The Court is satisfied that both aspects of the ULC DIP Motion are closely connected and should be approved together. To conclude otherwise would potentially put everything at risk, at a time where stability is most required.

67 Secondly, it remains that ACCC's interest in MPCo is subject to the SSNs' security. As such, all proceeds of the sale less adjustments, holdbacks and reserves should normally be paid to the SSNs. Despite this, provided they receive the CDN$200 million proposed distribution, the SSNs have consented to the sale proceeds being used by the Abitibi Petitioners to pay the existing ACI DIP Facility and to the ULC Reserve being used up to CDN$230M for the ULC DIP Facility funding.

68 It is thus fair to say that the SSNs are not depriving the Abitibi Petitioners of liquidity; they are funding part of the restructuring with their collateral and, in the end, enhancing this liquidity.

69 The net proceeds of the MPCo transaction after payment of the ACI DIP Facility are expected to be CDN$173.9 million. Accordingly, out of a CDN$200 million distribution to the SSNs, only CDN$26.1 million could technically be said to come from the ULC DIP Facility. Contrary to what the Bondholders alluded to, if minor aspects of the claims of the SSNs are disputed by the Abitibi Petitioners, they do not concern the CDN$200 million at issue.

70 Thirdly, the ULC DIP Facility bears no interest and is not subject to drawdown fees, while a distribution of CDN$200 million to the SSNs will create at the same time interest savings of approximately CDN$27 million per year for the ACI Group. There is, as a result, a definite economic benefit to the contemplated distribution for the global restructuring process.

71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a *CCAA* reorganization. Nothing in the *CCAA* prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada[FN7].

72 While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present *CCAA* reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's

approval has never been considered a breach of the stay.

73 In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN$200 million.

74 In *Windsor Machine & Stamping Ltd. (Re)*,[FN8] Morawetz J. dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

> 13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold Court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

75 Finally, even though the Monitor makes no recommendation in respect of the proposed distribution to the SSNs, this can hardly be viewed as an objection on its part. In the first place, this is not an issue upon which the Monitor is expected to opine. Besides, in its 19th report, the Monitor notes the following in that regard:

a) According to its Counsel, the SSNs security on the ACCC's 60% interest in MPCo is valid and enforceable;

b) The amounts owed to the SSNs far exceed the contemplated distribution while the SSNs' collateral is sufficient for the SSNs' claim to be most likely paid in full;

c) The proposed distribution entails an economy of CDN$27 million per year in interest savings; and

d) Even taking into consideration the CDN$200 million proposed distribution, the ULC DIP Facility provides the Abitibi Petitioners with the liquidity they require for most of the coming year.

76 All things considered, the Court disagrees with the Bondholders' assertion that the proposed distribution is against the goals and objectives of the *CCAA*. For some, it may only be a small step. However, it is a definite step in the right direction.

77 Securing the most needed liquidity at issue here and reducing substantially the extent of the liabilities towards a key secured creditor group no doubt enhances the chances of a successful restructuring while bringing stability to the on-going business.

78 This benefits a large community of interests that goes beyond the sole SSNs.

79 From that standpoint, the Court is satisfied that the restructuring is moving forward properly, with reasonable diligence and in accordance with the *CCAA* ultimate goals.

80 Abitibi Petitioners' firm intention, reiterated at the hearing, to shortly provide their stakeholders with a business

plan and a restructuring and recapitalization term sheet confirms it as well.

3) The Orders Sought

81 In closing, the precise wording of the orders sought has been negotiated at length between Counsel. It is the result of a difficult compromise reached between many different parties, each trying to protect distinct interests.

82 Nonetheless, despite their best efforts, this wording certainly appears quite convoluted in some cases, to say the least. The proposed amendment to the subrogation provision of the Second Amended Initial Order is a vivid example. Still, the mechanism agreed upon, however complicated it might appear to some, remains acceptable to all affected creditors.

83 The delicate consensus reached in this respect must not be discarded lightly. In view of the role of the Court in *CCAA* proceedings, that is, one of judicial oversight, the orders sought will thus be granted as amended, save for limited exceptions. To avoid potential misunderstandings, the Court felt necessary to slightly correct the specific wording of some conclusions. The orders granted reflect this.

84 Turning to the conclusions proposed by the Bondholders at paragraphs 8 to 11 of the draft amended order (now paragraphs 6 to 9 of this Order), the Court considers them useful and appropriate. They assist somehow in bringing into focus the need for this *CCAA* process to continue to move forward efficiently.

85 Minor adjustments to some of the wording are, however, required in order to give the Abitibi Petitioners some flexibility in terms of compliance with the ULC DIP documents and cash flow forecast.

86 For the expected upcoming filing by the Abitibi Petitioners of their business plan and restructuring and re-capitalization term sheet, the Court concludes that simply giving act to their stated intention is sufficient at this stage. The deadlines indicated correspond to the date agreed upon by the parties for the business plan and to the expected renewal date of the Initial Order for the restructuring and recapitalization term sheet.

FOR THESE REASONS, THE COURT:

ORDERS the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

ULC DIP Financing

1 *ORDERS* that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement(the "*ULC DIP Agreement*") among ACI, as borrower, and 3239432 Nova Scotia Company, an unlimited liability company ("*ULC*"), as lender (the "*ULC DIP Lender*"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as *Exhibit R-1* in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the

parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding *$230* million.

2 *ORDERS* that the credit facility provided pursuant to the ULC DIP Agreement (the "*ULC DIP*") will be subject to the following draw conditions:

a) a first draw of $130 million to be advanced at closing;

b) subsequent draws for a maximum total amount of $50 million in increments of up to $25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and

c) the balance of $50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

3 *ORDERS* the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "*Draft ULC DIP Agreement*") to the Monitor and to any party listed on the Service List which requests a copy of same (an "*Interested Party*") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

4 *ORDERS* that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

5 *ORDERS* that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "*ULC DIP Documents*"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

6 *ORDERS* that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

7 *ORDERS* that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

8 *GIVES ACT* to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

9 *GIVES ACT* to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

10 *ORDERS* that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "*ULC DIP Expenses*") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

11 *ORDERS* that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

12 *ORDERS* that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

a) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and

b) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the ap-

pointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

13 *ORDERS* that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

14 *ORDERS* that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "*Notice Period*") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second AmendedInitial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 *CCQ* concurrently with the written enforcement notice of a default mentioned above.

15 *ORDERS* that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

16 *ORDERS* that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

17 *AMENDS* the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

ORDERS further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of *$230* million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners (other than the property of Abitibi Consolidated (U.K.) Inc.) in favour of the ULC DIP Lender for all

amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November16,2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16,2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately $40 million, being the aggregate of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor.

ACI DIP Agreement

18 *ORDERS* that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

19 *ORDERS* that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of $200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

20 *ORDERS* that, subject to completion of the ULC DIP (including the initial draw of $130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of $130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to

the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

21 *ORDERS* that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary.

[21.1] **DECLARES** that for the purposes of paragraphs 1, 5, 10, 12, 13, 17 and 18 of the present Order, the term "Abitibi Petitioners" shall not include Abitibi-Consolidated (U.K.) Inc. added to the schedule of Abitibi Petitioners by Order of this Court on November 10, 2009;

22 *ORDERS* the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

23 *WITHOUT COSTS.*

Schedule "A" — Abitibi Petitioners

1. *ABITIBI-CONSOLIDATED INC.*

2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*

3. *3224112 NOVA SCOTIA LIMITED*

4. *MARKETING DONOHUE INC.*

5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*

6. *3834328 CANADA INC.*

7. *6169678 CANADA INC.*

8. *4042140 CANADA INC.*

9. *DONOHUE RECYCLING INC.*

10. *1508756 ONTARIO INC.*

11. *3217925 NOVA SCOTIA COMPANY*

12. *LA TUQUE FOREST PRODUCTS INC.*

13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*

14. *SAGUENAY FOREST PRODUCTS INC.*

15. *TERRA NOVA EXPLORATIONS LTD.*

16. *THE JONQUIERE PULP COMPANY*

17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY*

18. *SCRAMBLE MINING LTD.*

19. *9150-3383 QUÉBEC INC.*

20. *ABITIBI-CONSOLIDATED (U.K.) INC.*

Schedule "B" — Bowater Petitioners

1. *BOWATER CANADIAN HOLDINGS INC.*

2. *BOWATER CANADA FINANCE CORPORATION*

3. *BOWATER CANADIAN LIMITED*

4. *3231378 NOVA SCOTIA COMPANY*

5. *ABITIBIBOWATER CANADA INC.*

6. *BOWATER CANADA TREASURY CORPORATION*

7. *BOWATER CANADIAN FOREST PRODUCTS INC.*

8. *BOWATER SHELBURNE CORPORATION*

9. *BOWATER LAHAVE CORPORATION*

10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*

11. *BOWATER TREATED WOOD INC.*

12. *CANEXEL HARDBOARD INC.*

13. *9068-9050 QUÉBEC INC.*

14. *ALLIANCE FOREST PRODUCTS (2001) INC.*

15. *BOWATER BELLEDUNE SAWMILL INC.*

16. *BOWATER MARITIMES INC.*

17. *BOWATER MITIS INC.*

18. *BOWATER GUÉRETTE INC.*

19. *BOWATER COUTURIER INC.*

Schedule "C" — 18.6 CCAA Petitioners

1. *ABITIBIBOWATER INC.*

2. *ABITIBIBOWATER US HOLDING 1 CORP.*

3. *BOWATER VENTURES INC.*

4. *BOWATER INCORPORATED*

5. *BOWATER NUWAY INC.*

6. *BOWATER NUWAY MID-STATES INC.*

7. *CATAWBA PROPERTY HOLDINGS LLC*

8. *BOWATER FINANCE COMPANY INC.*

9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*

10. *BOWATER AMERICA INC.*

11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

FN1 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

FN2 In this Judgment, all capitalized terms not otherwise defined have the meaning ascribed thereto in either: 1) the *Second Amended Initial Order* issued by the Court on May 6, 2009; 2) the *Motion for the Distribution by the Monitor of Certain Proceeds of the MPCo Sale Transaction to U.S. Bank National Association, Indenture and Collateral Trustee for the Senior Secured Noteholders* (the "*Distribution Motion*") of the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes (respectively, the "*Committee*" and "*Trustee*", collectively the "*SSNs*") dated October 6, 2009; or 3) the Abitibi Petitioners' *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* (the "*ULC DIP Motion*") dated November 9, 2009.

FN3 *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* dated November 9, 2009 (the "*ULC DIP Motion*").

FN4 See Monitor's 19th Report dated October 27, 2009.

FN5 See Monitor's 19th Report dated October 27, 2009.

FN6 See Monitor's 19th Report dated October 27, 2009.

FN7 See *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.); *Re Rol-Land Farms Limited* (October 5, 2009), Toronto 08-CL-7889 (Ont. Sup. Ct.); and *Re Pangeo Pharma Inc.*, (August 14, 2003), Montreal 500-11-021037-037 (Que. Sup. Ct.).

FN8 *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.).

END OF DOCUMENT

TAB 2

2012 CarswellOnt 9607, 2012 ONSC 4423, 91 C.B.R. (5th) 268, 218 A.C.W.S. (3d) 490

2012 CarswellOnt 9607, 2012 ONSC 4423, 91 C.B.R. (5th) 268, 218 A.C.W.S. (3d) 490

Northstar Aerospace Inc., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Northstar Aerospace, Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (Applicants)

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: July 24, 2012
Judgment: July 30, 2012
Docket: CV-12-9761-00CL

Counsel: A.J. Taylor, K. Esaw for Applicants

Craig J. Hill for Court-Appointed Monitor, Ernst & Young Inc.

D.S. Grieve for Heligear Canada

A. Dale for CAW-Canada

G. Moffat for Chief Restructuring Officer

J.L. Wall for Her Majesty The Queen in Right of Ontario as represented by the Ministry of the Environment

R. Brookes for Region of Waterloo

S. Weisz, L. Rogers J. Willis for Fifth Third Bank as Pre-filing Agent and DIP Lender

W.P. Meagher for Corporation of the City of Cambridge

R.M. Slattery for 180 Market Portfolio

M. Jilesen for General Electric Canada

C. Prophet for Boeing Capital Loan Corporation

S. Pickens (by phone) for Fifth Third Bank

Subject: Insolvency; Constitutional; Corporate and Commercial; International

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Crown claims

Facility owned by N group of companies was subject to orders under Environmental Protection Act due to contamination caused by N group's prior use of industrial solvents at facility — Ministry of Environment (Ministry) issued March 15 Order requiring N group to undertake various activities related to monitoring, mitigation and remediation of environmental contamination at facility, which was presently non-operational — N Canada Inc. and certain Canadian subsidiaries (debtor companies) received protection of Companies' Creditors Arrangement Act (CCAA) — Initial Order was issued — Debtor companies brought motion for approval of agreement to purchase substantially all of N group's assets, not including facility, from N group; Ministry brought motion for declaration that March 15 Order was "regulatory order" pursuant to s. 11.1(2) of CCAA and was not subject to stay of proceedings in Initial Order; or, in alternative, sought order lifting stay — Debtor companies' motion granted on other grounds; Ministry's motion dismissed — Purpose of March 15 Order and Ministry's motion was to attempt to require debtor companies to continue to comply with March 15 Order and financial obligations associated therewith in perpetuity and in conflict with priorities enjoyed by other creditors — March 15 Order sought to enforce payment obligation and was therefore stayed by Initial Order — Ministry was entitled to claim against N group for costs of remedying environmental condition at facility — Ministry's request to lift stay denied on basis that Ministry was seeking to create super priority claim by way of March 15 Order — Such priority is not recognized at law.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Facility owned by N group of companies was subject to orders under Environmental Protection Act due to contamination caused by N group's prior use of industrial solvents at facility — Ministry of Environment (Ministry) issued orders requiring N group to fund and undertake various activities related to monitoring, mitigation and remediation of environmental contamination at facility, which was presently non-operational — N Canada Inc. and certain Canadian subsidiaries (debtor companies) received protection of Companies' Creditors Arrangement Act (CCAA) — Initial Order was issued — Debtor companies brought motion for approval of agreement by purchaser to purchase substan-

tially all of N group's assets, not including facility, from N group vendors; Ministry brought motion for declaration — Debtor companies' motion granted; Ministry's motion dismissed on other grounds — Having considered factors in s. 36(3) of CCAA, transaction was in best interests of N group's stakeholders and should be approved — Debtor companies complied with terms of Sales Process Order — Record established that creditors were adequately consulted and effects of transaction were positive — Consideration to be received for assets was reasonable and fair in circumstances.

Cases considered by *Morawetz J.*:

AbitibiBowater Inc., Re (2010), 68 C.B.R. (5th) 1, 52 C.E.L.R. (3d) 17, 2010 QCCS 1261, 2010 CarswellQue 2812 (Que. S.C.) — referred to

General Chemical Canada Ltd., Re (2007), 228 O.A.C. 385, (sub nom. *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.)* 2007 C.E.B. & P.G.R. 8258, 35 C.B.R. (5th) 163, 61 C.C.P.B. 266, 31 C.E.L.R. (3d) 205, 2007 ONCA 600, 2007 CarswellOnt 5497 (Ont. C.A.) — considered

Nortel Networks Corp., Re (2009), 256 O.A.C. 131, 2009 CarswellOnt 7383, 2009 ONCA 833, 59 C.B.R. (5th) 23, 77 C.C.P.B. 161, (sub nom. *Sproule v. Nortel Networks Corp.)* 2010 C.L.L.C. 210-005, (sub nom. *Sproule v. Nortel Networks Corp., Re)* 99 O.R. (3d) 708 (Ont. C.A.) — referred to

Nortel Networks Corp., Re (2012), 88 C.B.R. (5th) 111, 2012 CarswellOnt 3153, 2012 ONSC 1213, 66 C.E.L.R. (3d) 310 (Ont. S.C.J. [Commercial List]) — considered

Northstar Aerospace Inc., Re (2012), 2012 ONSC 3974, 2012 CarswellOnt 8605 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C. 1982

Chapter 11 — referred to

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

Generally — referred to

s. 6(5)(a) — considered

s. 11.1 [en. 1997, c. 12, s. 124] — considered

s. 11.1(2) [en. 1997, c. 12, s. 124] — considered

s. 11.1(3) [en. 1997, c. 12, s. 124] — considered

s. 11.1(4) [en. 1997, c. 12, s. 124] — considered

s. 11.8(8) [en. 1997, c. 12, s. 124] — considered

s. 11.8(9) [en. 1997, c. 12, s. 124] — considered

s. 36(3) — considered

s. 36(7) — considered

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 21 — considered

s. 92 ¶ 13 — considered

s. 92 ¶ 16 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 109 — considered

Environmental Protection Act, R.S.O. 1990, c. E.19

Generally — referred to

MOTION by debtor companies for approval of asset purchase agreement and other relief; MOTION by Ministry of Environment for declaration.

***Morawetz J.*:**

Overview

1 Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc. ("Northstar Canada"), 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "CCAA Entities") brought this motion for:

(a) approval of an agreement dated June 14, 2012 (the "Heligear Agreement") between Northstar Inc. and Northstar Canada (together, the "Canadian Vendors"), Northstar Aerospace (U.S.A.) Inc. ("Northstar USA") and other Northstar U.S. entities, (collectively, the U.S. Vendors", and together with the Canadian Vendors, the "Vendors") and Heligear Acquisition Co. (the "U.S. Purchaser") and Heligear Canada Acquisition Corporation (the "Canadian Purchaser" and, together with the U.S. Purchaser, "Heligear") for the sale of the Purchased Assets (the "Heligear Transaction");

(b) a vesting order of all of the Canadian Purchased Assets in the Canadian Purchaser free and clear of all encumbrances and interests, other than Canadian permitted encumbrances;

(c) if necessary, assigning the rights and obligations of the Canadian Vendors under the Canadian Assumed Contracts to the Canadian Purchasers; and

(d) authorization and directions to the Monitor, on closing of the Heligear Transaction, to distribute cash or cash equivalents from the proceeds of the Heligear Transaction in an amount equal to the outstanding DIP obligations owing under the DIP Agreement to the DIP Agent for the DIP Lenders (defined below).

2 The CCAA Entities applied for and were granted protection under the *Companies' Creditors Arrangement Act* (the "CCAA") pursuant to an Initial Order of this court dated June 14, 2012 [*Northstar Aerospace Inc., Re*, 2012 CarswellOnt 8605 (Ont. S.C.J. [Commercial List])] (the "Initial Order"). Ernst & Young Inc. was appointed as Monitor (the "Monitor") of the CCAA Entities and FTI Consulting Canada Inc. ("FTI Consulting") was appointed Chief Restructuring Officer ("CRO") of the CCAA Entities.

3 Certain of Northstar Canada's direct and indirect U.S. subsidiaries (the "Chapter 11 Entities") commenced insolvency proceedings (the "Chapter 11 Proceedings") pursuant to Chapter 11 of the United States Bankruptcy Code on June 14, 2012 in the United States Bankruptcy Court for the District of Delaware (the "U.S. Court"). The CCAA Entities and the Chapter 11 Entities are sometimes collectively referred to herein as "Northstar".

4 Argument on the motion was heard in two parts. In the morning, argument was heard on Canadian only issues. In the afternoon, argument was heard on Northstar issues in a crossborder hearing with the United States Bankruptcy Court for the District of Delaware. The crossborder hearing was held in accordance with the provisions of the previously approved Cross-Border Protocol between the U.S. Court and this court.

5 The motion for approval of the Heligear Transaction was opposed by the Ministry of the Environment ("MOE"), GE Canada, the Region of Waterloo and the City of Cambridge.

6 At the conclusion of argument, a brief oral endorsement was issued approving the Heligear Transaction, with reasons to follow. These are the reasons.

Facts

7 Northstar supplies components and assemblies for the commercial and military aerospace markets, and provides related services. Northstar provides goods and services to customers all over the world, including military defence suppliers Boeing, Sikorsky Aircraft Corporation and AgustaWestland Ltd., as well as the U.S. army. Northstar's products are used in the Boeing CH-47 Chinook helicopters, Boeing AH-64 Apache helicopters, Sikorsky UH-60 Blackhawk helicopters, AgustaWestland Links/Wildcat helicopters, the Boeing F-22 Raptor Fighter aircraft and various other helicopters and aircraft.

8 Northstar owns and leases operating facilities in the United States and Canada. In addition, Northstar owns a dormant facility located at 695 Bishop Street North in Cambridge, Ontario (the "Cambridge Facility").

9 The Cambridge Facility has been non-operational since April 2010, when Northstar Canada closed it to focus on its core business of manufacturing aerospace gears and transmissions.

10 Operations at the Cambridge Facility historically involved the use of industrial solvents, including trichloroethylene ("TCE").

11 In 2004, Northstar Canada notified the MOE of potential environmental contamination at the Cambridge Facility including TCE. Additional investigations determined that the contamination had migrated from beneath the Cambridge Facility to beneath nearby homes. In response, Northstar Canada has spent in excess of $20 million for environmental testing and remediation at and near the Cambridge Facility through April 2012.

12 A separate contamination source, not attributable to Northstar Canada or its operations, has also been identified near the Cambridge Facility. This second source is known as the Borg-Warner Site. GE Canada is the corporate successor to Borg-Warner Canada Inc.

13 Since the discovery of the environmental condition at the Cambridge Facility in 2004, Northstar has conducted remediation activities, on a voluntary basis, including after the granting of the Initial Order, with the consent of the DIP Lenders.

14 On March 15, 2012, an Ontario MOE director (the "Director"), pursuant to powers under the *Environmental Protection Act*, issued Order Number 6076-8RJRUP (the "March 15 Order") to Northstar Inc. and Northstar Canada. The March 15 Order was issued as a direct result of the MOE's concerns regarding Northstar Canada's solvency.

15 The purpose of the March 15 Order was stated as "to ensure the potential adverse effects from TCE and hexavalent chromium impacted groundwater to human health and the environment continues to be monitored, mitigated and remediated where necessary".

16 The March 15 Order requires Northstar to undertake the following activities, among others:

> (a) the operation of a laboratory and retention of a professional engineer to supervise the laboratory, which will operate to prepare, complete and/or supervise the work set out in the March 15 Order;

(b) the creation and implementation of an indoor air monitoring protocol, with annual assessment reports submitted to the MOE;

(c) continued:

(i) operation and monitoring of the indoor air mitigation systems ("IAMS") voluntarily installed by Northstar Canada prior to the issuance of the March 15 Order;

(ii) operation and monitoring of the soil vapour extraction systems ("SVES") voluntarily installed by Northstar prior to the issuance of the March 15 Order;

(iii) operation and maintenance of a pump and treat system;

(iv) groundwater remediation on or around the Cambridge Facility;

(v) groundwater and surface water monitoring;

(d) the submission of detailed annual assessment reports regarding the measures described above and, on the direction of the MOE, installation of such additional systems and adoption of such additional reporting requirements as may be required by the MOE; and

(e) submission of an updated interim remedial action plan to the MOE and, upon approval, implementation of same, with bi-annual updated plans unless otherwise advised by the MOE.

17 These obligations and others are fully set out at pages 8-19 of the March 15 Order.

18 On May 31, 2012, the Director issued a further order, Order Number 2066-8UQP82, (the "May 31 Order", and together with the March 15 Order, the "Director's Orders") ordering Northstar Inc. and Northstar Canada to provide financial assurance in the amount of $10,352,906 by certified cheque payable to the Ontario Ministry of Finance or irrevocable Letter of Credit issued by a Canadian chartered bank by June 6, 2012 to fund the measures contemplated by the March 15 Order.

19 Northstar has continued to perform monitoring, mitigation and remediation activities contemplated by the March 15 Order to the extent it was permitted to do so under the Initial Order. In addition, the CCAA Entities, with the consent of the DIP Lenders, have sought and obtained authorization to pay the utility payments associated with the IAMS. The CCAA Entities, however, advised the MOE that any payment of utility payments by the CCAA Entities was without prejudice to their position that the Director's Orders were stayed by the Initial Order and did not constitute an admission that the CCAA Entities were obligated to make or continue to make such payments — and further that they were not committed to continue making such payments.

20 The concerns raised by the MOE, the Region of Waterloo and the City of Cambridge are significant. TCE is a carcinogen. The effects of TCE were described in the affidavit filed by Dr. Liana Nolan, the Medical Officer of Health ("MOH") for the Regional Municipality of Waterloo. Chronic effects of exposure to TCE, other than cancer, are less well understood but potential effects include those to the central nervous system, kidney, liver, respiratory, developmental and reproductive systems.

21 TCE vapour has migrated into the basements of many homes from the groundwater beneath those homes.

22 To reduce TCE vapour intrusion to more acceptable levels, there are 59 homes that have subslab depressurization systems and 93 homes that are serviced by soil vapour extraction units. These systems were installed and are operated by Northstar. In addition, Northstar has attempted to reduce the extent and concentration of the TCE contamination in the groundwater beneath the Bishop Street community through the installation and operation of a groundwater pump and treat system.

23 Dr. Nolan is of the opinion that Northstar's remediation plan should continue in order to protect the health of residents of the Bishop Street community. It is also her opinion that discontinuing the current pump and treat system will result in increased levels and concentrations of TCE contamination. It is also her belief that discontinuing the operation and maintenance of the indoor air mitigation systems (soil vapour extraction units and subslab depressurization systems) will result in increased levels of TCE vapours in affected homes and will expose residents to undue and increased health risks.

24 The materials filed by the MOE describe a number of other environmental issues, which to date have been monitored:

- Ongoing groundwater monitoring by Northstar Canada
- Continued indoor air monitoring and mitigation
- Ongoing surface water monitoring — the Grand River
- Ongoing drinking water monitoring

25 The MOE is justifiably concerned about the future of the remediation efforts as Northstar Canada has made no provision for the continuation of its investigation, monitoring, mitigation and remediation of TCE contamination after the close of the Heligear Transaction.

26 Essentially, if the monitoring, mitigation and remediation of TCE contamination is discontinued as a result of the Heligear Transaction, there will be, according to the MOE and Dr. Nolan, the City of Cambridge and the Region of Waterloo, a significant public health issue.

27 The CCAA Entities take the position that the March 15 Order requires extensive further remediation steps and

they estimate that fully responding to it would require a minimum expenditure of $25 million over the next 20 years.

28 As detailed in the affidavit filed on the initial application, the CCAA Entities have been facing severe liquidity issues for many months and are unable to meet various financial and other covenants with their secured lenders and do not have the liquidity to meet their ongoing prefiling obligations.

29 Since late 2011, Northstar has issued press releases discussing, among things, concerns about its ability to continue as a going concern.

30 After a comprehensive marketing process conducted with the assistance of Harris Williams Inc. ("Harris Williams"), on June 14, 2012, the Canadian Vendors and Heligear entered into the Heligear Agreement for the sale of substantially all of Northstar's assets (the "Heligear Transaction").

31 The assets to be purchased by Heligear do not include the Cambridge Facility and related assets. It is apparent that during the Sales Process, no bidder that expressed an interest in the assets of Northstar was willing to purchase or expressed any interest in purchasing the nonoperating Cambridge Facility, either on its own or together with the other assets of Northstar.

32 Two significant credit facilities have security over the property of the CCAA Entities.

33 In 2010, the CCAA Entities entered into a $66 million secured credit agreement (the "Credit Facility") between certain of the CCAA and Chapter 11 Entities and Fifth Third Bank ("Fifth Third") and other lenders (collectively, the "Lenders").

34 The Monitor has found the security related to the Credit Facility to be valid, perfected and enforceable.

35 In the Initial Order, the court approved a Debtor-in-Possession Facility (the "DIP Facility") under which Fifth Third, as the DIP Agent, and other lenders (together, the "DIP Lenders"), agreed to provide up to a principal amount of $3 million to finance the CCAA Entities' working capital requirements and other general corporate purposes and capital expenditures. A court-ordered charge over the CCAA Entities' property in favour of the DIP Lenders (the "DIP Lenders' Charge") was also granted and was given super priority status by court order dated June 27, 2012.

36 As of August 3, 2012, the proposed closing date for the proposed Heligear Transaction, the aggregate amount owing under the DIP Facility, the U.S. Dip Facilities (to which the CCAA Entities are guarantors) and the Credit Facility will be approximately $75 million. Net proceeds from the Heligear Transaction are expected to be less than $65 million after transaction costs, payment of outstanding post-filing obligations and prior ranking claims. As a result, if the Transaction is approved, Northstar's secured creditors are expected to realize a shortfall.

37 Notwithstanding this shortfall, the secured creditors support approval of the Heligear Transaction.

38 The DIP Lenders have advised Northstar that they will not fund the continued voluntary remediation efforts

after closing of the proposed Heligear Transaction, which is scheduled for August 3, 2012.

Analysis

39 The MOE takes the position and has served a motion for a declaration that the March 15 Order is a "regulatory order" pursuant to s. 11.1(2) of the CCAA and is not subject to the stay of proceedings provided by the Initial Order; or, in the alternative, the MOE seeks an order lifting the stay.

40 The MOE also seeks an order that the Heligear Transaction not be approved.

41 Alternatively, if the Heligear Transaction is approved, the MOE seeks an order that no proceeds be distributed pending the release of the decision on this motion and the hearing of further submissions on the allocation of proceeds.

42 The issues on this motion, from the standpoint of the MOE, are:

(a) is the March 15 Order subject to the stay of proceedings granted in the Initial Order?

(b) should the court declare, pursuant to s. 11.1(4) of the CCAA that the MOE is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed?

43 In addition, the MOE takes the position that the court should not approve the sale where the effect of such an order would so seriously prejudice the public interest.

44 The MOE also takes the position that:

(i) the March 15 Order is regulatory in nature and not subject to the stay;

(ii) the Order is not a "claim" within the meaning of ss. 11.8(8) and 11.8(9) of the CCAA; and

(iii) any other interpretation of these provisions upsets the balance between the federal power over bankruptcy and insolvency in s. 91(21) of the *Constitution Act, 1867* and provincial regulatory authority over the environment, founded on s. 92(13) and s. 92(16).

45 Alternatively, the MOE requests an order lifting the stay of the March 15 Order in order to permit continued enforcement of the March 15 Order as against Northstar.

46 Turning first to the constitutional argument, the MOE acknowledged that it was not until July 23, 2012, the day before the scheduled hearing, that notice of a constitutional question was provided to the Attorney General of Canada as required by s. 109 of the *Courts of Justice Act*.

47 Counsel to the MOE advised that the Attorney General of Canada was not in a position to respond on such a short time frame. Counsel to the MOE requested an adjournment of this aspect of the motion. This request was opposed by the CCAA Entities and those supporting the CCAA Entities.

48 After hearing argument on the adjournment request, I denied the request for several reasons: the environmental issue raised by the MOE has been known about since the outset of the CCAA Proceedings and, in fact, since before the issuance of the CCAA Proceedings; a similar issue was litigated in *Nortel Networks Corp., Re*, 2012 ONSC 1213 (Ont. S.C.J. [Commercial List]) ("*Nortel*"); and, the proposed Heligear Transaction is scheduled to close August 3, 2012 and it is not feasible to adjourn this aspect of the motion and still comply with commercial requirements. In addition, I also accept the arguments of both counsel to the CCAA Entities and Fifth Third that the MOE should not be permitted to bifurcate its case.

49 The first substantive issue raised by the submissions of the MOE is whether the March 15 Order is subject to the stay of proceedings granted in the Initial Order.

50 The Initial Order grants a broad stay of proceedings in favour of the CCAA Entities, subject to certain limitations, including investigations, acts, suits or proceedings by a regulatory body that are permitted by s. 11.1 of the CCAA.

51 Exceptions to the stay should be narrowly interpreted so as to accord with the objectives of the CCAA: *Nortel Networks Corp., Re*, 2009 ONCA 833 (Ont. C.A.) at para. 17; *Nortel*, *supra*, at para. 55.

52 Subsection 11.1(2) of the CCAA provides that, subject to subsection 11.1(3), a stay of proceedings shall not affect an action, suit or proceeding that is taken by a regulatory body, other than the enforcement of a payment ordered by the regulatory body.

53 I recently considered this issue in *Nortel*. Counsel to the CCAA Entities submits that the facts in this case are virtually identical to those in *Nortel*. He cites as an example the fact that the March 15 Order requires, among other things, the continued pumping and treatment of groundwater, the submission of an action plan to be reviewed and amended by the MOE, if necessary, and additional remediation work. Counsel submits that these requirements significantly overlap with the obligations set forth by the MOE in the orders at issue in *Nortel*.

54 In *Nortel*, at para. 104, I stated that: "[t]he Ministry has the discretion under the legislation and, if the Minister is solely acting in is regulatory capacity, it can do so unimpeded by the stay. This is the effect of section 11.1(2) of the CCAA".

55 However, at para. 105 I stated that:

> [w]hen the entity that is the subject of the MOE's attention is insolvent and not carrying on operations at the property in question, it is necessary to consider the substance of the MOE's actions. If the result of the issuance of the MOE Orders is that [the debtor] is required to react in a certain way, it follows, in the present circumstances,

> that [the debtor] will be required to incur a financial obligation to comply. It is not a question of altering its operational activities in order to comply with the EPA on a going forward basis. There is no going forward business. [The debtor] is in a position where it has no real option but to pay money to comply with any environmental issue. In my view, if the MOE moves from draft orders to issued orders, the result is clear. The MOE would be, in reality, enforcing a payment obligation, which step is prohibited by the Stay.

56 Counsel to the CCAA Entities pointed out one distinction between *Nortel* and the present scenario. In *Nortel*, the MOE had not issued draft orders against *Nortel* until after the CCAA proceedings had already commenced, whereas in this case, the March 15 Order was issued prefiling as a result of concern about the CCAA Entities' financial situation. As stated in the conclusion to the provincial officer's report issued in connection with the March 15 Order:

57 While Northstar has undertaken all needed investigation, mitigation and remediation programs on a voluntary basis without the need for a director's order, recent financial disclosures made by Northstar have revealed there is significant doubt regarding the corporation's ability to continue as a going concern which could impact on the environmental remediation programs.

58 The record in this case is clear. The CCAA Entities are insolvent. The Cambridge Facility was shut down in 2010 and no operations (other than environmental remediation activities) have been conducted there since that time. The CCAA Entities have conducted a court approved Sales Process. During the Sales Process, no bidder expressed any interest in purchasing the Cambridge Facility or was willing to assume the obligations associated with it.

59 I agree with the submission of counsel to the CCAA Entities that the purpose of the March 15 Order and the MOE's motion is to attempt to require the CCAA Entities to continue to comply with the March 15 Order and all of the financial obligations associated therewith in perpetuity and in conflict with the priorities enjoyed by other creditors.

60 At paragraph 127 in *Nortel*, I stated that, "the moment that [the debtor] is "required" to undertake such an activity, it is "required" to expend monies in response to actions being taken by the MOE. In my view, any financial activity that [the debtor] is required to undertake is stayed by the provisions of the Initial Order".

61 In this case, it seems to me quite clear that the March 15 Order seeks to enforce a payment obligation and it is therefore stayed by the Initial Order: see also *AbitibiBowater Inc., Re*, 2010 QCCS 1261 (Que. S.C.) ("*Abitibi*") at para. 160.

62 Counsel to the CCAA Entities submits that the MOE is attempting to create a priority claim through the issuance of the March 15 Order that does not exist at law and contrary to the priority scheme provided in the CCAA.

63 Counsel to the CCAA Entities cites *General Chemical Canada Ltd., Re*, 2007 ONCA 600 (Ont. C.A.) ("*General Chemical*") at para. 46, for the proposition that federal insolvency statutes were amended to delineate the priority for the MOE in insolvency scenarios and, thus, "giving effect to provincial environmental legislation in the face of these amendments... would impermissibly affect the scheme of priorities in the federal legislation".

64 The scope of the MOE's security is set out in the CCAA at s. 11.8(8) which provides:

> 11.8(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remediating any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge
>
> (a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and
>
> (b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

65 Subsection 11.8(9) of the CCAA provides:

> 11.8(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

66 In my view, the MOE is entitled to file a claim against Northstar for any costs of remedying the environmental condition at the Cambridge Facility. However, the MOE is not entitled to attempt to use the March 15 Order to create a priority that it otherwise does not have access to under the legislation.

67 This conclusion is consistent with the views that I expressed in *Nortel* at paras. 107 and 116 and is in accordance with the reasoning of *AbitibiBowater* at paras. 132 and 148, as well as *General Chemical* at para. 46.

68 With respect to the Heligear Transaction, full details are contained in the affidavit filed in support of the motion.

69 I have considered the factors listed under s. 36(3) of the CCAA. I am satisfied that the record establishes that the Heligear Agreement was the result of a broad and comprehensive marketing process conducted with the assistance of Harris Williams. The Sales Process Order approved key elements of the Sales Process, including (a) the execution of the Heligear Agreement, *nunc pro tunc*, for the purpose of establishing a stalking horse bid and (b) the Bidding Procedures which governed the determination of the successful bid.

70 I am satisfied that the CCAA Entities complied with the terms of the Sales Process Order.

71 I am also satisfied that while Northstar conducted a broad and comprehensive marketing process prior to the commencement of these proceedings, the Monitor has reviewed and supported the approval of the execution of the Heligear Agreement *nunc pro tunc* and the approval of the Bidding Procedures as granted in the Sales Process Order.

72 The CCAA Entities take the position that the Heligear Transaction is in the best interests of Northstar's stakeholders, including its employees, suppliers and customers.

73 I am satisfied that the record establishes that the creditors were adequately consulted and the effects of the Heligear Transaction are positive. I am also satisfied that the consideration to be received for the Canadian Purchased Assets is reasonable and fair in the circumstances.

74 In making these statements, I do not in any way wish to diminish the arguments put forth by the MOE and supported by the Region of Waterloo, the City of Cambridge and GE Canada. The concerns raised by the MOE are real and serious. However, the reality of the situation is that during the Sales Process, no bidder was willing to purchase — or expressed any interest in purchasing — the Cambridge Facility, either alone or together with the other assets of Northstar.

75 The reality of the situation was also expressed by counsel to Fifth Third. Counsel submitted that the record is clear that, if the Heligear Transaction is not approved, Fifth Third will proceed to enforce its rights. As a result of ss. 11.8(8) and (9) of the CCAA, Fifth Third Bank has a superior priority position to the MOE and would be in a position to commence proceedings to enforce its rights as such.

76 The practical result at that point would be that Northstar would have no assets available and no ability to comply with the MOE Order.

77 The reality of the situation is that, regardless of whether the Heligear Transaction is approved, Northstar will not have the practical ability to comply with the MOE Order. In this respect, the sale of the Canadian Purchased Assets to the Canadian Purchaser has no real effect on the MOE or any other party with an interest in the Cambridge Facility.

78 The Heligear Transaction is supported by the Monitor, the CRO, Fifth Third Bank (both as DIP Agent and as Agent for the Lenders under Northstar's existing secured facility), Boeing, Boeing Capital and the CAW.

79 In addition to the factors set out in s. 36(3), discussed above, s. 36(7) of the CCAA sets out the following restrictions on the disposition of assets within CCAA proceedings:

> 36(7) 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.

80 The CCAA Entities have advised that they intend to make the payments of the amounts described in subsections 6(4)(*a*) and (5)(*a*) of the CCAA on their normal due dates from the proceeds of the Heligear Transaction.

81 Counsel to the CAW made reference to issues of successor liability. These issues are not directly before the court today and do not factor into this endorsement.

Disposition

82 In conclusion, I am satisfied that the Heligear Transaction is in the best interests of Northstar's stakeholders, including its employees, suppliers and customers. The proceeds of the Transaction will be available for distribution to the CCAA Entities' creditors in accordance with their legal priorities. The Lenders have asserted a claim against the proceeds of the Heligear Transaction. Independent counsel to the Monitor has reviewed the Lenders' security and concluded that the security granted under the Credit Facility is valid, perfected and enforceable.

83 In the result, I am satisfied that the Heligear Transaction should be approved.

84 An order is also made declaring that the MOE is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

85 Further, MOE's request to lift the stay is denied on the basis that the MOE is seeking to create a super priority claim by way of the March 15 Order. Such a priority is not recognized at law and, consequently, it is appropriate that the MOE's enforcement of its rights as a creditor should be stayed.

86 An order is also granted vesting all of the Canadian Purchased Assets in the Canadian Purchaser free and clear of all restrictions.

87 Finally, the Monitor is authorized and directed, on closing of the Heligear Transaction, to make distributions to the DIP Agent for the DIP Lenders and to the Lenders in accordance with their legal priorities.

88 I thank counsel for their comprehensive submissions and argument in connection with this matter.

Debtor companies' motion granted; Ministry's motion dismissed.

END OF DOCUMENT

TAB 3

2007 CarswellOnt 6705, 12 P.P.S.A.C. (3d) 46, 37 C.B.R. (5th) 107

2007 CarswellOnt 6705, 12 P.P.S.A.C. (3d) 46, 37 C.B.R. (5th) 107

Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.

TEXTRON FINANCIAL CANADA LIMITED (Applicant) and BETA LIMITEE/BETA BRANDS LIMITED (Respondent) and BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 242G and MINTZ & PARTNERS LIMITED

Ontario Superior Court of Justice

L.C. Leitch R.S.J.

Heard: July 19, 2007
Judgment: October 18, 2007[FN*]
Docket: 06-CL-6820

Counsel: E. Patrick Shea for Textron Financial Canada Limited

Steven Weisz for Sun Beta LLC

Duncan Grace for Moving Party, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 242

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Bankruptcy and insolvency --- Priorities of claims — Preferred claims — Wages and salaries of employees — Priority over other creditors

Creditor had registered security interest over inventory and accounts of debtor — At time of appointment of receiver, debtor owed vacation pay to its employees — Creditor petitioned for bankruptcy and application was outstanding — Interim distribution order directed receiver to hold reserve for vacation pay — Union brought motion for declaration that employees' claim had priority over creditor's — Motion dismissed — Vacation pay was deemed to be held in trust by s. 40(1) of Employment Standards Act, 2000 — Priority given by s. 30(7) of Personal Property Security Act

probably did not apply as creditor had perfected purchase-money security interest in inventory and its proceeds — In any event, priorities established by provincial legislation were superseded by those created by s. 136 of Bankruptcy and Insolvency Act ("BIA") — Vacation pay reserve was not excluded property under BIA — Debtor did not in fact hold those funds in trust and receiver had no obligation to do so — Priorities were not crystallized on date receiver was appointed — Court was bound to apply priorities under BIA unless application was abandoned.

Cases considered by *L.C. Leitch R.S.J.*:

British Columbia v. Henfrey Samson Belair Ltd. (1989), 1989 CarswellBC 711, [1989] 1 T.S.T. 2164, 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, 1989 CarswellBC 351 (S.C.C.) — referred to

Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of) (1993), 23 C.B.R. (3d) 161, 1 E.T.R. (2d) 1, 6 P.P.S.A.C. (2d) 5, 1993 CarswellOnt 251 (Ont. Bktcy.) — considered

Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of) (1997), 1997 CarswellOnt 4609, 50 C.B.R. (3d) 79 (Ont. C.A.) — referred to

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2005), (sub nom. *TCT Logistics Inc. (Bankrupt), Re)* 194 O.A.C. 360, 2005 CarswellOnt 636, 7 C.B.R. (5th) 202, 74 O.R. (3d) 382 (Ont. C.A.) — considered

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), 1995 CarswellSask 739, 1995 CarswellSask 740, 188 N.R. 1, 24 C.L.R. (2d) 131, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, [1995] 10 W.W.R. 161 (S.C.C.) — referred to

Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce (1982), 17 B.L.R. 170, 2 P.P.S.A.C. 22, 134 D.L.R. (3d) 369, 1982 CarswellOnt 165, (sub nom. *Huxley Catering Ltd., Re)* 41 C.B.R. (N.S.) 217, 36 O.R. (2d) 703 (Ont. C.A.) — considered

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — followed

Ontario Dairy Cow Leasing Ltd. v. Ontario (Milk Marketing Board) (1993), 4 P.P.S.A.C. (2d) 269, 1993 CarswellOnt 655 (Ont. C.A.) — considered

Sperry Inc. v. Canadian Imperial Bank of Commerce (1985), 50 O.R. (2d) 267, 17 D.L.R. (4th) 236, 8 O.A.C. 79, 55 C.B.R. (N.S.) 68, 4 P.P.S.A.C. 314, 1985 CarswellOnt 167 (Ont. C.A.) — considered

Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd. (2007), 2007 CarswellOnt 89, 27 C.B.R. (5th) 1 (Ont. S.C.J.) — referred to

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) — distinguished

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 67(1) — referred to

s. 136 — referred to

s. 244 — referred to

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

Generally — referred to

Employment Standards Act, 2000, S.O. 2000, c. 41

Generally — referred to

s. 40(1) — considered

s. 40(2) — considered

Pension Benefits Act, 1987, S.O. 1987, c. 35

Generally — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

Personal Property Security Act, R.S.O. 1980, c. 375

s. 35(1)(c) — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

s. 1(1) "purchase-money security interest" — referred to

s. 30(7) — considered

s. 30(8) — referred to

s. 33 — referred to

s. 33(1)(a) — referred to

s. 33(1)(b) — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47

Generally — referred to

MOTION by union for declaration that claim for employees' vacation pay had priority over claim of secured creditor.

***L.C. Leitch R.S.J.*:**

1 The Bakery, Confectionary, Tobacco Workers and Grain Millers International Union, Local 242G ("Local 242G") brings a motion for a declaration that its claim on account of vacation pay ranks in priority to the claims of the secured creditors of Beta Limitee/Beta Brands Limited ("Beta Brands") in and to Beta Brands accounts and inventory and any and all proceeds derived or to be derived therefrom. The motion is opposed by the applicant, a secured creditor of Beta Brands and Sun Beta LLC, an unsecured creditor of Beta Brands and a participant in the applicant's secured loan to Beta Brands.

Background Facts

2 The applicant holds a security interest over all of the present and future personal property of Beta Brands including, without limitation, Beta Brands' inventory and accounts pursuant to a security agreement dated December 17, 2004, which was amended August 29, 2005, and June 20, 2006. Notice of this security interest was registered under the *Personal Property Security Act*, R.S.O. 1990, c. P.1 (the "PPSA") on November 18, 2004. All secured creditors of Beta Brands that had registered financing statements against Beta Brands prior in time to the applicant's registration subordinated their interests to the applicant.

3 A default letter and a statutory notice under section 244 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.3 (the "BIA") were sent by the applicant's counsel to Beta Brands' counsel on November 24, 2006. Beta Brands was then in negotiations with Bremner Food Group Inc. ("Bremner") respecting a sale of its assets. The applicant entered into a forbearance agreement with Beta Brands dated December 13, 2006, to facilitate the sale to Bremner. The applicant agreed to forbear enforcement of its security on certain terms and conditions and to provide financing to Beta Brands to manufacture inventory required to complete the sale to Bremner.

4 On January 3, 2007, pursuant to the order of Lax J., Mintz & Partners Limited (the "Receiver") was appointed the interim Receiver and Receiver of Beta Brands' property, which included accounts receivable and inventory. Lax J. found that the applicant has valid, perfected security over the property of Beta Brands.

5 As of January 3, 2007, the members of Local 242G were owed substantial amounts including an amount on account of vacation pay estimated at $559,000. Local 242G had opposed the appointment of the Receiver. As noted by Lax J., Local 242G submitted that the "true purpose" of the receivership "was to avoid or eliminate the contractual and/or legislative obligations for severance and termination pay, which are substantial" (*Textron Financial Canada Ltd. v. Beta Ltee/Beta Brands Ltd.*, [2007] O.J. No. 84 (Ont. S.C.J.) at para. 10).

6 By order dated January 5, 2007, the Receiver was authorized to sell Beta Brands' bakery division and certain finished goods inventory to Bremner. Local 242G also participated at the hearing that led to that order. The employment of all members of Local 242G was terminated shortly thereafter.

7 The Receiver was authorized to sell other assets by a further order dated April 12, 2007. The Receiver successfully collected some accounts receivables of Beta Brands.

8 A bankruptcy application in respect of Beta Brands and an affidavit of verification were executed by the applicant on February 20, 2007. It is clear from the Sixth Report of the Receiver that there were communications relating to a bankruptcy proceeding in February 2007 in which Local 242G participated; however, no bankruptcy application was issued.

9 An interim distribution order was granted on consent on March 1, 2007. Pursuant to that order, the Receiver established a vacation pay reserve of $550,000.00. As set out in the interim distribution order, the creation of this reserve "shall not constitute an admission or otherwise evidence that funds necessary to satisfy any liability of Beta Brands for Outstanding Vacation Pay were or are held separate and apart in trust or otherwise" (at para. 2). The order also provided that the reserve was deemed to have been drawn from the proceeds of distribution of Beta Brands' inventory and the collection of receivables.

10 At the hearing of this motion, the applicant's counsel advised that a second bankruptcy petition was issued July 17, 2007, dated July 12, 2007, and an affidavit of verification was sworn July 12, 2007.

11 It is clear that Local 242G has diligently pursued relief on behalf of its members and that there has been an ongoing "dispute" regarding their vacation pay from the outset of the receivership which predates any bankruptcy application.

Statement of Issues

12 This motion raises the following issues:

> 1. Are the former employees of Beta Brands entitled to a statutory lien in respect of vacation pay that ranks in priority to the applicant's security interest in Beta Brands inventory and accounts?
>
> 2. Are the former employees of Beta Brands entitled to a deemed trust in respect of vacation pay that ranks in priority to the applicant's security interest in Beta Brands inventory and accounts?
>
> 3. Will the bankruptcy of Beta Brands have the effect of reversing or nullifying the priority that such statutory lien or deemed trust has in respect of vacation pay?
>
> 4. If the bankruptcy of Beta Brands will reverse or nullify the priority of any lien or deemed trust in respect of vacation pay, is it appropriate for the court to order a distribution to Local 242G's members prior to the bankruptcy application in respect of Beta Brands being determined?
>
> 5. If a distribution is ordered, what procedure should be put in place to determine the quantum of the vacation pay owing to Beta Brands' former employees?

The Statutory Lien Issue

13 Section 40(2) of the *Employment Standards Act, 2000*, S.O. 2000, c.41 (the "*ESA*") establishes a statutory lien with respect to vacation pay. Section 40(2) of the *ESA* provides as follows:

> (2) An amount equal to vacation pay becomes a lien and charge upon the assets of the employer that in the ordinary course of business would be entered in books of account, even if it is not entered in the books of account.

14 Although s. 40(2) of the *ESA* provides the employees with a statutory lien in respect of their vacation pay, there is nothing in the *ESA* which establishes priority of that lien in respect of the other relevant security interests. As such, priority will be determined based on the chronological order in which the respective interest arose with the first in time having priority. The applicant was granted security over the assets and property of Beta Brands in 2004. There is no evidence that the vacation pay claimed by Local 242G on behalf of Beta Brands' former employees was accrued prior to 2004. Thus, it appears that the statutory lien does not have priority over the security interest of the applicant.

15 As a result, although Local 242G can establish a statutory lien in accordance with s. 40(2) of the *ESA*, that lien does not have priority over the applicant's security interest granted in 2004.

The Deemed Trust Issue

16 Section 40(1) the *ESA* "deems" Beta Brands to have held vacation pay in "trust" for the employees of Beta Brands. That section provides as follows:

> Every employer shall be deemed to hold vacation pay accruing due to an employee in trust for the employee whether or not the employer has kept the amount for it separate and apart.

17 The section "deems" the vacation pay owing to Beta Brands' former employees to be held "separate and apart." Thus, there is no question that the employees have a deemed trust in respect of their vacation pay held by Beta Brands. It is important to note that such a trust has been described as "a legal fiction" (see *Ivaco Inc., Re*, *infra* at para. 46).

18 The critical question is whether this deemed trust ranks in priority to the applicant's security interest in Beta Brands' inventory and accounts.

19 There is nothing in s. 40(1) of the *ESA* that establishes priority of the deemed trust. Guidance on this point comes from the *PPSA*.

20 Section 30(7) of the *PPSA* provides the following:

> A security interest in an account or inventory and its proceeds is subordinate to the interest of a person who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

21 Section 30(8) of the *PPSA* provides that subsection (7) does not apply to a perfected purchase-money security interest in inventory or its proceeds.

22 A contentious issue on this motion is whether the applicant has a perfected purchase-money security interest in Beta Brands' inventory or its proceeds. There is no dispute that the applicant's security interest was perfected. If the applicant's interest in Beta Brands' inventory is a purchase-money security interest then the deemed trust in favour of Beta Brands employees will be subordinate to the applicant's security interest.

23 A purchase-money security interest (a "PMSI") is defined in s. 1(1) of the *PPSA* as follows:

> "purchase-money security interest" means,
>
> > (a) a security interest taken or reserved in collateral, other than investment property, to secure payment of all or part of its price,
> >
> > (b) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in or to the collateral, to the extent that the value is applied to acquire the rights, or

(c) the interest of a lessor of goods under a lease for a term of more than one year;

24 Local 242G takes the position that there is no evidence which suggests that the applicant's security interest is a PMSI in inventory or its proceeds. Local 242G points out that portions of the applicant's advances were operating loans, while acknowledging that the forbearance agreement contemplated funding for purposes of an inventory build. The applicant is of the view that they do, in fact, have such a security interest on the basis that it advanced all funds to produce the inventory, there were no other operating lenders, and the proceeds from the sale of that inventory are traceable.

25 Local 242G also advances the proposition that when the agreement of purchase and sale with Bremner was signed, all of the assets of Beta Brands were converted to an account and thus, the applicant would lose the benefit of a PMSI. As Local 242G points out, the Ontario Court of Appeal in *Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce* (1982), 2 P.P.S.A.C. 22 (Ont. C.A.) concluded that at p. 23:

> Accordingly, from the moment the contract for sale was made by Huxley Catering Limited the right to the purchase money was a chose in action that was capable of being assigned.

This contract for sale was made before Huxley Catering Ltd. made an assignment in bankruptcy. As a result, the bank was entitled to the purchase money pursuant to its assignment of book debts and the proceeds were not available to the Trustee in Bankruptcy for distribution to all creditors.

26 Section 33 of the *PPSA* sets out the requirements that must be complied with in order for a PMSI in inventory or its proceeds to have priority over any other security interest in the same collateral. There is no dispute that the applicant's security interest was perfected at the time Beta Brands obtained possession of the inventory as required by subsection 33(1)(a). Although the applicant did not give notice in writing to every other secured party who has registered a financing statement in which the collateral is classified as inventory before the date of registration by the applicant as required by subsection 33(1)(b), I agree with the applicant's counsel that notice to such creditors was not required to obtain priority because the applicant had the benefit of subordination agreements from such creditors.

27 It seems to me that the applicant has a PMSI in Beta Brands' inventory and its proceeds based upon its position set out above. Therefore, s. 30(7) would not be applicable and the deemed trust would not rank in priority to the applicant's PMSI in inventory and its proceeds. I appreciate the perspective of Local 242G that the evidentiary foundation for the PMSI is limited and indeed, the applicant took the position that it was unnecessary to determine whether it had a PMSI in inventory and its proceeds because the applicant was prepared to ground its opposition to the motion on the applicability of the priority rules in bankruptcy. As a result, the main issue on this motion was whether the priority of the deemed trust can prevail in these circumstances where a bankruptcy application was signed and an affidavit of verification sworn, after the Receiver was appointed but remained outstanding. I will now turn to consideration of the impact of bankruptcy on the deemed trust.

The Impact of Bankruptcy on the Deemed Trust

28 The law is well established that the change in priorities that is created by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") supersedes the priorities established by the relevant provincial legislation. Section 136 of the *BIA* establishes the priority of claims on a bankruptcy. Application of this provision creates a result in which the vacation pay claims of Beta Brands' former employees characterized as either a lien or a trust ranks subordinate to the claims of Beta Brands' secured creditors, but would have priority over the claims of Beta Brands' unsecured creditors. The *ESA* as provincial legislation cannot alter priorities established by the *BIA*. Thus, the priority in respect of the deemed trust established by s. 30(7) of the *PPSA* (assuming the applicant did not have a PMSI in inventory and its proceeds) would not be effective in a bankruptcy (see *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 75 C.B.R. (N.S.) 1 (S.C.C.) and *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.)). Local 242G quite properly acknowledged that if the priority rules in bankruptcy are relevant, then s. 30(7) of the *PPSA* is inoperative.

Will the Trust relating to the Vacation Pay be Excluded Property on Bankruptcy?

29 As discussed more fully below, the position of Local 242G is that the priority rules in bankruptcy have no relevance on this motion. The alternative position is that even if those priority rules apply, Local 242G's claim to vacation pay would be effective against a trustee in bankruptcy because the Receiver was obliged to create a reserve for vacation pay as part of its fiduciary obligations.

30 I will deal first with the alternative position of Local 242G. Local 242G relies on the provisions of s. 67(1) of the *BIA*, which defines property to exclude property that the bankrupt holds in trust. Thus, Local 242G submits that even if the priority rules under the *BIA* apply, the deemed trust would still have priority by virtue of the definition of property in s. 67(1) of the *BIA*. To fit within this exception, the trust must satisfy the requirements of the general law of trusts (described in *Ivaco Inc., Re*, *infra* at para. 39 as "the three certainties of a common law trust: certainty of intent; certainty of subject matter; and certainty of object") and the trust property must be kept separate and apart, and be traceable (see *British Columbia v. Henfrey Samson Belair Ltd.*, *supra*).

31 The position of Local 242G is that the Receiver knew vacation pay was owed when it was appointed and when it terminated the employment Local 242G's members. Although Local 242G does not suggest on this motion that the Receiver is personally liable for vacation pay, it asserts that the Receiver knowing there was a priority dispute had the obligation to set aside moneys to answer the employees' claims to vacation pay in the event that their claims were found to have priority. To put it more simply, Local 242G says that the Receiver should have established a separate fund to which the deemed trust could attach and thus be excluded from Beta Brands' property upon bankruptcy. According to Local 242G, the interim distribution order in regard to vacation pay merely confirmed what the Receiver was already obliged to do — identify and segregate property or proceeds to satisfy the vacation pay liability thereby creating a trust that is not excluded property in the event of a bankruptcy.

32 The applicant's position, supported by Sun Beta, is that Beta Brands held no property in trust that can be excluded from the impact of bankruptcy — in other words, there is no actual trust that can survive the bankruptcy of Beta Brands. They note that Beta Brands did not actually segregate any assets separate and apart in respect of vacation pay and that the terms of the interim distribution order limited the significance of the creation of the reserve for vacation

pay. They also take the position that it is important that the Receiver maintain the status quo. Thus, in their view, Local 242G's proposition is inconsistent with the Receiver's obligations and is unworkable because a Receiver ought not to determine priorities of competing complainants absent a specific statutory requirement such as was before the court in *TCT Logistics Inc.*, *infra* discussed in more detail below.

33 Despite the able argument of counsel for Local 242G, I cannot accept the propositions he advanced. Beta Brands did not hold any funds separate and apart for vacation pay and was not obliged to do so. Therefore, there can be no actual trust in favour of the former employees that survives a bankruptcy. The interim distribution order required the Receiver to establish a reserve for the vacation pay pending a determination of the employees' entitlement in priority to the rights of Beta Brands' secured creditors. The order specifically provided that the reserve was not an admission or other evidence that the vacation pay was being held separate and apart from Beta Brands' assets and property. I disagree with Local 242G that the Receiver, knowing there was a priority dispute, was obliged to create a segregated fund for vacation pay. The Receiver's obligation cannot exceed what the debtor was obliged to do. The Receiver "stands in the shoes of the debtor, and is furthermore acting as an officer of the court" as the Court of Appeal noted in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.* (2005), 7 C.B.R. (5th) 202 (Ont. C.A.), at 216. In that case, the legislation in issue required the debtor to maintain a segregated fund to satisfy the trust obligation in issue and the Receiver was similarly obliged to do so. Here Beta Brands was under no such obligation in relation to vacation pay. It was not required to, and did not, maintain a separate fund on account of vacation pay. Thus there is no segregated fund for the Receiver to maintain and preserve and the Receiver is under no obligation to create such a fund.

Are the Priority Rules in Bankruptcy Relevant?

34 I will turn next to the issue of whether the priority rules in bankruptcy are relevant on this motion. Local 242G asserts that the court has an obligation to determine priority issues based on the facts as they exist at the time the rights of the competing complainants came into conflict. I am urged to focus on when the priority issue crystallized and determine the priority dispute as at that date.

35 Local 242G emphasizes that its dispute regarding the vacation pay has been clear from "day one," and it made every possible effort to collect vacation pay from that day. Local 242G's position on this motion is grounded on the fact that when the dispute regarding the vacation pay arose a bankruptcy proceeding was not pending, nor had a bankruptcy occurred. The position of Local 242G is that the employees ought not to be deprived of their vacation pay because there might be a bankruptcy.

36 The applicant's position, again supported by Sun Beta LLC, is that the appointment of the Receiver does not crystallize the date on which priorities are determined and until a bankruptcy proceeding is effectively abandoned or denied, the court should not order a distribution to creditors whose claims would be subordinated by the bankruptcy.

37 Local 242G relies on *Sperry Inc. v. Canadian Imperial Bank of Commerce* (1985), 50 O.R. (2d) 267 (Ont. C.A.) for its position that the priority issues should be determined when the priority dispute crystallized (which Local 242G asserts is the date the Receiver was appointed, and thus a date when there was no application in bankruptcy). The issue in *Sperry Inc.* was the priority of the security interests of Sperry Rand Inc. and the Canadian Imperial Bank of

Commerce in the unpaid inventory of W.J. Allinson Farm Equipment & Supplies Limited. The Court of Appeal found that neither Sperry nor the bank had registered or perfected their security interests, with the result that Sperry's security interest had priority under s. 35(1)(c) of the *Personal Property Security Act*, R.S.O. 1980, c. 375 (now see R.S.O. 1990, c. P.10, s. 30(1)(4)) as the first security interest attached. After making that determination, the Court of Appeal went on to express its views "on different bases for coming to the same conclusion" (*Sperry Inc.*, *supra*, at 278). The Court said, in *obiter*, "that it would be reasonable to conclude that the priority issue between the parties should be resolved as of the time when their respective security interest came into conflict" (*Sperry Inc.*, *ibid*).

38 This principle was adopted by the Ontario Court of Appeal in *Ontario Dairy Cow Leasing Ltd. v. Ontario (Milk Marketing Board)*, [1993] O.J. No. 464 (Ont. C.A.) where it concluded, "The priority issue between the parties must be resolved as of the time when their respective security interests came into conflict" (at para. 4).

39 The principle in *Sperry Inc.* that a priority dispute is addressed as at the date the conflict arose was also adopted by Mr. Justice Killeen in *Canadian Imperial Bank of Commerce v. Melnitzer (Trustee of)*, [1993] O.J. No. 3021 (Ont. Bktcy.), aff'd [1997] O.J. No. 4634 (Ont. C.A.) [*Melnitzer*]. At para. 194 of his reasons, Killeen J. concluded that once "808756 Ontario rights came into 'conflict' with those of other creditors on August 3 when the Receiver, Coopers & Lybrand, took over control of the assets [...] under the rule laid down in *Sperry Inc. v. CIBC* 808756 Ontario's then unperfected interest [was] prevented from acquiring a higher status by later acts such as the August 29 registration."

40 Local 242G also relies on the decision in *Toronto Dominion Bank v. Usarco Ltd.*, 1991 CarswellOnt 540 (Ont. Gen. Div.). The decision in *Usarco Ltd.* dealt with deemed trust provisions in the *Pension Benefits Act*, S.O. 1987, c. 35. In that case, a bankruptcy petition was filed, dated January 5, 1990. As a term of an adjournment, the Receiver undertook to "hold $500,000 collected since November 7, 1991 (sic) from the proceeds of accounts receivable and inventories of Usarco until the return of the motion [...]" (*Usarco Ltd.*, *supra*, at para. 8).

41 By the date of judgment on August 2, 1991, no further action had been taken on the petition in bankruptcy. The bank indicated that no such move would be made until certain real property was sold, but without providing any likely timetable. The pension administrator argued that the deemed trust had been converted to a true trust by virtue of the Receiver having separated the funds pursuant to the undertaking, or by virtue of notice. Mr. Justice Farley found that "it would be inappropriate for the Bank to put all proceedings involving Usarco (including this motion by the Administrator) into suspended animation while the Bank determined if, as and when it wished to take action" (*Usarco Ltd.*, *supra*, at para. 9). He ordered the Receiver to pay out the amounts covered by the deemed trust provisions in the *Pension Benefits Act*, *supra*.

42 Local 242G submits that while *Usarco Ltd.* was distinguished in *Ivaco Inc., Re*, 2006 CarswellOnt 6292 (Ont. C.A.), a case relied on by the applicant, the principles underlying the reasoning in *Usarco Ltd.* were not commented on and should be applied here where the circumstances are even more compelling because the priority dispute arose before the bankruptcy application began.

43 The applicant submits that the decision in *Usarco Ltd.* is also distinguishable on its facts on this motion, and relies on the principles established in *Ivaco Inc., Re* in support of its position. In *Ivaco Inc., Re* deemed trust provisions in the *Pension Benefits Act*, R.S.O. 1990, c. P.8 were again considered. Proceedings under the *Companies' Creditors*

Arrangement Act, R.S.C. 1985, c. C-36 [*CCAA*], had run their course, and an application under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*] was pending. The court found that there was no requirement to segregate the amounts of the deemed trust under the *CCAA*, and that there was no gap between the *CCAA* and the *BIA* that would allow an order to pay out the deemed trust amounts. The Court of Appeal noted that provinces cannot directly alter priorities under the *BIA*, and in *Ivaco Inc., Re* refused to allow them to do so indirectly.

44 While I agree with Local 242G that, according to *Sperry Inc.*, priorities as between competing security interests are determined when they come into conflict, I do not agree that priorities are "crystallized" or frozen on the date a Receiver is appointed such that the subsequent occurrence of a bankruptcy is not relevant to the court's analysis. It seems to me that it was key to the conclusion of Killeen J. in *Melnitzer (Trustee of)* that the receivership order, by its terms, "effectively prevented 808756, or any other creditor, from improving its priority position thereafter" (*supra*, at para. 189). The receivership order made by Lax J. January 3, 2007 does not contain terms and provisions of a similar nature. Indeed, paragraph 5 of the order, as the applicants' counsel points out, permits the filing by creditors of any registration to preserve or protect a security interest and the registration of a claim for lien and the order specifically contemplates that any party may apply to amend or vary it.

45 I agree with the applicant and Sun Beta that the facts on this motion are distinct from those considered by the court in *Usarco Ltd.* In *Usarco Ltd.* the bankruptcy application had been effectively abandoned, and it was arguable that the funds were actually segregated and held in trust by the Receiver. As the court in *Ivaco Inc., Re* observed in distinguishing the case, "in *Usarco Ltd.* the petitioning creditor was not proceeding with its bankruptcy petition because its principal had died, and no other creditor took steps to advance the petition. Thus, unlike in this case, in *Usarco Ltd.* it was unclear whether bankruptcy proceedings would ever take place" (*Ivaco Inc., Re*, *supra*, at para. 67). For similar reasons, I find the facts on this motion different from those considered in *Usarco*. A bankruptcy application in respect of Beta Brands was signed by the applicant on February 20, 2007, and a further petition was issued just prior to the hearing of this motion. Although the first application was not proceeded with it cannot be said that it has been "effectively abandoned" and, indeed, a further petition was issued.

46 The *Ivaco Inc., Re* case established that the court should not exercise its discretion to order distribution of pension amounts where a bankruptcy application is pending and the effect of bankruptcy will be to subordinate the claim for pension amounts to claims of the secured creditors. In *Ivaco Inc., Re*, the court noted at paragraph 64 that "where a creditor seeks to petition a debtor company into bankruptcy at the end of CCAA proceedings, any claim under a provincial deemed trust must be dealt with in bankruptcy proceedings [...]. Were it otherwise, creditors might be tempted to forgo efforts to restructure a debtor company and instead put the company immediately into bankruptcy. That would not be a desirable result."

47 The facts on this motion are in line with those before the court in *Ivaco Inc., Re* where the creditors were actively seeking to petition the debtor company into bankruptcy. The principles established in *Ivaco Inc., Re* support a determination that this court should not exercise its discretion to order distribution of vacation pay where a bankruptcy application is to be heard and the effect of the bankruptcy will be to subordinate the claim for vacation pay. As a result this motion by Local 242G must be dismissed.

48 The following words of the Court of Appeal at para. 69 of *Ivaco Inc., Re* with respect to pension claimants are

equally applicable to the claims of Local 242G's members in relation to their vacation pay:

> Because the federal legislative regime under the CCAA and the BIA determines the claims of creditors of an insolvent company, if the rights of pension claimants are to be given priority, Parliament, not the courts, must do so.

Indeed as noted in *Ivaco Inc., Re* at para. 69, "Parliament has at least signalled its intentions to do so" by passage of the *Wage Earner Protection Program Act*, S.C. 2005, c.47, which, as the court noted, had not then been proclaimed in force. As of this date, this legislation still has not been proclaimed. This legislation, which defines "wages" to include vacation pay, would establish a program to enable individuals to collect "wages" from employers who are bankrupt or subject to a receivership. Regrettably for the members of Local 242G, without such legislation that would give their claim priority, the declaration they seek cannot be granted.

Motion dismissed.

FN* A corrigendum issued by the court on November 13, 2007 has been incorporated herein.

END OF DOCUMENT

TAB 4

2012 CarswellOnt 14138, 2012 ONSC 6376, 221 A.C.W.S. (3d) 853

2012 CarswellOnt 14138, 2012 ONSC 6376, 221 A.C.W.S. (3d) 853

Pinnacle Capital Resources Ltd. v. Kraus Inc.

Pinnacle Capital Resources Limited in its capacity as general partner of Red Ash Capital Partners II Limited Partnership, Applicant and Kraus Inc., Kraus Canada Inc., Strudex Fibres Limited and 538626 B.C. Ltd., Respondents

Ontario Superior Court of Justice [Commercial List]

L.A. Pattillo J.

Heard: November 7, 2012
Judgment: November 9, 2012
Docket: CV-12-9731-00CL

Proceedings: additional reasons at *Pinnacle Capital Resources Ltd. v. Kraus Inc.* (2013), 2013 CarswellOnt 891, 2013 ONSC 674 (Ont. S.C.J. [Commercial List])

Counsel: Linc Rogers, Jenna Willis, for Receiver

Larry Ellis, for Applicant

Raymond Slattery, David Ullmann, for Equistar Chemicals, LP

Subject: Insolvency; Corporate and Commercial; Estates and Trusts

Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities

Questions posed by creditor — Receiver was appointed for insolvent companies — Sale approval and vesting order approved going concern sale transaction of substantially all of assets of companies — Portion of documents related to sale were deemed to contain confidential information and were to remain sealed — Sale transaction closed — Receiver had narrow mandate to complete sale and did not take possession of company's assets — Creditor made claim

for $551,951 under s. 81.1 of Bankruptcy and Insolvency Act — After inspection of goods receiver assessed creditor's claim at $35,425.25 — Purchaser used or consumed goods and funds totalling $35,425.25 and receiver held funds in trust pending agreement between purchaser and creditor or further order of court — Creditor brought motion for order directing receiver to provide answers to questions posed by creditor — Motion dismissed — Majority of questions posed were not related to creditor's s. 81.1 claim and were mere fishing expedition looking for impropriety by receiver — Receiver acted reasonably and in accordance with duties in responding to questions and had no further information relating to creditor's claim — Further questions were irrelevant and unreasonable.

Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties

Questions posed by creditor — Receiver was appointed for insolvent companies — Sale approval and vesting order approved going concern sale transaction of substantially all of assets of companies — Portion of documents related to sale were deemed to contain confidential information and were to remain sealed — Sale transaction closed — Receiver had narrow mandate to complete sale and did not take possession of company's assets — Creditor made claim for $551,951 under s. 81.1 of Bankruptcy and Insolvency Act — After inspection of goods receiver assessed creditor's claim at $35,425.25 — Purchaser used or consumed goods and funds totalling $35,425.25 and receiver held funds in trust pending agreement between purchaser and creditor or further order of court — Creditor brought motion for order directing receiver to provide answers to questions posed by creditor — Motion dismissed — Majority of questions posed were not related to creditor's s. 81.1 claim and were mere fishing expedition looking for impropriety by receiver — Receiver acted reasonably and in accordance with duties in responding to questions and had no further information relating to creditor's claim — Further questions were irrelevant and unreasonable.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

Confidential information — Receiver was appointed for insolvent companies — Sale approval and vesting order approved going concern sale transaction of substantially all of assets of companies — Portion of documents related to sale were deemed to contain confidential information and were to remain sealed — Sale transaction closed — Receiver had narrow mandate to complete sale and did not take possession of company's assets — Creditor made claim for $551,951 under s. 81.1 of Bankruptcy and Insolvency Act — After inspection of goods receiver assessed creditor's claim at $35,425.25 — Purchaser used or consumed goods and funds totalling $35,425.25 and receiver held funds in trust pending agreement between purchaser and creditor or further order of court — Creditor brought motion for order varying sale and approval and vesting order by unsealing confidential appendices — Motion adjourned — Given circumstances in which appendices were sealed, it was important to give secured creditor involved in sale of companies opportunity to establish documents should remain confidential — Motion relating to unsealing of confidential appendices to be brought back on proper notice to secured creditor.

Bankruptcy and insolvency --- Proving claim — Practice and procedure — Miscellaneous

Payment of claim — Receiver was appointed for insolvent companies — Sale approval and vesting order approved going concern sale transaction of substantially all of assets of companies — Sale transaction closed — Receiver had narrow mandate to complete sale and did not take possession of company's assets — Creditor made claim for $551,951 under s. 81.1 of Bankruptcy and Insolvency Act — After inspection of goods receiver assessed creditor's

claim at $35,425.25 — Purchaser used or consumed goods and funds totalling $35,425.25 and receiver held funds in trust pending agreement between purchaser and creditor or further order of court — Creditor brought motion for order directing receiver to pay creditor $35,425.25 — Motion dismissed — Pursuant to sale agreement and vesting order, where purchaser paid receiver in trust for goods used or consumed, cash to be disposed in accordance with agreement — Under agreement money held in trust by receiver could not be paid out until agreement was reached by receiver, creditor and purchaser, or until court order was made for disposition.

Debtors and creditors --- Receivers — Discharge of receiver — General principles

Receiver was appointed for insolvent companies — Sale approval and vesting order approved going concern sale transaction of substantially all of assets of companies — Sale transaction closed — Receiver had narrow mandate to complete sale and did not take possession of company's assets — Creditor made claim for $551,951 under s. 81.1 of Bankruptcy and Insolvency Act — After inspection of goods receiver assessed creditor's claim at $35,425.25 — Purchaser used or consumed goods and funds totalling $35,425.25 and receiver held funds in trust pending agreement between purchaser and creditor or further order of court — Receiver and companies brought motion for order discharging receiver and releasing receiver from further obligations as receiver on filing of discharge certificate — Motion granted — Purposes of receiver's appointment were complete — In absence of evidence of improper or negligent conduct receiver to be released.

Cases considered by *L.A. Pattillo J.*:

Battery Plus Inc., Re (2002), 2002 CarswellOnt 230, 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]) — referred to

Bell Canada International Inc., Re (2003), 2003 CarswellOnt 4537 (Ont. S.C.J. [Commercial List]) — considered

Look Communications Inc. v. Look Mobile Corp. (2009), 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) — considered

Nash v. CIBC Trust Corp. (1996), 1996 CarswellOnt 2185, (sub nom. *Nash v. C.I.B.C. Trust Corp.)* 6 O.T.C. 368 (Ont. Gen. Div.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — considered

Turbo Logistics Canada Inc. v. HSBC Bank Canada (2009), 81 C.B.R. (5th) 169, 2009 CarswellOnt 5929 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 81.1 [en. 1992, c. 27, s. 38(1)] — considered

MOTION by creditor for order directing receiver to provide answers to questions posed by creditor, for order varying sale and approval and vesting order by unsealing confidential appendices, and for payment for goods used or consumed by purchaser; MOTION by receiver for discharge.

***L.A. Pattillo J.*:**

Introduction

1 This matter involves two motions.

2 The first is by PricewaterhouseCoopers Inc. ("PwC") in its capacity as Court-appointed receiver (the "Receiver") of the respondents Kraus Inc. ("Kraus"), Kraus Canada Inc. ("Kraus Canada"), Strudex Fibres Limited ("Strudex") and 538626 B.C. Ltd. (collectively, the "Companies") for, among other things, an order discharging it and releasing it from any and all further obligations as Receiver, upon filing its discharge certificate.

3 The second is a motion by Equistar Chemicals, LP ("Equistar") for a) An order varying paragraph 8 of the Sale and Approval and Vesting Order dated June 11, 2012 by unsealing the confidential appendices; b) An order directing PwC to provide answers to questions posed by Equistar; and c) An order directing PwC to pay Equistar $35,425.25.

Background

4 Red Ash Capital Partners II Limited Partnership was a secured creditor of the Companies.

5 The applicant Pinnacle Capital Resources Limited, in its capacity as general partner of Red Ash Capital Partners II Limited Partnership ("Red Ash"), obtained an order of the Court dated May 28, 2012 appointing PwC Interim Receiver of Kraus, Kraus Canada and Strudex (collectively the "Operating Companies") In that capacity, PwC filed two reports, the first dated May 29, 2012 and the second June 10, 2012.

6 On June 11, 2012, again on Red Ash's application, PwC was appointed trustee in bankruptcy of each of the Operating Companies. On the same day, and pursuant to Red Ash's receivership application, PwC was appointed as Receiver of the Companies.

7 Also on June 11, 2010, the Court issued a Sale Approval and Vesting Order approving a going concern sale transaction (the "Sale Transaction") of substantially all of the assets of the Companies (the "Purchased Assets") contemplated by an asset purchase agreement between the Receiver and Kraus Brands LP (the "Purchaser"), a party related to Red Ash, dated as of June 11, 2012 (the "Sale Agreement").

8 Paragraph 8 of the Sale Approval and Vesting Order provides that the documents marked as Confidential Appendices A, B and C to the Receiver's First Report contain confidential information and shall remain confidential and shall not form part of the permanent court record pending further order of the Court.

9 The Sale Transaction closed on June 11, 2012.

10 The reasons for the interim receivership were set out in the material filed in support of the initial application. The Interim Receiver monitored the receipts and disbursements of the Companies but did not take possession of the assets of the Operating Companies nor did it manage or operate their businesses. The Interim Receivership ended when the Receivership Order became effective on June 11, 2012.

11 Pursuant to the Receivership Order, the Receiver had a very narrow mandate. It was appointed specifically to complete the Sale Transaction in accordance with the Sale Agreement and convey the Purchased Assets "without taking possession or control thereof".

12 During the period of the Interim Receivership, and as suppliers received notice of the application to appoint a receiver of the Companies, the Interim Receiver and/or the Companies received claims for the repossession of property pursuant to s. 81.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"). As at June 11, 2012, the date of the Sale Approval and Vesting Order became effective, a total of nine claimants, including Equistar, had delivered 81.1 claims totalling $2,248,734.

13 Because certain of the Purchased Assets were subject to the s. 81.1 claims (the s. 81.1 Assets), the Sale Approval and Vesting Order provided in paragraph 6 thereof that the s. 81.1 Assets do not vest in the Purchaser until such time as the applicable s. 81.1 claim is determined by agreement of the parties or by further order of the Court. The Sale Approval and Vesting Order further provides that, notwithstanding the foregoing, the Purchaser is entitled to use and consume any s. 81.1 Asset, provided the Purchaser pays to the Receiver, in trust, the invoice amount of any s. 81.1 Asset used and consumed by the Companies or the Purchaser.

14 Paragraph 6 of the Sale Approval and Vesting Order required that the Receiver file a report advising as to the s. 81.1 Assets in the possession of the Companies as at June 11, 2012 and "to the extent ascertainable, as at May 28, 2012."

15 In satisfaction of the requirement in paragraph 6 of the Sale Approval and Vesting Order, the Receiver filed its Third Report dated June 14, 2012. The Third Report contained a list of the s. 81.1 claimants, the steps by the Receiver to determine the s. 81.1 Assets in the possession of the Companies on June 11, 2012, the steps taken to segregate and preserve those assets and the inspections by s. 81.1 claimants. It also detailed the Receiver's attempts to determine the s. 81.1 Assets in the possession of the Companies on May 28, 2012.

Equistar's s. 81.1 Claim

16 On June 8, 2012, the Receiver received a s. 81.1 claim in the amount of $551,951.00 from Equistar. Equistar supplied poly resin to the Companies.

17 On June 12, 2012, a representative of Equistar attended at Strudex's premises and was shown the silos where Equistar's goods were normally delivered. The representative did a visual inspection of the goods remaining in the applicable silo and was provided production records for that silo. A digital meter reading of the silo was also taken in the presence of Equistar's representative.

18 Subsequently, the Receiver assessed the s. 81.1 claims using the criteria set out in s. 81.1 of the BIA. The Receiver assessed the eligible value of Equistar's claim to be $35,425.25. On June 19, 2012, the Receiver advised Equistar of its assessment.

19 On July 31. 2012, Equistar's US attorney sent a letter to the Receiver taking issue with the Receiver's determination of value. Equistar's position was that its claim should include all goods Equistar delivered within 30 days prior to May 28, 2012. It took issue with the challenges the Receiver reported it had faced in respect of assessing the status of the s. 81.1 Assets as at May 28, 2012 and requested further analysis.

20 The Receiver responded to Equistar's attorney's letter on August 7, 2012. It provided further details as to Strudex's inventory system, records, tracking, etc. as well as specific detail in respect of the use of product supplied by Equistar to Strudex in the period between May 28 and June 11, 2012, according to the records available to the Receiver. The letter further stated that if Equistar wished to conduct further investigation of the matter, the Receiver would attempt to facilitate such investigation with the Purchaser. The Receiver heard nothing further from Equistar.

21 In the period since June 11, 2012, the Purchaser used or consumed the s. 81.1 Assets subject to Equistar's claim that were in the Companies possession on June 11, 2012. In accordance with paragraph 6 of the Sale Approval and Vesting Order, the Purchaser paid to the Receiver, in trust, the invoice amount of the s. 81.1 Assets subject to Equistar's s. 81.1 claim that it used or consumed subsequent to June 11, 2012 in the amount of $35,425.25. The Receiver continues to hold such funds in trust pending agreement amongst the Purchaser and Equistar or further order of the Court.

Equistar's Motion

22 The Receiver's discharge motion was originally returnable on October 16, 2012. At the request of counsel for Equistar who were retained on October 9, 2012, the motion was adjourned to November 5, 2012 "to permit further review by creditor". Equistar had been previously represented in the receivership proceedings.

23 On October 24, 2012, Equistar's counsel sent a letter to the Receiver's counsel enclosing a list of 114 questions "for response by the Receiver in connection with the Receiver's impending motion for discharge."

24 The questions cover a very broad range of topics, including:

a. the relationship between the Receiver and Red Ash and the extent of Red Ash's control over the actions and decisions of the Receiver and the funding of the receivership;

b. information available to proposed purchasers about the existence of s. 81.1 claims and the goods supplied by them;

c. the extent of the relationship between PwC and the Companies and the extent of control exercised by PwC in that capacity prior to its appointment;

d. the extent of PwC's control over the sale process;

e. any advice given by PwC to the directors and officers of the Companies related to their obligations with respect to trading while insolvent;

f. the decision to sell the cash gleaned from suppliers products as part of the assets on closing;

g. the Liquidation Analysis (Confidential Appendices C) and whether or not the Receiver considered the impact on unsecured creditors in evaluating same;

h. the decision to use the interim receivership structure and its impact on suppliers;

i. forecasts of consumption of supplier goods available to or relied upon by the Receiver; investigations conducted by the Receiver, as described in the Third Report, which relate to the extent of goods supplied by Equistar;

j. specific questions related to the quantities of the goods supplied by Equistar;

k. general questions about how the Receiver perceived the treatment of unsecured creditors and the suppliers, and what steps, if any it took to advise the relevant parties in connection with same.

25 On October 31, 2012, the Receiver replied to the October 24, 2012 letter and advised that it had reviewed and considered Equistar's questions and in the Receiver's view, the questions were inappropriate, irrelevant to Equistar's s. 81.1 claim, had been dealt with in the Receiver's prior communications with Equistar and/or related to activities already approved by the Court. Accordingly, it advised that it would not be answering any of the questions.

26 On November 5, 2012, the Receiver's discharge motion was put over to November 7, 2012 to enable Equistar to bring its motion to obtain the answers to the questions and unseal the Confidential Appendices. It further amended its notice of motion to also seek payment of $35,425.25

Law and Analysis

(a) The Questions

27 A court-appointed receiver is an officer of the court and is in a fiduciary capacity to all stakeholders: *Nash v. CIBC Trust Corp.*, 1996 CarswellOnt 2185 (Ont. Gen. Div.) at para. 6. The fact that the receiver owes fiduciary duties to stakeholders does not, however, entitle a stakeholder to go on a fishing expedition for information: *Turbo Logistics Canada Inc. v. HSBC Bank Canada* (2009), 81 C.B.R. (5th) 169 (Ont. S.C.J. [Commercial List]) at para. 18.

28 A court-appointed receiver is required to respond to reasonable requests for information from parties with an interest in the receivership: *Battery Plus Inc., Re* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]). What is reasonable must be determined, in my view, having regard to the interest of the requesting party and the relevance of the information sought based on the issue or issues. In addition, and as noted by Farley J. in *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 (Ont. S.C.J. [Commercial List]) at para. 9, the objectivity and neutrality of the officer of the court is also a factor to consider.

29 Equistar submits that it is entitled to the answers to its questions in order to determine the correct amount of its s. 81.1 claim; who the directing minds were that caused the claim to arise; and whether or not any claim exists against any of the parties, including the Receiver for their actions in creating an unpaid debt owing to Equistar.

30 The vast majority of the 114 questions relate to the Receiver's relationship with Red Ash and the Companies prior to and during the receivership as well as various steps during the receivership. Those questions have nothing to do with Equistar's s. 81.1 claim. Those questions are nothing more, in my view, than a fishing expedition to see if Equistar can uncover some sort of impropriety which it suspects may have occurred but of which it has no proof. In that regard, it is instructive that Equistar has provided no evidence of impropriety before or during the receivership. All it has are suspicions of impropriety which is not sufficient to elevate its questions into the reasonable category.

31 Questions 12 and 13 and 75 to 97 relate for the most part to Equistar's s. 81.1 claim. The problem is that the Receiver has already answered Equistar's questions concerning its claim and provided it with all of its information. The Receiver duly and thoroughly investigated and provided all relevant facts it was able to obtain to Equistar. I would have thought that if Equistar had any follow up questions, it would have contacted the Receiver directly with them. Equistar provided no evidence that it requires further information or that to its knowledge, the information is available and the Receiver has failed to provide it. In fact, it is a reasonable inference from a number of the questions that Equistar already knows the answer.

32 The Receiver has no further information or documents relating to Equistar's claim. In my view, in responding as it has to Equistar's questions relating to its s. 81.1 claim, the Receiver has acted reasonably and in accordance with its duty. In the circumstances, it is not required, in my view, to answer Equistar's further questions which in the circumstances, are either irrelevant or unreasonable and in most cases, both.

33 Equistar's motion in respect of the 114 questions is therefore dismissed.

(b) Unsealing the Confidential Appendices

34 Equistar also seeks an order unsealing the Confidential Appendices as provided in paragraph 8 of the Sale Approval and Vesting Order.

35 The First Report describes the three Appendices. Appendix A is a Confidential Information Memorandum prepared by PricewaterhouseCooper Corporate Finance with the assistance of the Companies management for the sale process in the fall of 2011. It describes the Companies business in significant detail. Appendix B is a detailed summary of the four highest offers received in December 2011 and the three revised offers received in January 2012 in respect of the sale of the Operating Companies. Appendix C is a Liquidation Analysis of assets and business of the Companies based on net book values as of March 31, 2012.

36 In the First Report, the Receiver requested the sealing of the three Appendices from the public record until after closing of the Sale Transaction or further order of the court. As noted, paragraph 9 of the Sale Approval and Vesting Order provides that the Appendices contain confidential information and shall remain confidential and shall not form part of the permanent record pending further order of the court.

37 Equistar submits that because the Sale Transaction is complete, there is no reason to continue with the sealing order and the documents should be unsealed. It submitted that the two circumstances justifying a sealing order as set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) are no longer present here.

38 Counsel for Red Ash opposed Equistar's request to unseal the documents. It submits that given the Court determined, as part of the Sale Approval and Vesting Order, that the Appendices were confidential, Equistar's motion for unsealing should fail as it has not established that the documents are no longer confidential. In the alternative, it submits that the documents remain confidential. In respect of that submission, because it was only served with Equistar's motion material on the eve of the motion, Red Ash requests an adjournment in order that it can file material to establish that the documents in question still remain confidential.

39 As Newbould J. pointed out in *Look Communications Inc. v. Look Mobile Corp.*, 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17, it is often the case that on the Commercial List sensitive documents concerning an asset sale are sealed in order to protect the sale process. Once that process has been completed, it follows that the information in the documents is no longer confidential.

40 I am mindful of the importance of public disclosure in the courts as discussed in *Sierra Club*. I therefore think, given the circumstances in which the Appendices were sealed, that Red Ash should be required to establish that the documents in issue still remain confidential. Accordingly, I intend to adjourn that portion of Equistar's motion, to be brought back on with proper notice to Red Ash in order to allow it to properly respond.

(c) The $35,425.25

41 The final relief requested by Equistar is the payment by the Receiver of the $35,425.25 it is holding in trust in

respect of its s. 81.1 claim.

42 The Sale Approval and Vesting Order provide in paragraph 6(b) that a s. 81.1 claim is to be determined "by court order or by agreement amongst the Receiver, the applicable claimant to the s. 81.1 Asset and the Purchaser". Paragraph 6 (e) provides that where the Purchaser pays the Receiver in trust for the s. 81.1 assets its used or consumed, the cash payment "shall stand in place and stead of the s. 81.1 Asset, with such cash to be disposed of in accordance with" the determination as provided in paragraph 6(b).

43 There has been no court order or agreement with respect to Equistar's s. 81.1 claim. Equistar has not yet sought such determination. Accordingly, pursuant to paragraph 6 of the Sale Approval and Vesting Order, the $35,425.25 being held by the Receiver in trust cannot be disposed of until such determination.

44 Equistar's request for payment of $35,425.25 is therefore dismissed.

The Receiver's Motion

45 The Receiver's appointment was for the narrow purposes of completing the sale of the assets of the Companies and certain miscellaneous post-closing matters and reporting on the s. 81.1 assets in possession of the Companies at the time of its appointment and if possible, on May 28, 2012. Those purposes have been completed.

46 All s. 81.1 claims except for Equistar's have been resolved. The Receiver proposes that it pay the $35,425.25 it is holding in trust on account of Equistar's s. 81.1 claim to be paid to the Trustee in Bankruptcy of the Operating Companies to permit Equistar's claim to be settled or resolved by court order in the bankruptcy. In my view, given that PwC is also the Trustee, this is a reasonable solution.

47 The Receiver seeks a release and discharge from any and all claims arising out of its actions as Receiver save and except for gross negligence or wilful misconduct on its part. It is that request which prompted Equistar's list of questions. The release is a standard term in the Commercial List model order of discharge. In my view, in the absence of any evidence of improper or negligent conduct on the part of the Receiver, the release should issue. A receiver is entitled to close its file once and for all. There is no such evidence here.

Conclusion

48 Based on the material filed, the discharge order as requested by the Receiver should issue.

49 Equistar's motion is dismissed except for the portion relating to the unsealing of the Confidential Appendices which shall be adjourned to be brought back on, if so desired, on proper notice to Red Ash and the Receiver.

50 There will be no order of costs in respect of the Receiver's discharge motion. The Receiver is entitled, however, to costs in respect of Equistar's motion. In the absence of agreement, brief submissions of no more than two pages along with a cost outline shall be made by the Receiver within ten days. Equistar shall respond within ten days of

receipt of the Receiver's submissions.

Order accordingly.

END OF DOCUMENT

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43 and SECTION 243(1) OF THE BANKRUPTCY AND INSOLVENCY ACT, R.S.C. 1985, c. B-3, AS AMENDED BETWEEN FREEPORT FINANCIAL LLC. AND PRACS INSTITUTE CANADA B.C. LTD.

Court File No. CV-13-10046-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF
PRICEWATERHOUSECOOPERS INC.
(Motion returnable June 26, 2013)

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