Court File No. CV-11-9159-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST, PRISZM INC. AND KIT FINANCE INC

Applicants

BRIEF OF AUTHORITIES

11.3 CCAA Assignment Motion Returnable: Monday, May 30, 2011

May 26, 2011

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Conflict Lawyers for the Applicants

Court File No. CV-11-9159-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST, PRISZM INC. AND KIT FINANCE INC.

(the "**Applicants**")

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INDEX

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

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Applicants

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TAB 1

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2009 CarswellBC 2286, 2009 BCSC 1169, [2009] B.C.W.L.D. 7082, [2009] B.C.W.L.D. 7080, [2009] B.C.W.L.D. 7252, 57 C.B.R. (5th) 52

Hayes Forest Services Ltd., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-3 And In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57 And In the Matter of Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Ltd.

British Columbia Supreme Court

Burnyeat J.

Heard: July 8, 10, 24, 2009; August 14, 2009
Judgment: August 27, 2009
Docket: Vancouver S085453

Counsel: S.C. Fitzpatrick for Teal Cedar Products Ltd.

J.I. McLean for Hayes Forest Services Limited, Hayes Holding Services Limited, Hayes Helicopter Services Ltd.

E.J. Milton, Q.C. for Western Forest Products Inc.

J. Cytrynbaum for G.E. Canada Corporation

J. Mistry for Steelworkers Locals 1-80, 1-85

F.R. Dearlove for Canadian Imperial Bank of Commerce

Subject: Natural Resources; Civil Practice and Procedure; Corporate and Commercial; Public; Insolvency; Estates and Trusts

Natural resources --- Timber — Timber licences — Miscellaneous

H Ltd. filed for protection under Companies' Creditors Arrangement Act ("CCAA") — H Ltd. logged timber for T Ltd. under contract in respect of tree farm licence — In accordance with regulation, contract provided that H Ltd. could assign its rights or interest under agreement provided H Ltd. obtained T Ltd.'s consent which would not be unreasonably withheld — Contract provided for disputes to be referred to arbitration — H Ltd. requested consent of T Ltd. to assignment of contract to N Ltd. — T Ltd. advised that it was withholding consent because

N Ltd. was not suitable assignee — T Ltd. brought application to lift stay of proceedings so that it could commence arbitration proceedings in respect of issue of whether it was reasonable to withhold its consent to assignment of contract — H Ltd. brought application for approval of sale of contract to N Ltd. — Application to lift stay of proceedings dismissed; application for approval of sale granted — Issue should be dealt with in CCAA proceedings — Language of s. 11(4) of CCAA was broad enough to allow decision in CCAA proceedings to be substituted for arbitration process contemplated under contract — H Ltd. met burden of showing that reasonable person would not have withheld consent — T Ltd. should have had no hesitation in concluding that equipment, crew and expertise to undertake work required under contract would be available to N Ltd. — If N Ltd. failed to perform under contract, H Ltd. would be in position to take back contract and perform required logging — Concerns regarding financial capability of N Ltd. and lack of business plan were answered — Part of T Ltd.'s refusal to provide consent was designed to achieve collateral purpose of having contract revert to T Ltd. — T Ltd. did not meet burden of showing that it was reasonable to approve offer of another company, 858 Ltd., since no information was provided regarding financial capability of 858 Ltd. and offer contained conditions precedent that were not met.

Alternative dispute resolution --- Relation of arbitration to court proceedings — Where jurisdiction of court ousted by statute

H Ltd. filed for protection under Companies' Creditors Arrangement Act ("CCAA") — H Ltd. logged timber for T Ltd. under contract in respect of tree farm licence — In accordance with regulation, contract provided that H Ltd. could assign its rights or interest under agreement provided H Ltd. obtained T Ltd.'s consent which would not be unreasonably withheld — Contract provided for disputes to be referred to arbitration — H Ltd. requested consent of T Ltd. to assignment of contract to N Ltd. — T Ltd. advised that it was withholding consent because N Ltd. was not suitable assignee — T Ltd. brought application to lift stay of proceedings so that it could commence arbitration proceedings in respect of issue of whether it was reasonable to withhold its consent — H Ltd. brought application for approval of sale of contract to N Ltd. — Application to lift stay of proceedings dismissed; application for approval of sale granted — Issue should be dealt with in CCAA proceedings — But for filing under CCAA, disputes under contract would have been governed by dispute resolution provisions under contract, Forest Act and related regulations — Language of s. 11(4) of CCAA was broad enough to allow decision in CCAA proceedings to be substituted for arbitration process — Determination of issue was less expeditious and more expensive under arbitration provisions — Time constraints imposed by N Ltd. could not be met by arbitration proceedings — Issue was commonly dealt with by court and required no forestry related experience — Assignment could be approved even if conclusion was reached that it was not unreasonable for T Ltd. to withhold its consent.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

H Ltd. filed for protection under Companies' Creditors Arrangement Act ("CCAA") — H Ltd. logged timber for T Ltd. under contract in respect of tree farm licence — In accordance with regulation, contract provided that H Ltd. could assign its rights or interest under agreement provided H Ltd. obtained T Ltd.'s consent which would not be unreasonably withheld — Contract provided for disputes to be referred to arbitration — H Ltd. requested consent of T Ltd. to assignment of contract to N Ltd. — T Ltd. advised that it was withholding consent because N Ltd. was not suitable assignee — T Ltd. brought application to lift stay of proceedings so that it could commence arbitration proceedings in respect of issue of whether it was reasonable to withhold its consent — H Ltd. brought application for approval of sale of contract to N Ltd. — Application to lift stay of proceedings dis-

missed; application for approval of sale granted — Issue should be dealt with in CCAA proceedings — But for filing under CCAA, disputes under contract would have been governed by dispute resolution provisions under contract, Forest Act and related regulations — Language of s. 11(4) of CCAA was broad enough to allow decision in CCAA proceedings to be substituted for arbitration process — Determination of issue was less expeditious and more expensive under arbitration provisions — Time constraints imposed by N Ltd. could not be met by arbitration proceedings — Issue was commonly dealt with by court and required no forestry related experience — Assignment could be approved even if conclusion was reached that it was not unreasonable for T Ltd. to withhold its consent — H Ltd. met burden of showing that reasonable person would not have withheld consent.

Cases considered by *Burnyeat J.*:

Armbro Enterprises Inc., Re (1993), 1993 CarswellOnt 241, 22 C.B.R. (3d) 80 (Ont. Bktcy.) — referred to

Doman Industries Ltd., Re (2003), 2003 BCSC 376, 2003 CarswellBC 538, 14 B.C.L.R. (4th) 153, 41 C.B.R. (4th) 29 (B.C. S.C. [In Chambers]) — referred to

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — referred to

Exxonmobil Canada Energy v. Novagas Canada Ltd. (2002), 2002 CarswellAlta 739, 30 B.L.R. (3d) 262, [2003] 3 W.W.R. 657, 318 A.R. 99, 10 Alta. L.R. (4th) 80, 2002 ABQB 455 (Alta. Q.B.) — considered

Gauntlet Energy Corp., Re (2003), 2003 ABQB 718, 2003 CarswellAlta 1209, 45 C.B.R. (4th) 47, [2004] 4 W.W.R. 373, 336 A.R. 302, 36 B.L.R. (3d) 250, 20 Alta. L.R. (4th) 314, 5 P.P.S.A.C. (3d) 236 (Alta. Q.B.) — considered

Hayes Forest Services Ltd. v. Teal Cedar Products Ltd. (2008), [2008] 11 W.W.R. 612, 257 B.C.A.C. 105, 432 W.A.C. 105, 2008 CarswellBC 1325, 2008 BCCA 283, 82 B.C.L.R. (4th) 110 (B.C. C.A.) — referred to

Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd. (1997), 1997 CarswellOnt 4328, 44 O.T.C. 288 (Ont. Gen. Div. [Commercial List]) — considered

Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd. (1987), 46 R.P.R. 34, 13 B.C.L.R. (2d) 367, 1987 CarswellBC 128 (B.C. S.C.) — referred to

Philip's Manufacturing Ltd., Re (1991), 9 C.B.R. (3d) 1, [1992] 1 W.W.R. 651, 60 B.C.L.R. (2d) 311, 1991 CarswellBC 502 (B.C. S.C.) — referred to

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — followed

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) — referred to

Skeena Cellulose Inc., Re (2003), 2003 CarswellBC 1399, 2003 BCCA 344, 184 B.C.A.C. 54, 302 W.A.C. 54, 43 C.B.R. (4th) 187, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — considered

Smoky River Coal Ltd., Re (1999), 12 C.B.R. (4th) 94, 1999 ABCA 179, 71 Alta. L.R. (3d) 1, 175 D.L.R.

(4th) 703, 237 A.R. 326, 197 W.A.C. 326, [1999] 11 W.W.R. 734, 1999 CarswellAlta 491 (Alta. C.A.) — considered

T. Eaton Co., Re (1997), 1997 CarswellOnt 5954 (Ont. Gen. Div.) — referred to

T. Eaton Co., Re (1997), 1997 CarswellOnt 1914, 46 C.B.R. (3d) 293 (Ont. Gen. Div.) — referred to

1455202 Ontario Inc. v. Welbow Holdings Ltd. (2003), 2003 CarswellOnt 1761, 33 B.L.R. (3d) 163, 9 R.P.R. (4th) 103 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

s. 11 — referred to

s. 11(4) — referred to

Forest Act, R.S.B.C. 1996, c. 157

Generally — referred to

s. 160 — referred to

s. 162 — referred to

Rules considered:

Rules of Court, 1990, B.C. Reg. 221/90

R. 3(3.1) [en. B.C. Reg. 191/2000] — pursuant to

R. 10 — pursuant to

R. 12 — pursuant to

R. 13(1) — pursuant to

R. 13(6) — pursuant to

R. 14 — pursuant to

R. 44 — pursuant to

Regulations considered:

Forest Act, R.S.B.C. 1996, c. 157

Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96

Generally — referred to

s. 4(1) — referred to

s. 5 — referred to

ss. 48-51 — referred to

APPLICATION by company under *Companies' Creditors Arrangement Act* for approval of sale of logging contract; APPLICATION to lift stay of proceedings.

Burnyeat J.:

1 Hayes Forest Services Limited, Hayes Holding Services Limited and Hayes Helicopter Services Ltd. ("Hayes") apply pursuant to the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), the *Forest Act*, R.S.B.C. 1996, c. 157 and its Regulations, Rules 3(3.1), 10, 12, 13(1), 13(6), 14 and 44 of the *Rules of Court* and the inherent jurisdiction of the Court for Orders approving the sale of that "certain replaceable stump to dump logging contract" ("Contract") between Hayes Forest Services Limited and Teal Cedar Products Ltd. ("Teal") to North View Timber Ltd. ("North View") relating to Timber Forest Licence 46 ("TRL46"). A $50,000.00 deposit has been paid by North View, and a further $277,000.00 would be paid at the time of the closing contemplated by the purchase. The balance of the purchase price of $1,614,266.00 is to be paid at the rate of $3.00 per cubic metre of the timber harvested under the Contract.

2 In opposing that application, Teal applies to lift the stay of proceedings granted under the July 31, 2008 Order so that Teal may commence arbitration proceedings in respect of the issue of whether it is reasonable to withhold its consent to the assignment of the Contract to North View and adjourning the application of Hayes pending the completion of the arbitration proceedings. In the alternative, Teal requests an order adjourning the application pending the production of certain documentation and information concerning the proposed sale to North View. In the further alternative, Teal seeks an order that a sale of the Contract be approved to 0858434 B.C. Ltd. ("858") for a purchase price of $1,400,000.00, with a down payment of $400,000.00, and with the balance of the purchase price to be paid at the rate of $2.00 per cubic metre of timber harvested under the Contract.

3 As part of a July 31, 2008 Order, a Monitor was appointed to report to the Court and the creditors from time to time. In a June 25, 2009 letter to counsel for Hayes, the Monitor states in part regarding the proposed sale to North View:

> In our opinion, the offer represents a reasonable price for this asset in today's market and we believe that the Company has diligently attempted to market this asset over an extended period of time.
>
> The purchase price is payable based on Northview logging activity under the contract. We believe that this is the only realistic mechanism to conclude a sale at this value. In order to protect its position and ensure future payments are made, the Company will receive a deposit of $327,000 on completion of the sale, and take security over the contract such that in the event Northview defaults on its future obligations the Company will be in a position to enforce that security and retake ownership of the contract.

Background

4 A "replaceable stump to dump" logging contract in respect of Tree Farm Licence 46 dated January 9, 1990 was entered into by Fletcher Challenge Canada Ltd. as the holder of the contract and Pat Carson Bulldozing Ltd. as the contractor. The interests of the original parties have both been acquired by other parties. The interest of Pat Carson Bulldozing Ltd. was acquired by Hayes Forest Services Limited. The interest of Fletcher Challenge Canada Ltd. was acquired by Teal pursuant to a January 19, 2004 Asset Purchase Agreement and a May 6, 2004 Assignment of Agreement. From January 1, 2008 through August 2, 2008, Hayes logged approximately 43,000 cubic meters of timber for Teal under the Contract.

5 These proceedings under the *CCAA* were commenced on July 31, 2008. At the time of the July 31, 2008 "initial Order", there were four ongoing disputes regarding key operating and financial terms of the Contract. In each dispute, the dispute resolution mechanism under the provisions under the *Forest Act* and its Regulations and under the Contract required mediation, arbitration and court proceedings. The applicable "Dispute Resolution" mechanism under the Contract was set out in paragraph 22.01:

> The Company and the Contractor mutually agree that where a dispute arises between them regarding a term, condition or obligation under this Agreement, and the Work under this Agreement is carried out on lands managed by the Company under a Tree Farm Licence or Forest Licence, then either party may require the dispute to be resolved in accordance with the Dispute Resolution Clause attached as Schedule "D" to this Agreement.

6 Portions of the Schedule "D" referred to in Paragraph 22.01 of the Contract are attached as Appendix "A" to these Reasons for Judgment.

7 In a September 30, 2008 letter, Hayes notified Teal that Hayes was in the process of seeking expressions of interest with respect to the purchase of the Contract as part of the restructuring contemplated under the *CCAA* filing. In an October 10, 2008 response, counsel for Teal advised counsel for Hayes that:

> Teal is certainly prepared to consider any potential assignee of the contract, and will expect the usual information, including financial information, that would normally be produced in that process.

8 The relationship between Hayes and Teal was such that a number of positions were taken by Teal which resulted in applications by Hayes in the *CCAA* proceedings. Hayes took the position that monies were owing by Teal under the Contract. Against what was owing, Teal attempted to set-off "unliquidated claims" it alleged it had under rate disputes arising out of the Contract. An Order was made on August 15, 2008 prohibiting such a set-off.

9 An attempt was made by Teal along with Western Forest Products Ltd. ("Western") to set aside the *CCAA* proceedings on September 4, 2008. That application was unsuccessful.

10 In October, 2008, Teal reduced the contract rate payable to Hayes for work done under the Contract. An order was made compelling payment on the existing contractual rates.

11 Teal sought to lift the stay of proceedings imposed under the July 31, 2008 Order to permit it to proceed with the various ongoing rate disputes under which it claimed Hayes owed it in excess of $2,500,000. Hayes consented to the lifting of the stay of proceedings to permit those claims to proceed. By November, 2008, Teal had not taken any steps to prosecute the arbitrations contemplated under the Contract. Hayes obtained an order establishing a "bar date" by which time Teal was required to have those claims arbitrated. Before the bar date

was reached, Teal and Hayes settled all rate disputes between them on the basis that Hayes was not indebted to Teal. That settlement agreement was approved by the Court in February, 2009.

12 In November 2008, Teal made an offer to Hayes to purchase the Contract for $764,112 with $191,028 on closing and the remainder at the rate of $2.00 per cubic meter of timber harvested under the Contract paid quarterly with the first payment to be made on April 1, 2009. The offer had a December 15, 2009 completion date. The offer provided that Teal would be the successor employer for those employees of Hayes engaged under the Contract who were not eligible for compensation under the B.C. Forestry Revitalization Trust. The offer was open for acceptance until December 1, 2008. The offer was not accepted by Hayes.

13 Under the Contract, Teal was to provide a 2009 logging plan to Hayes. The 2009 logging plan was provided to Hayes on December 9, 2008. On January 12, 2009, a representative of Teal advised a representative of Hayes that Teal was "... suspending operations indefinitely with respect to the work allocated to Hayes ..." Since December, 2008, Teal has not assigned work under the Contract to Hayes. Under the Contract, Hayes is entitled to 34.6% of the stump to dump logging work available relating to TFL46.

Possible Transfer of the Contract to North View

14 The *Timber Harvesting Contract and Subcontract Regulation*, B.C. Reg. 22/93, and paragraph 18 of the Contract governs the question of whether the Contract can be assigned. Section 4(1) of the Regulation provides: "Every replaceable contract must provide that the interests of the contractor are assignable, subject to the consent of the licence holder, and that consent must not be withheld unreasonably." In accordance with that section, paragraph 18 of the Contract provides:

> 18.01 The Contractor may assign any of its rights or interests under this Agreement, provided the Contractor first obtains the consent of the Company. The Company will not unreasonably withhold its consent to any assignment proposed by the Contractor.
>
> 18.02 Any assignment or transfer by the Contractor of this Agreement or of any interest therein ... without the written consent of the Company will be void....

15 In a May 8, 2009 letter to Teal, Hayes requested the consent of Teal to the assignment of the Contract to North View and advised that they contemplated completing the transfer prior to June 15, 2009. The letter also stated:

16 The outstanding payments under the Purchase Agreement will be secured by a security interest granted by the Purchaser (North View) to Hayes in all of the Purchaser's rights, title and interest in and to the Logging Contract and all proceeds thereof or therefrom.

17 In a May 14, 2009 letter, Hayes provided further information to Teal with respect to North View. In a May 15, 2009 letter, Teal sought information concerning North View and forwarded a questionnaire for completion and return. In a May 22, 2009 letter, Hayes provided the questionnaire to Teal. At that stage, it is clear that not all of the questions set out in the questionnaire had been answered in full. In any event, the questionnaire was not answered to the satisfaction of Teal. Despite the fact that all of the questions it had set out had not been answered, Teal wrote to Hayes on May 29, 2009 advising that it would be withholding their consent to the assignment of the Contract because Teal was of the view that the information provided did not justify providing their consent.

18 The matters which remained of concern to Teal were set out in that letter, being that North View:

1. is not a going concern;

2. when it last operated, was a minor business with revenues of about 1 to 2% of what the Contract currently delivers to the contractor and financial statements that suggest it is financially not viable or capable of performing the Contract;

3. has no experience performing a Coastal stump to dump contract;

4. has no equipment or crew or substantive projections of the equipment or crew it needs to perform its obligations under the Contract;

5. despite the difficult circumstances in the Coastal forest industry, has no business plan demonstrating that it can viably perform the obligations under the Contract, and no apparent financial resources to fund acquisition of equipment or ongoing expenses of operations; and

6. has no executed assignment of the Contract conditional on our consent being provided.

19 The letter then detailed the nature of the concerns of Teal. Despite the position having been taken, Hayes continued to provide information and Teal continued to request further information. On June 5, 2009, Hayes provided further information regarding North View and on June 8, 2009, Teal requested further information. In a June 12, 2009 letter, Teal advised that it was continuing to withhold its consent setting out detailed reasons regarding why they were continuing to take that position. The following "summary" was provided by Teal regarding the proposed assignment to North View:

> In summary, the evidence continues to indicate North View is not a suitable assignee. It is a small and virtually inactive company, particularly in the context of the operation required under the Contract. It has no experience performing a Coastal stump to dump operation, let alone a significant one; no experience with a union operation; few financial resources; no commitments from financial institutions or others to provide the necessary working capital to begin operations; and no equipment or crew. Moreover, it has no firm plans to address these issues in the context of the five-year replaceable contract it seeks to obtain.
>
> In our view, these and the other concerns we have raised comprise, at any time, reasonable grounds for us to withhold consent.
>
> However, beyond this, you are proposing to assign this important Contract to a company with these shortcomings at a time when the Coast forest industry is, as you acknowledge, in a severe downturn. In these conditions, few licensees, Teal included, can afford to expend scarce resources dealing with weak or failing contractors. Teal has already incurred significant time and expenses addressing the financial difficulties experienced by you as the current contractor. You incurred these difficulties despite your significant resources and experience in Coastal, unionized, stump to dump operations. If a contractor with significant resources and experience has had difficulties, it is most probable an under-resourced and inexperienced contractor such as North View will also face significant difficulties. Teal is no position to bear the costs in time, money and process of another failure of the contractor holding this Contract. It is unreasonable to expect Teal to put itself in that position by consenting to an assignment to a contractor with North View's shortcomings.

Should the Dispute Go to Arbitration?

20 The "Dispute Resolution Clause" set out in the Contract provides for a period of 30 days for the parties to attempt to resolve any dispute arising, the ability of either party to then refer the matter to arbitration, the ability of each party to have two days to complete their submissions and the requirement that the arbitrator shall hand down the arbitral award within seven days of the completion of the submissions. However, each party is entitled to an "examination for discovery" as that term is defined in the Rules of Court, including discovery of documents and discovery of one officer representative of the other party, to a maximum of three days. Once the award of the arbitrator has been received, a party would be at liberty to apply to this Court to have the award set aside. Any party not satisfied with the decision of a Judge of this Court could then apply to the Court of Appeal to overturn the decision reached by a Judge of this Court. These parties have had a history of a number of their disputes going to the Court of Appeal.

21 Teal contacted Mr. Daniel B. Johnston regarding his availability to act as an arbitrator. Although Mr. Johnston is Counsel for the law firm representing Hayes, Mr. Johnston has served as an mediator and arbitrator in disputes between Hayes and Teal pertaining to the Contract in the past and has advised Teal that it is "highly likely" that he would be available for "a few days over the next six weeks to act as the arbitrator...."

22 But for the filing under the *CCAA*, disputes under the Contract would be governed by the Dispute Resolution provisions under the Contract and under ss. 162 and 160 of the *Forest Act* and ss. 5 and 48 - 51 of the Regulation under that *Act*: *Hayes Forest Services Ltd. v. Teal Cedar Products Ltd.* (2008), 82 B.C.L.R. (4th) 110 (B.C. C.A.). However, the Court under the *CCAA* has the jurisdiction to decide a dispute which arises under the Contract between Hayes and Teal despite the provincial statutory authority and the terms of the Contract: *Smoky River Coal Ltd., Re* (1999), 175 D.L.R. (4th) 703 (Alta. C.A.).

23 In *Luscar*, *supra*, the Court dealt with the issue of whether a judge had the discretion under the *CCAA* to establish a procedure for resolving a dispute between the parties who had previously agreed under a contract to arbitrate their disputes. The question before the Court was whether the dispute should be resolved as part of the "supervisory role of the reorganization" of the company under the *CCAA* or whether the Court should stay the proceedings while the dispute was resolved by an arbitrator. The decision of the Learned Chambers Judge was that the dispute should be resolved as expeditiously as possible by the Court of Queen's Bench under the *CCAA* proceedings.

24 In upholding the ruling of the Learned Chambers Judge, and concluding that the discretion of the Learned Chambers Judge had been exercised properly, Hunt J.A., on behalf of the Court stated:

> The above jurisprudence persuades me that "proceedings" in s. 11 includes the proposed arbitration under the B.C. Arbitration Act. The Appellants assert that arbitration is expeditious. That is often, but not always, the case. Arbitration awards can be appealed. Indeed, this is contemplated bys. 15(5) of the Rules. Arbitration awards, moreover, can be subject to judicial review, further lengthening and complicating the decision-making process. Thus, the efficacy of CCAA proceedings (many of which are time-sensitive) could be seriously undermined if a debtor company was forced to participate in an extra-CCAA arbitration. For these reasons, having taken into account the nature and purpose of the CCAA, I conclude that, in appropriate cases, arbitration is a "proceeding" that can be stayed under s. 11 of the CCAA.
>
> (at para. 33)

> The language of s. 11(4) is very broad. It allows the court to make an order "on such terms as it may impose". Paragraphs (a), (b) and (c) empower the court order to stay "all proceedings taken or that might be taken" against the debtor company; restrain further proceedings "in any action, suit or proceeding" against the debtor company; and prohibit "the commencement of or proceeding with any other action, suit or proceeding" (emphasis added). These words are sufficiently expansive to support the kind of discretion exercised by the chambers judge.
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> (at para. 50)

25 I agree that the language of s. 11(4) of the *CCAA* is broad enough to allow this Court to substitute a decision in these proceedings for the arbitration process contemplated under the Contract. In this regard, see also the decision in *Landawn Shopping Centres Ltd. v. Harzena Holdings Ltd.* (1997), 44 O.T.C. 288 (Ont. Gen. Div. [Commercial List]) where the Court allowed the arbitration stipulated under a contract to be replaced by a claim of the landlord being dealt with by the Court under the terms of a plan of arrangement.

26 Of similar effect are other decisions where the contracts between landlords and tenants were affected by the power contained under s. 11 of the *CCAA*: *T. Eaton Co., Re* (1997), 46 C.B.R. (3d) 293 (Ont. Gen. Div.); *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]); *Philip's Manufacturing Ltd., Re* (1991), 9 C.B.R. (3d) 1 (B.C. S.C.); *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) with additional reasons at (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]); *Armbro Enterprises Inc., Re* (1993), 22 C.B.R. (3d) 80 (Ont. Bktcy.); and *Skeena Cellulose Inc., Re* (2003), 13 B.C.L.R. (4th) 236 (B.C. C.A.).

27 *Skeena, supra,* dealt with the interaction between logging contracts established under the *Forest Act* and the scheme of judicial stays and creditors' compromises available under the *CCAA*. The Court authorized the termination of contracts similar to the Contract here despite the provisions in the contracts themselves. In this regard, Newbury J.A. on behalf of the Court stated at paragraph 37:

> In the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights. Most notably, in *Re Dylex Ltd.* (1995) 31 C.B.R. (3d) 106 (Ont. Ct. (Gen. Div.)), Farley J. followed several other cases in holding that in "filling in the gaps" of the CCAA, a court may sanction a plan of arrangement that includes the termination of leases to which the debtor is a party. (See also the cases cited in *Dylex*, at para. 8; *Re T. Eaton Co.* (1999) 14 C.B.R. (4th) 288 (Ont. S.C.), at 293-4; *Smoky River Coal*; *supra*, and *ReArmbro Enterprises Inc.* (1993) 22 C.B.R. (3d) 80 (Ont. Ct. (Gen. Div.)), at para. 13.) In the latter case, R.A. Blair J. said he saw nothing in principle that precluded a court from "interfering with the rights of a landlord under a lease, in the CCAA context, any more than from interfering with the rights of a secured creditor under a security document. Both may be sanctioned when the exigencies of the particular re-organization justify such balancing of the prejudices." In its recent judgment in *Syndicat national de l'amianted'Asbestos inc. v. Jeffrey Mines Ltd*, [2003] Q.J. No. 264, the Quebec Court of Appeal observed that "A review of the jurisprudence shows that the debtor's right to cancel contracts prejudicial to it can be provided for in an order to stay proceedings under s. 11." (para. 74.)

28 In May 31, 2008 Oral Reasons for Judgment (Supreme Court of British Columbia Action No. S080752). In *Backbay Retailing Corporation, and Gray's Apparel Company Ltd.*, the Court approved an assignment of the interests of the Petitioner's interests in leases in certain retail outlets to a third party despite the objection of the

landlords and despite the fact that leases provided that the approval or consent of the landlords was required prior to the transfer, assignment or assumption of the leases. The new tenants were not prepared to agree to be liable for past defaults under the leases and required that all of the rights under the leases including those that were expressed to be personal to Petitioners be assigned to them. The petitioners had asserted no common law entitlement to the orders that they sought but, rather, had submitted that the Court has a statutory discretion under the *CCAA* to make the orders sought so long as that is consistent with the objectives of the *CCAA* to facilitate a restructuring. Citing with approval the decision in *Playdium, supra,* Hinkson J. concluded that the proposed purchase and sale agreement was in the best interests of the Petitioners, would afford significant benefits to their landlords, and that the refusal of the proposed tenants to assume the liabilities of the immediate predecessors was not a reasonable basis upon which to withhold consent.

29 Hinkson J. also cited with approval the decision of Kent J. in *Gauntlet Energy Corp., Re* (2003), 336 A.R. 302 (Alta. Q.B.): "Interference with contractual rights of creditors and non-creditors is consistent with the objective of the CCAA to allow struggling companies an opportunity to survive whenever reasonably possible." (at para. 58). Hinkson J. also relied on the decision in *Doman Industries Ltd., Re* (2003), 14 B.C.L.R. (4th) 153 (B.C. S.C. [In Chambers]) and *T. Eaton Co., Re*, [1997] O.J. No. 6388 (Ont. Gen. Div.). In July 11, 2008 Oral Reasons for Judgment, Levine J.A. denied leave to appeal the Order of Hinkson J.

30 I have concluded that I should override the arbitration provisions in this Contract to allow a Court determination of the issue of whether Teal is or is not unreasonably withholding its approval for the transfer of the Contract to North View. First, I am satisfied that the determination of this issue is less expeditious and more expensive under the arbitration provisions. The past history between these parties is that the arbitration proceedings have been both lengthy and incredibly costly. In the context of a previous application, counsel for Teal indicated that the cost of an arbitration might approach $250,000.00. Second, an arbitration award is subject to judicial review, further lengthening and complicating the decision-making process. Third, there are time constraints imposed by North View regarding the purchase of this Contract. Those deadlines cannot be met by the arbitration proceedings contemplated under the Contract. Fourth, there is no reason why the question whether the consent has been unreasonable withheld or not cannot be determined by the Court. Although a number of arbitrators are experienced in dealing with the type of issues that would arise in the arbitration of other issues which have arisen between Hayes and Teal, the question of whether consent has been unreasonably or reasonably withheld is an issue which is commonly dealt with by the Court and requires no forestry related expertise. Taking into account all of those factors, I am satisfied that the issue raised by the dispute between the parties should be dealt with by this Court in the *CCAA* proceedings. The application of Teal to lift the stay of proceedings granted on July 31, 2008 is dismissed.

Can the Court Approve the Assignment of the Contract, Even Though It Is Not Unreasonable for Teal to Withhold Its Consent?

31 I am satisfied that the *CCAA* Court can approve an assignment even if I reach the conclusion that it is not unreasonable for Teal to withhold its consent. In *Playdium, supra,* Spence J. dealt with a proposal to transfer all of the assets of Playdium to a new corporation as the only viable alternative to a liquidation of the assets of the company. Under that tenancy, an agreement could not be assigned without the consent of Famous Players, which consent could not be unreasonably withheld. Famous Players had argued that it had not been properly requested to consent and it had not received adequate financial information and assurances regarding management expertise and how their agreement might be brought into good standing. Save for the *CCAA* Order in place, Spence J. concluded that there could be no assignment but that the *CCAA* Order affords "... a context in which the court

has the jurisdiction to make the order." Spence J. concluded that he had jurisdiction to compel the assignment of leases over the objections of other parties and held that he had the jurisdiction to approve the assignment of leases even though it would not have been unreasonable for Famous Players to withhold its consent to the assignment. I am prepared to adopt the path taken by Spence J. in *Playdium, supra*, if I conclude that it is reasonable for the consent of Teal to be withheld.

Has the Consent of Teal Been Unreasonably Withheld?

32 The determination of the reasonableness of withholding consent is a question of whether a reasonable person would have withheld consent in the circumstances. The determination will be dependent on such factors as the commercial realities of the marketplace, the economic impact of the assignment, and the financial position of the proposed assignee. *Exxonmobil Canada Energy v. Novagas Canada Ltd.*, [2003] 3 W.W.R. 657 (Alta. Q.B.), dealt with the assignment of the management of the interest of Exxonmobil Canada Energy in a gas processing plant. Regarding the argument that the assignment had been unreasonably withheld, Park J. concluded that it was reasonable to have refused the consent to the assignment and, in these regards, made the following statements:

> The reasons for including a consent requirement in the assignment was to allow each party the opportunity of reasonably assessing any future contractual partners. If a proposed assignee did not meet the criteria reasonably required by the other party, the assignment should not proceed. (at para. 54)
>
> On an objective basis it is entirely reasonable to enquire into the financial capability of a proposed business partner in determining whether to accept that party as a business partner. There must be adequate information provided to EMC regarding the strength of the Solex financial covenant. Further, if NCLP and Solex wish to argue (as they did) that EMC would be in a better position with the financial covenant of each of Solex and NCLP, in the absence of Solex being novated into the Agreement, then it would be reasonable for Solex and NCLP to provide adequate information on the strengths of those financial covenants rather than leaving EMC to surmise.
>
> However, it is not the final strength or weakness of Solex's financial covenant which prevents consent. Rather it is the failure of Solex to provide relevant and material financial information which will enable EMC to assess the financial strength of Solex on a go forward basis. The absence of financial information provided by Solex means that EMC has reasonably withheld its consent. EMC in the circumstances cannot satisfy itself as to the financial ability of Solex to meet its prospective obligations as the proposed assignee under the Agreement.
>
> Finally, I note that EMC has not withheld its consent for improper reasons. As I noted previously, the desire of EMC to resolve outstanding issues between itself and NCLP is a separate issue, and is not tied to EMC's desire to receive proper and adequate financial information from Solex as a separate entity. EMC did not withhold its consent in order to secure additional benefits as argued by Solex and NCLP.
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> (at paras. 58-60)

33 The reasonableness of withholding consent has often been considered in the context of leases. In *1455202 Ontario Inc. v. Welbow Holdings Ltd.* (2003), 9 R.P.R. (4th) 103 (Ont. S.C.J.), Cullity J. concluded that the landlord was justified in its decision based on the lack of information concerning the business experience of the proposed assignee stating:

In determining whether the Landlord has unreasonably withheld consent, I believe the following propositions are supported by the authorities cited by counsel and are of assistance:

1. The burden is on the Tenant to satisfy the court that the refusal to consent was unreasonable: *Shields v. Dickler*, [1948] O.W.N. 145 (C.A.),at pages 149-50; *Sundance Investment Corporation Ltd. v. RichfieldProperties Limited et al*, [1983] 2 W.W.R. 493 (Alta. C.A.), at page 500;cf. *Welch Foods Inc. v. Cadbury Beverages Canada Inc.* (2001), 140 O.A.C. 321 (C.A.), at page 331. In deciding whether the burden has been discharged, the question is not whether the court would have reached the same conclusion as the Landlord or even whether a reasonable person might have given consent; it is whether a reasonable person could have withheld consent: *Whiteminster Estates v. HedgesMenswear Ltd.* (1972), 232 Estates Gazette 715 (Ch. D.), at pages715-6; *Zellers Inc. v. Brad-Jay Investments Ltd.*, [2002] O.J. No. 4100 (S.C.J.), at para. 35.

2. In determining the reasonableness of a refusal to consent, it is the information available to - and the reasons given by - the Landlord at the time of the refusal - and not any additional, or different, facts or reasons provided subsequently to the court - that is material: *Bromley ParkGarden Estates Ltd. v. Moss*, [1982] 2 All E.R. 890 (C.A.), at page 901-2 per Slade L.J. Further, it is not necessary for the Landlord to prove that the conclusions which led it to refuse consent were justified, if they were conclusions that might have been reached by a reasonable person in the circumstances: *Pimms, Ltd. v. Tallow Chandlers in the City of London*, [1964] 2 All E.R. 145 (C.A.), at page 151.

3. The question must be considered in the light of the existing provisions of the lease that define and delimit the subject matter of the assignment as well as the right of the Tenant to assign and that of the Landlord to withhold consent. The Landlord is not entitled to require amendments to the terms of lease that will provide it with more advantageous terms: *Jo-EmmaRestaurants Ltd. v. A. Merkur & Sons Ltd.* (1989), 7 R.P.R. (2d) 298 (Ont. Div. Ct.); *Re Town Investments Ltd.*, [1954] Ch. 301 (Ch. D.) -but, as a general rule, it may reasonably withhold consent if the assignment will diminish the value of its rights under it, or of its reversion: *Federal Business Development Bank v. Starr* (1986), 55 O.R. (2d) 65 (H.C.) , at page 72. A refusal will, however, be unreasonable if it was designed to achieve a collateral purpose, or benefit to the Landlord, that was wholly unconnected with the bargain between the Landlord and the Tenant reflected in the terms of the lease: *Bromley Park Garden EstatesLtd. v. Moss*, above, at page 901 per Dunn L.J.)

4. A probability that the proposed assignee will default in its obligations under the lease may, depending upon the circumstances, be a reasonable ground for withholding consent. A refusal to consent will not necessarily be unreasonable simply because the Landlord will have the same legal rights in the event of default by the assignee as it has against the assignor: *Ashworth Frazer Ltd., v. Gloucester City Council*, [2001] H.L.J. 57.

5. The financial position of the assignee may be a relevant consideration. This was encompassed by the references to the "personality" of an assignee in the older cases see, for example, *Shanley v. Ward* (1913), 29 T.L.R. 714 (C.A.); *Dominion Stores Ltd. v. Bramalea Ltd.*, [1985] O.J.No. 1874 (Dist. Ct.)

6. The question of reasonableness is essentially one of fact that must be determined on the circumstances of the particular case, including the commercial realities of the market place and the economic impact of an assignment on the Landlord. Decisions in other cases that consent was reasonably, or un-

> reasonably, withheld are not precedents that will dictate the result in the case before the court: *Bickel et al. v. Duke ofWestminster et al.*, [1976] 3 All E.R. 801 (C.A.), at pages 804-5;*Ashworth Frazer Ltd. v. Gloucester City Council*, above, at para. 67;*Dominion Stores Ltd. v. Bramalea Ltd.*, above, at para. 25.
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> (at para. 9)

34 Of the six general areas of concern raised by Teal, the objection that there was no executed Assignment of Contract is no longer an issue as an executed assignment conditional on the consent of Teal has now been provided.

35 Regarding the concern regarding the lack of equipment or crew, I am satisfied that this should not be an impediment to the assumption of the contractual obligations by North View. Some of the crew that will be required has already been contracted through Horsman Trucking Ltd. ("Horsman"), who has entered into a services subcontract with North View. In general, I accept the evidence of Donald P. Hayes who makes this statement in his July 2, 2009 Affidavit:

> At present there is no work available under the Teal Bill 13 Contract and no equipment is currently required. When logging recommences under the Contract, the Purchaser will be able to acquire equipment either directly or be able to subcontract out portions of the work (as is currently done by Hayes) and service the Contract without difficulty.
>
> There is currently a surplus of logging equipment on Vancouver Island. The most recent auction of equipment was held in June, 2009 by Ritchie Bros. in Duncan, BC. The sale prices at that recent Ritchie Bros.' auction were extremely low and any contractor on the Island will have no difficulty acquiring the necessary equipment at some of the lowest historic prices for that equipment.
>
> There is current an abundance of logging equipment from Coastal BC operations that has been returned to various leasing companies. I am aware of certain lessors that are now re-leasing this equipment without the requirement of a down payment by the new lessee. Essentially the new lessee simply makes payments based on the returned value of the equipment. This will make it very easy for any contractor or subcontractor to acquire any equipment needed to service a contract for logging or road building.

36 I am also satisfied that North View sets out a satisfactory explanation regarding equipment in its July 16, 2009 letter to Teal:

> I have made inquiries in the market as to the availability of equipment. Hayes has all of the equipment for sale that I would require to start the operations. I confirm that in the event of short notice from Teal that Hayes would rent or rent to purchase suitable equipment as required including a grapple yarder, log loaders, back spar, cat etc.
>
> Finning also has new and used inventory in stock. I am also aware of several contractors who are shut down and will likely have equipment for short term rent or rental purchase.
>
> Pick up trucks are readily available for purchase or lease in the market and Hayes will sell me the industrial box liners required.
>
> Until there is a logging plan and a start date, I have not tried to firm up equipment arrangements. Without the logging plan and a start date, I cannot be sure of the equipment actually required or the timing of that re-

quirement.

37 Regarding the concern that North View is not a going concern, while it is clear that North View is an entity which is not presently operating, my review of the experience of the principals of North View allows me to conclude that the principals have sufficient experience to allow North View to be successful in performing the work that is provided by Teal under the Contract. The principal of North View has over 35 years of logging experience and worked as a subcontractor for Hayes between 2005 and 2008 on the work required under the Contract. As well, North View will have the assistance of the principals of Hayes, and has contracted with an experienced hauler to subcontract the hauling of timber to the dump operations.

38 I also accept the following evidence regarding the proposed operations of North View under the Contract which is set out in the July 24, 2009 Affidavit of Donald P. Hayes:

> The contract will be operated as follows:
>
> (a) Falling. The falling work under the contract is currently done by a sub contractor, Gemini, they had done the falling work for years, and will continue to do so for North View Timber Ltd. ("North View");
>
> (b) Yarding. Mr. Horsman is one of the most experienced yarders on the coast and has done this work on this contract for Hayes. He will do this work;
>
> (c) Loading. This work will be contracted out to an experienced loader. The loading takes place in close proximity to the yarding and can be supervised by the yarder, in this case Mr. Horsman;
>
> (d) Hauling. The hauling will be subcontracted to Horsman Trucking Ltd, a well know and experienced hauler on the Island. I have know them for years and they have a good reputation.

39 I am satisfied that Teal should have no hesitation in concluding that the equipment, crew and expertise to undertake the work required under the Contract will be available to North View. In this regard, I am also mindful of the fact that, if North View fails to perform under the Contract, Hayes will be in a position to take back the Contract and then perform the logging required under the Contract. In the past, Teal was satisfied with the performance of Hayes under the Contract, and should have some solace that Hayes will be in a position to perform under the Contract if North View does not.

40 Regarding the concern of Teal that North View is not financially capable, I note that a $50,000.00 deposit has already been paid, that an agreement has been reached with Horsman to sell to Horsman the hauling subcontract for $400,000.00 so that the further $277,000.00 required at the date of closing will be available, that $100,000.00 will be set aside to meet capital requirements, and that preliminary discussions are underway with B.D.C. and Caterpillar Finance regarding financing once any logging plan proposed by Teal is known. In this regard, I am satisfied that the payments under the Contract must be made by Teal every two weeks, and I take into account the advice received from North View that its expenses need to be paid monthly so that the working capital that would otherwise be required to service this Contract is reduced.

41 Finally, Teal is concerned that North View has no "business plan". I am satisfied that this concern is answered in the July 16, 2009 letter from North View to Teal:

> I have not regularly prepared business plans. My practice is to study the logging plan, when I receive it and then determine the equipment and people that I need. I then closely supervise the production and all pur-

chases to control the cash flow.

I have had Mr. Donald P. Hayes assist me with the preparation of the

Business Plan. Mr. Hayes is a Chartered Accountant and the President of Hayes Forest Services Limited, the current operator of the contract. This is a much more detailed plan than I could produce myself. I have reviewed it with Mr. Hayes and based on my knowledge I confirm that in my opinion the Business Plan reflects the economic conditions in the industry and uses reasonable assumptions concerning rates, costs, financing and working capital needs including the payment of the $3.00 per cubic meter promissory note to Hayes. I further confirm that I believe that the contract is viable at market rates.

This Business Plan has not been independently reviewed but was developed in conjunction with Mr. Hayes who has operated this contract for over 20 years and is extremely knowledgeable in respect of this contract. Once the actual logging plan is provided, it will likely require material changes to the Business Plan.

42 As well, it should be obvious to Teal that it is difficult to put forward a "business plan" when the 2009 and 2010 work allocated under the Contract is not known. While it is clear that North View does not have the present capacity or business plan in place to handle a cut of 125,000 cubic metres, it is also clear that there is no current work under the Contract and this yearly volume has not been required of Hayes for over three years.

43 In the context of leases, the Court must look at all of the circumstances to determine if consent has been reasonably withheld: *Lehndorff Canadian Pension Properties Ltd. v. Davis Management Ltd.* (1987), 13 B.C.L.R. (2d) 367 (B.C. S.C.) at para. 51. The *Forest Act* and the *Timber Harvesting Regulations* require similar contracts to be assignable and puts the onus on licence holders such as Teal to justify their refusal to consent to any assignment. Taking into account all of the circumstances surrounding this question, I am satisfied that Teal has not shown that it is reasonable to withhold its consent. At the same time, I am satisfied that Hayes has met the burden of showing that a reasonable person would not have withheld consent.

44 In this regard, I have concluded that at least part of the refusal to provide consent was designed by Teal to achieve a collateral purpose that is wholly unconnected with the bargain between Teal and Hayes. In November 2008, Teal made an offer to purchase the Contract for $764,112.00. From this, I can conclude that Teal believes that there is significant value to it if the Contract cannot be performed by Hayes or if Teal can otherwise obtain the benefits of the Contract in order that they can be transferred to another operator. Teal has also provided an offer through 858 to purchase the Contract for $1,400,000.00. This is further evidence of the value to Teal of stopping a transfer of the Contract to North View in the hope that the Contract will revert to it by virtue of the inability or unwillingness of Hayes to perform under the Contract.

What Should Be Made of the Offer of 858?

45 The offer of 858 was open for acceptance until August 11, 2009 and was directed to the attention of Hayes Forest Services Ltd. ("Offer"). It was a condition of the Offer that Horsman enter into a replaceable services sub-contract with 858 in the same form as the Horsman contract with North View. As at August 14, 2009, no confirmation had been received from Horsman that they were prepared to accept that stipulation. The purchase price under the Offer is $1,400,000, with $400,000 at the time of closing (being the amount that would be available to 858 under the Horsman contract) and with balance of the purchase price by a promissory note for $1,000,000.

46 In response to the concern raised by Hayes that Teal would be in a position to control the amount of work that would be available to 858 so that 858 would not be in a position to pay the balance due and owing under the Promissory Note quickly or at all, the following provision was inserted after the first draft of the Offer was forwarded to Hayes:

> 2.11 **Amount of Work Dispute.** Teal and the Purchaser agree that if, at any time before the Purchaser pays the Contract Purchase Price in full, the Vendor reasonably believes that Teal has failed to meet its obligation under Paragraph 2.05 of the Teal Contract, the Vendor may give notice (the "**Dispute Notice**") to Teal and the Purchaser specifying in reasonable detail the particulars of the default, in which case a dispute is deemed to exist between the Vendor and Teal under this Agreement, which dispute, despite the reference in Paragraph 2.05 of the Teal Contract to resolving amount of work disputes in accordance with the Contract Regulation (as defined in the Teal Contract), will be resolved as follows:
>
> (a) as soon as reasonably practicable after the notice is given, the Vendor and Teal will:
>
> (i) cause their respective appropriate personnel with decision making authority to meet in an attempt to resolve the dispute through amicable negotiations; and
>
> (ii) provide frank, candid and timely disclosure of all relevant facts, information and documents to facilitate those negotiations;
>
> (b) if the dispute is not resolved by such negotiations within 15 days of the Vendor having given the Dispute Notice, either the Vendor or Teal may, within 30 days after the Dispute Notice was given, deliver a Notice (a "Mediation Notice") to the other party requiring the dispute to go to mediation, in which case the Vendor and Teal will attempt to resolve the dispute by structured negotiation with a mediator administered under the Commercial Mediation Rules of the British Columbia International Commercial Arbitration Centre before a mediator agreed upon by the Vendor and Teal or, failing agreement, appointed by the Centre;
>
> (c) if:
>
> (i) the dispute is not resolved within 14 days after the mediator has been agreed upon or appointed under Section 2.11(b); or
>
> (ii) the mediation is terminated earlier as a result of a written notice by the mediator to the Vendor and Teal that the dispute is not likely to be resolved through mediation, either the Vendor or Teal may, not more than 14 days after the conclusion of the period referred to in Section 2.1 1(c)(i) or the receipt of the notice referred to in Section 2.11(c)(ii), as the case may be, commence arbitration proceedings by giving a notice of arbitration to the other party, in which case the dispute will be referred to and finally resolved by arbitration administered under the British Columbia International Commercial Arbitration Centre's Shorter Rules for Domestic Commercial Arbitration before an arbitrator agreed upon by the Vendor and Teal or, failing agreement, appointed by the Centre, and the decision of the arbitrator will be final and binding on the Vendor, the Purchaser and Teal, but will not be a precedent in any subsequent arbitration under this Section;
>
> (d) pending resolution or other determination of the dispute under this Section, the Purchaser will continue to perform its obligations under the Teal Contract; and

(e) if, as a result of the resolution or other determination of the dispute under this Section, Teal allocates an additional amount of work to the Purchaser, the Purchaser will perform that additional amount of work in accordance with the terms of the Teal Contract.

47 Some of the objections to the Offer are summarized in the August 10, 2009 letter from counsel for Hayes to counsel for Teal:

As you are aware our client has entered into a contract with North View Logging Ltd. to sell that contract to North View. Having done so Hayes is not in a position to enter into a second contract to sell the same contract.

Apart from that problem, there are a number of other issues that make this offer problematic from Hayes' perspective, these include:

1. The proposed purchase price is substantially less than the North View offer, some $250,000. In addition, to obtain an extension of the closing of the transaction to North View, Hayes has had to agree to a break fee of $50,000 payable to North View if Hayes sells the contract to Teal. A copy of that agreement is enclosed;

2. The rate of payment on the Promissory Note is only $2 per M3 as opposed to the $3 per M3 to be paid by North View;

3. The Purchaser is a shell company incorporated on August 6, 2009 that appears to have no assets. It is proposed that the sale proceeds derived from the Horsman Trucking subcontract be used to fund the cash component of the transaction, with the balance to be paid by the $2 per M3 payable under the Promissory Note. The Purchaser will not have any of its assets invested in this contract and is not at any financial risk. There is no consequence to the Purchaser simply walking away from its obligations and allowing Teal to cancel the underlying Bill 13 contract for non performance;

4. The only security proposed is from what appears to be a shell company and even that is limited to the underlying Bill 13 contract itself. If the Purchaser, a Teal nominee, defaults in performance, Teal will cancel the Bill 13 contract, and the "security" held by Hayes would vanish;

5. Payment under the promissory note is wholly dependent upon Teal allocating the amount of work that the holder of the Bill 13 contract is entitled to. An arm's length purchaser, such as North View, has a strong economic interest in enforcing its rights as against Teal to ensure that it receives the volume of work it is entitled to. The Purchaser proposed by Teal is a Teal nominee and will have no such economic interest. Teal has taken every step it can in the course of the CCAA proceedings to terminate the Bill 13 contract. We see no reason to expect that this attitude will change once both sides of the Bill 13 contract are in the control of Teal;

6. Teal can arbitrarily reduce and or delay the amount payable under the Promissory Note by allocating work that could or should be done by Hayes to other contractors working for Teal on TFL 46. It is doing so now;

7. There is no evidence of the ability of the Purchaser to do the work required under the contract, its finances, equipment or personnel.

48 Many of the objections raised by Hayes regarding the Offer parallel many of the objections raised by Teal regarding the North View offer. While Teal and 858 have common shareholders, none of the information that Teal required of North View is available to Hayes or the Court regarding the Offer of 858. If it is the position of Teal that the Court should approve the offer of 858 because it is reasonable to do so and is in the best interests of the creditors of Hayes to do so, then I conclude that Teal has not met the burden of showing that it is. In the context of whether withholding consent has been reasonable or not, a number of factors apply. If those factors are applied to the application of Teal, it is clear that a reasonable person would withhold consent and it is clear that approval of the offer of 858 would not be ordered. It is difficult for Teal to argue on one hand that a reasonable person would withhold consent for the proposed assignment to North View but, at the same time, the Court should approve the proposed transfer to 858, even though there is even less information available to allow the Court to reasonably assess the future contractual partner recommended by Teal. There is no information regarding the financial capability of 858. There is nothing which would allow the Court to satisfy itself as to the financial ability of 858 to meet its prospective obligations. As well, the Court is not in a position to approve offers where the offer continues to contain conditions precedent that have not been met. In this regard, the approval of Horsman to "transfer" its contract with Hayes to 858 so that 858 receives $400,000.00 remains an unfulfilled condition.

49 There are also significant economic advantages to the creditors of Hayes to accept the North View offer and for the Court to make a finding that the consent of Teal has been unreasonably withheld so that the assignment of the Contract to North View should be approved. First, the offer of North View is $214,266.00 better. Second, the balance of the purchase price is paid off more quickly as the payment will be based on $3.00 per cubic metre, whereas the payment of the balance of the purchase price contemplated by 858 will be based on a payment of $2.00 per cubic metre. Third, if there is default, it is clear that the creditors of Hayes will benefit if there is a reversion of the Contract to Hayes. I cannot conclude that is the case with the Offer. Fourth, it may well be that Hayes will have to pay a $50,000.00 cancellation fee to Horsman if the Offer is approved by the Court.

50 It also should be noted that 858 is bringing none of its own money "to the table". Rather, all of the $400,000.00 that will be due on closing comes from the funds that would be available from Horsman if Horsman is prepared to enter into a similar subcontract with 858. As well, all payments of the $2.00 per cubic metre contemplated under the Offer are wholly dependent upon Teal allocating the amount of work that is contemplated under the Contract. North View has a stronger economic interest to enforce its rights against Teal to ensure that it receives the volume of work it is entitled to under the Contract whereas 858 has no such economic interest. As well, what is proposed under the Offer provides ample opportunity for the arbitration process and appeals therefrom to delay the question of the allocation of work to 858.

51 I am satisfied that Teal has unreasonably withheld its consent for the assignment of the Contract from Hayes to North View. Even if I had not reached that conclusion, I am satisfied that the advantages to the creditors of Hayes far outweigh any disadvantages so that I should exercise the discretion available to me under the *CCAA* to approve the assignment of the Contract despite the consent of Teal being reasonably withheld. The sale to North View Timber Ltd. of the replaceable stump to dump logging contract between Hayes Forest Services Limited and Teal Cedar Products Ltd. is approved. The application by Teal Cedar Products Ltd. to approve a sale of that contract to 858434 BC Ltd. is dismissed.

52 The parties will be at liberty to speak to the question of costs.

Application for approval of sale granted; application to lift stay of proceedings dismissed.

Appendix "A"

Schedule "D"

Dispute Resolution Cause Timber Harvesting Contracts

Dispute Resolution

Where the Work performed by the Contractor under an agreement with the Company is carried out on lands managed by the Company under a Tree Farm Licence or Forest Licence, and where a dispute arises over a term, condition or obligation under the agreement which cannot be resolved amicably between the parties within 30 days of the dispute arising, the Company and the Contractor mutually agree that either party may invoke the following dispute resolution provisions:

(a) The parties may by agreement first attempt to resolve their dispute with the assistance of a single professionally qualified mediator. The mediator shall be chosen by agreement between the parties. In the event that the parties fail to agree on the choice of a mediator, then a mediator shall be chosen by a mutually agreed upon third party unrelated to the parties to this agreement.

(b) In the event that the mediator is unsuccessful in assisting the parties to resolve their dispute within 5 days of the commencement of the mediation, or either party wishes the dispute to proceed directly to arbitration, then either party may require by notice in writing that the. matter be referred to arbitration as provided for by the provisions of the Dispute Resolution Clause.

Where either party to the agreement has commenced an action in a court of competent jurisdiction regarding a term, condition or obligation under the agreement, and the action is in good standing, then the parties to the agreement shall not invoke or continue with the dispute resolution provisions of the agreement until such time as the court action has been finally concluded. Where a court issues a judgement in an action regarding a term, condition or obligation under the agreement and the judgement becomes final, then that judgement shall constitute the final resolution of the dispute between the parties.

Arbitration

The Company and the Contractor mutually agree that where a dispute is to be resolved by arbitration (the "Arbitration Proceeding"), it shall be so resolved by a single arbitrator to be agreed on by the parties. If the parties are unable to agree on the choice of arbitrator then a single arbitrator shall be selected pursuant to the Commercial Arbitration Act, S.B.C. 1996, c. 3 as amended.

The Arbitration Proceeding shall be conducted in Vancouver British Columbia or such other place as the parties may agree in writing. The rules of procedure for the Arbitration Proceeding shall be those provided for in the Commercial Arbitration Act for domestic commercial arbitrations. as amended by the provisions of the Dispute Resolution Clause.

Each party shall only be entitled to two days to complete their submissions to the arbitrator. Each party shall have the right of reply to the submission of the other for one hour only. ....

The arbitrator shall hand down the arbitral award within 7 days of the completion of the submissions and reply of the parties.

Discovery

Each party shall be entitled to the following pre-arbitration "examination for discovery" rights, as that term is defined in the Rules of Court of the Supreme Court of British Columbia:

(a) discovery of all relevant documents pertaining directly to the issue or issues in dispute between the parties;

(b) discovery of one officer or representative of the other party;

(c) each party shall be allowed to discover the officer or representative of the other for no more than one day for each $50,000.00 in dispute to a maximum of three days, and where no amount has been specified, then each party shall only be allowed a maximum of two days of discovery of the officer or representative of the other.

Costs of the Dispute Resolution

Where a provision in the agreement has been referred to mediation or arbitration by the Company or the Contractor, then any funds actually in dispute shall be deposited in an interest bearing trust account. Upon the resolution of the dispute, the funds and interest thereon shall be paid to the Company and the Contractor proportionately as agreed between the parties, or as directed by the arbitration award.

The Company and the Contractor shall pay all costs associated with the provision of mediation or arbitration services forthwith upon an invoice for these services being rendered, equally, except as provided for below.

The Company and the Contractor shall each bear their own costs in resolving the dispute between them, with the following exceptions:

(a) Where one party is found, on a balance of probabilities

(i) not to have pursued its various rights and responsibilities under this agreement in good faith,

(ii) not to have used all reasonable effort to resolve its dispute with the other through mediation with a minimum of delay and expense, or

(iii) not to have used all reasonable effort to resolve its dispute with the other by the Arbitration Proceeding with a minimum of delay and expense,

then the offending party shall pay the disbursements and one half of all other direct expense incurred by the other;

(b) Where both parties are found, on a balance of probabilities, to have acted in bad faith or made less than all reasonable effort to resolve their dispute, then each party shall bear its own direct costs and disbursements and shall share equally all costs associated with the conduct of the mediation and/or the Arbitration Proceeding; and

(c) For the purposes of sub-paragraphs (a) and (b) of this paragraph, the costs associated with the provision of mediation and arbitration services and the Conduct of the Arbitration Proceeding shall be considered a disbursement.

Any award or division of costs referred to herein shall constitute a liquidated debt immediately due and payable by the one party to the other, and shall be satisfied to the extent possible by the indebted party to the other from the funds held in trust and referred to above.

Failure of Arbitration

Where the Contractor and the Company agree in writing, or where the arbitrator is unable to resolve the dispute, then the dispute shall be resubmitted for arbitration in accordance with the provisions of the Dispute Resolution Clause of the agreement.

Where the inability of the arbitrator to resolve the dispute arises out of the misconduct of one of the parties in the dispute or a party affiliated with one of the parties in the dispute, then the dispute shall be deemed to be settled in favour of the other party with that other party entitled to their full costs arising out of the dispute as a liquidated debt.

END OF DOCUMENT

TAB 2

2009 CarswellOnt 8071, 62 C.B.R. (5th) 248

Nexient Learning Inc., Re

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended, And In the Matter of a Plan of Compromise or Arrangement of Nexient Learning Inc. and Nexient Learning Canada Inc.

Ontario Superior Court of Justice

H.J Wilton-Siegel J.

Heard: November 30, 2009
Judgment: December 23, 2009
Docket: CV-09-8257-00CL

Counsel: George Benchetrit for Nexient Learning Inc., Nexient Learning Canada Inc.

Margaret Sims, Arthi Sambasivan for Global Knowledge Network (Canada) Inc.

Catherine Francis, David T. Ullman, Melissa McCready for ESI International Inc.

Lynne O'Brien for Monitor

Subject: Insolvency

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

Debtor obtained certain materials from licensor pursuant to license agreement — License agreement granted debtor exclusive and perpetual use of materials on royalty-free basis subject to certain conditions — Agreement was not assignable on stand-alone basis but could be assigned in context of major changes in ownership — Licensor was entitled to terminate agreement on basis of insolvency of debtor — Debtor successfully applied for protection under Companies' Creditors Arrangement Act ("CCAA") — Licensor unsuccessfully tried to terminate license agreement — All of debtor's assets were sold to proposed assignee — License agreement was not listed among debtor's assets but assignee wished to assume it — Debtor brought motion for order permanently staying licensor's right of termination and authorizing assignment of license agreement to proposed assignee — Motion dismissed — Court had authority to grant requested relief but only when doing so was important to reorganization process — Such relief had only been granted when sale of debtor's assets could not otherwise proceed — Underlying considerations included purpose and spirit of CCAA proceedings and effect on parties' contractual rights — In this case, asset sale had proceeded without regard to whether agreement would be assigned or not

and without notice to licensor — Requested relief would currently have no impact on CCAA proceedings — Another factor was proposed assignee's decision not to assume companion agreement that debtor had with licensor — Granting requested relief at this point would amount to unfair interference with licensor's contractual rights.

Cases considered by *H.J Wilton-Siegel J.*:

Playdium Entertainment Corp., Re (2001), [2001] O.T.C. 828, 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) — followed

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — followed

Statutes considered:

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

Generally — considered

s. 11(4) — referred to

s. 11(4)(c) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 57.01(6) — referred to

MOTION by debtor for order permanently staying licensor's right to terminate license agreement and authorizing assignment of license agreement to proposed assignee.

***H.J Wilton-Siegel J.*:**

1 On this motion, the applicants, Nexient Learning Inc. and Nexient Learning Canada Inc. (collectively, "Nexient") and Global Knowledge Network (Canada) Inc. ("Global Knowledge"), seek an order authorizing the assignment of a contract from Nexient to Global Knowledge on terms that would permanently stay the right of the other party to the contract, ESI International Inc. ("ESI"), to exercise rights of termination that arose as a result of the insolvency of Nexient. ESI is the respondent on the motion, which is brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") as a result of Nexient's earlier filing for protection under that statutue.

Background

The Parties

2 Nexient Learning Inc. and Nexient Learning Canada Inc. are corporations incorporated under the laws of Canada.

3 Global Knowledge is a corporation incorporated under the laws of Ontario carrying on business across

Canada.

4 ESI is a United States corporation having its head office in Arlington, Virginia.

5 Nexient was the largest provider of corporate training and consulting in Canada. It had three business lines, which had roughly equal revenue in 2008: (1) information technology ("IT"); (2) business process improvements ("BPI"); and (3) leadership business solutions. The BPI line of business was principally comprised of three subdivisions — business analysis ("BA"), project management ("PM") and IT Infrastructure Library Training.

6 The curriculum and course materials offered by Nexient in respect of its PM programmes were licenced to Nexient by ESI pursuant to an agreement dated March 29, 2004, as extended by a first amendment dated January 16, 2006 (collectively, the "PM Agreement"). The PM Agreement granted Nexient an exclusive licence to offer the ESI PM course materials in Canada in return for royalty payments. The PM Agreement expires on December 31, 2009.

7 Similarly, the curriculum and course materials offered by Nexient in respect of its BA programmes were licenced to Nexient by ESI pursuant to an agreement dated January 16, 2006 ("BA Agreement"). The BA Agreement was executed in connection with a transaction pursuant to which ESI received the rights to BA materials from a predecessor of Nexient in return for payment of $2.5 million and delivery of the BA Agreement to the Nexient predecessor. The BA Agreement provided for a perpetual, exclusive royalty-free licence to use such BA materials in Canada.

8 ESI is a significant participant in the market for project management, business analysis, sourcing management training and business skills training. It offers classroom, on-site, e-training and professional services. To deliver its services, ESI typically enters into distributorship arrangements with distributors in countries around the world, which it describes as "strategic partnering arrangements". In Canada, ESI considers Nexient to be its "strategic partner". That arrangement is defined by the PM Agreement, the BA Agreement and, according to ESI, oral understandings and a course of dealings between ESI and Nexient that collectively constitute an "umbrella" agreement.

9 Global Knowledge Training LLC, a United States corporation ("Global Knowledge U.S."), is the parent corporation of Global Knowledge. Together with its affiliates, Global Knowledge U.S. is one of ESI's largest competitors.

Relevant Provisions Of The BA Agreement

10 Despite the grant of a perpetual licence in section 2.1, the BA Agreement provides for three "trigger" events giving rise to a right to terminate the contract. Of the three termination events, the following two are relevant:

> 6. Term and Termination
>
> 6.2 Upon written notice to [Nexient], ESI will have the right to terminate this Agreement in the event of any of the following:
>
> . . . . .

> 6.2.2 [Nexient] commits a material breach of any provision of this Agreement and such material breach remains uncured for thirty (30) days after receipt of written notification of such material breach, such written notice to include full particulars of the material breach.
>
> 6.2.3 [Nexient] (i) becomes insolvent, (ii) makes an assignment for the benefit of creditors, (iii) files a voluntary petition in bankruptcy, (iv) an involuntary petition in bankruptcy filed against it is not dismissed within ninety (90) days of filing, or (v) if a receiver is appointed for a substantial portion of its assets.

11 Pursuant to section 8.5, the BA Agreement is not assignable by either party except in the event of a merger, acquisition, reorganization, change of control, or sale of all or substantially all of the assets of a party's business.

12 Section 8.7 of the BA Agreement provides that the agreement is governed by the laws of Virginia in the United States. Section 8.8 provides that the federal and state courts within Virginia have the exclusive jurisdiction over any dispute, controversy or claim arising out of or in connection with the BA Agreement or any breach thereof.

Proceedings under the CCAA

13 On June 29, 2009, Nexient was granted protection under the CCAA by this Court. The initial order made on that day was subsequently amended and restated on two occasions, the latest being August 19, 2009 (as so amended and restated, the "Initial Order").

14 On July 8, 2009, the Court approved a stalking horse sales process involving a third party offeror. The sales process was conducted by the monitor RSM Richter Inc. (the "Monitor"). Both ESI and Global Knowledge participated in that process. In this connection, ESI signed a non-disclosure agreement on July 13, 2009 (the "NDA").

15 By letter dated July 24, 2009 (the "Termination Notice"), ESI purported to terminate the BA Agreement effective immediately on the grounds of breaches of sections 6.2.2 and 6.2.3 of the Agreement (the "Insolvency Defaults"). In respect of section 6.2.2, ESI alleged that the disclosure to potential purchasers of Nexient's assets of the BA Agreement, and of information relating to the BA materials offered by Nexient thereunder, constituted a breach of the confidentiality provisions of the BA Agreement. By the same letter, ESI purported to grant Nexient a temporary licence to continue acting as ESI's distributor in Canada for the BA materials solely to fulfill Nexient's existing obligations. Such licence was expressed to terminate on August 21, 2009.

16 No similar termination notice was sent in respect of the PM Agreement. As noted, the PM Agreement expires on December 31, 2009.

17 It is undisputed that Nexient owes ESI approximately $733,000 on account of royalties for the use of ESI's corporate training materials. ESI says that this amount includes royalties in respect of two BA courses that are not covered by the BA Agreement and are therefore payable in accordance with the "umbrella" agreement that governs the strategic partnership between ESI and Nexient.

18 By letter dated July 28, 2009, counsel for Nexient informed ESI of its client's view that, given the stay of

proceedings in the Initial Order, the Termination Notice was of no force or effect.

19 The existence and content of the Termination Notice and the letter of Nexient's legal counsel dated July 28, 2009 were communicated orally to Brian Branson ("Branson"), the chief executive officer of Global Knowledge U.S., by Donna De Winter ("De Winter"), the president of Nexient, some time between July 28 and July 31, 2009. Both documents were sent to Global Knowledge on or about August 25, 2009.

The Sale Transaction

20 Global Knowledge was the successful bidder in the sales process. In connection with the sale transaction, Nexient and Global Knowledge entered into an asset purchase agreement dated August 5, 2009 (the "APA") and a transition and occupation services agreement dated August 17, 2009 (the "Transition Agreement").

21 Under the APA, Global Knowledge agreed to acquire all of Nexient's assets as a going concern pursuant to the terms of the APA (the "Sale Transaction"). As Global Knowledge had not completed its due diligence of Nexient's contracts, the APA provided for a ninety-day period after the closing date (the "Transaction Period") during which, among other things, Global Knowledge could review the contracts to which Nexient was a party and determine whether it wished to take an assignment of any or all of such contracts. The APA also provided that, prior to the closing date, Global Knowledge had the right to designate any or all of the contracts as "Excluded Assets" which would not be assigned at the closing but would instead be dealt with pursuant to the Transition Agreement. At the Closing, Global Knowledge elected to treat all contracts of Nexient (the "Contracts") as "Excluded Assets".

22 Significantly, section 2.7 of APA provided that the purchase price would not be affected by designation of any assets, including any Contracts, as "Excluded Assets":

> **2.7 Purchaser's Rights to Exclude**
>
> Notwithstanding anything to the contrary in this Agreement, the Purchaser may, at its option, exclude any of the Assets, including any Contracts, from the Transaction at any time prior to Closing upon written notice to the Vendors, whereupon such Assets shall be Excluded Assets, provided, however, that there shall be no reduction in the Purchase Price as a result of such exclusion. For greater certainty, the Purchaser may, at its option, submit further and/or revised lists of Excluded Assets at any time prior to Closing.

Accordingly, there was no reduction in the purchase price under the Sale Transaction as a result of the exclusion of the BA Agreement from the assets that were sold and assigned to Global Knowledge at the Closing (as defined below).

23 It was a condition of completion of the Sale Transaction in favour of both parties that a vesting order, in form and substance acceptable to Nexient and Global Knowledge acting reasonably, be obtained vesting in Global Knowledge all of Nexient's right, title and interest in the Nexient assets, including the Contracts to be assumed, free and clear of all "Claims" (as defined below). As described below, the Sale Order (defined below) addressed the vesting of all Contracts that Nexient might decide to assume at the end of the Transition Period. It did not, however, include a provision that permanently stayed ESI's rights of termination based on the Insolvency Defaults.

24 Under section 4 of the Transition Agreement, Global Knowledge had the right to review the Contracts

and was obligated to notify Nexient of the Contracts it wished to assume not less than seven days prior to the end of the Transition Period. Under section 14(ii), Nexient was obligated to assign to Global Knowledge all of Nexient's right, benefit and interest in such Contracts provided all required consents or waivers in respect of the Contracts to be assigned had been obtained. Upon such assignment, section 6 provided that Global Knowledge would assume all obligations and liabilities of Nexient under such Contracts, whether arising prior to or after Closing. The Transition Agreement further provided that, during the Transition Period, Global Knowledge would perform the Contracts on behalf of Nexient.

25 On or about August 17, 2009, subsequent to submitting Global Knowledge's bid and prior to the hearing of this Court to approve the Sale Transaction, Branson spoke to John Elsey ("Elsey"), the president and chief executive officer of ESI, regarding ESI's right to terminate the BA Agreement. ESI continued to assert that it was entitled to terminate the BA Agreement on the grounds of the Insolvency Defaults. Branson advised Elsey that Global Knowledge had a different interpretation of ESI's right to terminate the BA Agreement. As discussed below, it is unclear whether the parties were addressing the same issue in this and other conversations described below regarding the right of ESI to terminate the Agreement. However, nothing turns on this issue. During that conversation, Branson advised Elsey of the proposed closing date of August 21, 2009 for the Sale Transaction.

26 Branson also spoke to De Winter and Scott Williams of Nexient regarding the enforceability of the Termination Notice (in respect of De Winter, it is unclear whether this is a reference to the telephone conversation referred to above or another conversation). Branson says he was also advised by Nexient's counsel that ESI could not terminate the BA Agreement under Canadian bankruptcy law. In addition, Branson says he also spoke to a representative of the Monitor and its legal counsel. He says their view on the enforceability of the Termination Notice was consistent with the view expressed by De Winter.

27 Following this conversation, Elsey wrote a letter to Branson in which he reiterated that the parties did not agree on the legal effect of the Termination Notice. Elsey went on in that letter to extend the purported interim licence of the BA materials granted in the Termination Notice to September 30, 2009 in view of future discussions concerning possible future collaboration between ESI and Global Knowledge scheduled for the week of September 7, 2009.

Court Approval Of The Sale Transaction

28 The Sale Transaction, together with the APA and the Transition Agreement, was approved by the Court on August 19, 2009 pursuant to the sale approval and vesting order of that date (the "Sale Order"). ESI did not file an appearance in the CCAA proceedings of Nexient. Nexient did not give notice of the Court hearing to ESI. Therefore, ESI did not receive notice of the Court hearing on August 19, 2009 nor did it receive copies of the APA or the Transition Agreement at that time. It did not attend the hearing to approve the Sale Transaction and therefore did not oppose the Order.

29 The Sale Order provided that, upon delivery of the "First Monitor's Certificate" at the time of Closing, the Nexient assets other than the Contracts would vest in Global Knowledge free and clear of any "Claims". Similarly, the Sale Order provided that, upon delivery of the "Second Monitor's Certificate" at the end of the Transition Period, the Contracts to be assigned to Global Knowledge would vest free and clear of any "Claims".

30 "Claims" is defined in the Sale Order to be all security interests, charges or other financial or monetary claims of every nature or kind. "Claims" do not, however, include any rights of termination of the BA Agreement in favour of ESI based on the Insolvency Defaults. Global Knowledge does not dispute this interpretation.

Accordingly, it has brought this proceeding to seek an order directed against ESI permanently staying ESI's rights to terminate the BA Agreement on such basis after the proposed assignment to Global Knowledge.

31 The Sale Transaction closed on August 21, 2009 (the "Closing"). Global Knowledge paid the full purchase price for the Nexient assets at that time. At the same time, the Monitor delivered the First Monitor's Certificate thereby transferring the assets to Global Knowledge free of all Claims.

32 At the time of the Sale Order, the stay under the Initial Order was also extended until the end of the Transition Period. The stay and the Transaction Period were further extended until the hearing of this motion and, at such hearing, were further extended until two days after the release of this Endorsement.

33 Nexient does not intend to file a plan of arrangement under the CCAA. As a result of the completion of the Sale Transaction, it no longer has any operations and all employees as of November 1, 2009 were assumed by Global Knowledge on that date. Upon the lifting of the stay at the end of the Transition Period, it is understood that Nexient intends to make an assignment in bankruptcy.

Events Subsequent To The Closing

34 At the time that Global Knowledge and Nexient entered into the APA, Global Knowledge marketed a few BA courses in Canada, although it says its courses approached the subject-matter in a different manner from ESI's BA courses. Global Knowledge did not offer PM courses in Canada. However, it had access to PM materials from Global Knowledge U.S. that it believed it could readily adapt for the Canadian market.

35 According to De Winter, Nexient did not regard Global Knowledge as a competitor in Canada in the BA and PM product lines at that time. By acquiring the Nexient assets including the BA Agreement, however, Global Knowledge became, in effect, a new competitor in the Canadian market for BA and PM products. At the same time, as described below, ESI, which had previously marketed its products through its strategic arrangement with Nexient, also decided to enter the Canadian market in its own right.

36 Although it had not yet determined to reject the PM Agreement, on or about September 4, 2009, Global Knowledge also commenced discussions with McMaster University regarding recognition of its training facilities and eventual accreditation of its proposed PM courses. The BA and PM courses of ESI offered by Nexient were already accredited by McMaster University.

37 Subsequent to August 21, 2009, ESI and Global Knowledge had discussions regarding their possible future relationship. In a telephone conference on September 11, 2009, attended by representatives of ESI, Global Knowledge and Nexient, Global Knowledge indicated that it did not intend to acquire the PM Agreement.

38 As a result, given the anticipated competition with Global Knowledge, ESI concluded that it would need to find a new strategic partner in Canada or begin delivering its products directly in Canada. It chose to pursue the latter option. In response to ESI commencing direct operations in Canada, Global Knowledge and Nexient commenced the motions described below seeking various orders pertaining to the BA Agreement and the NDA including injunctive relief relating to alleged breaches of these agreements.

39 In early November 2009 Global Knowledge formally advised Nexient pursuant to the Transition Agreement that it proposed to take an assignment of the BA Agreement and the NDA but did not propose to take an assignment of the PM Agreement. Its notice was unconditional — that is, it did not make such assignment con-

ditional on receiving the requested relief in this proceeding.

40 ESI opposes the assignment of the BA Agreement to Global Knowledge on the basis sought by Global Knowledge, which would permanently stay the exercise of any termination rights of ESI based on the Insolvency Defaults.

Procedural Matters

Motions Brought By The Parties

41 Nexient commenced this motion on October 30, 2009. The notice of motion seeks a declaration that the BA Agreement and the PM Agreement remain in force and are both assignable to Global Knowledge, and an order restraining ESI from interfering with Nexient's rights under the BA Agreement and PM Agreement and from carrying on BA and PM training programmes in Canada.

42 On November 3, 2009, Global Knowledge served its own notice of motion seeking the same relief. In addition, Global Knowledge seeks a declaration that the NDA is assignable to it, an order restraining ESI from breaching certain covenants in the NDA that Global Knowledge alleges have been breached relating to ESI's commencement of direct operations in Canada since September 21, 2009, and ancillary relief related to such order.

43 ESI responded by a notice of cross-motion dated November 17, 2009 seeking an order staying or dismissing the Nexient and Global Knowledge motions to the extent the relief sought (1) relates to contracts that have not been assigned to Global Knowledge; (2) does not benefit the Nexient estate; and (3) relates to contracts subject to the exclusive jurisdiction of the courts of Virginia in the United States. ESI takes the position that the BA Agreement is not assignable to Global Knowledge, that the relief sought by Nexient and Global Knowledge benefits only Global Knowledge, and that all matters pertaining to the BA Agreement are within the exclusive jurisdiction of courts in Virginia pursuant to the exclusive jurisdiction clause in that agreement. It therefore also seeks an order staying the motions of Nexient and Global Knowledge insofar as they involve the BA Agreement pending a determination by the appropriate court in Virginia of the disputes, controversies or claims pertaining to the BA Agreement asserted by the parties in their respective motions.

Narrowing Of The Issues For The Court On This Hearing

44 As a result of the following three developments before and at the hearing of this motion, the issues for the Court on this motion have been narrowed considerably.

45 First, as mentioned, Global Knowledge has advised Nexient that it does not intend to assume the PM Agreement. Accordingly, neither Nexient nor Global Knowledge now seeks any relief in respect of the PM Agreement.

46 Second, the parties agreed at the hearing that, on the filing of the Second Monitor's Certificate, the NDA would be assigned to Global Knowledge.

47 Third, the motion of Global Knowledge for injunctive relief in respect of alleged interference with Global Knowledge's rights under the BA Agreement, and in respect of alleged breaches of the NDA, was adjourned to December 21, 2009, by which date it is intended that Global Knowledge shall have commenced a separate application for the relief it seeks against ESI apart from the declaration sought on the present motion.

48 I think it is inappropriate for the Global Knowledge motion respecting injunctive relief to be adjudicated in the Nexient CCAA proceedings. Global Knowledge's claim flows from its rights against ESI under the BA Agreement and the NDA. This claim is entirely a matter between ESI and Global Knowledge. It therefore falls outside the Nexient CCAA proceedings, which will effectively terminate upon the lifting of the stay under the Initial Order at the end of the Transition Period. While Global Knowledge will not formally take an assignment of the BA Agreement and the NDA until such time, I accept that Global Knowledge may have a sufficient interest in these agreements at the present time to obtain injunctive relief, in view of Nexient's obligation under the Sale Agreement to assign them to Global Knowledge. However, to obtain such relief, Global Knowledge must first commence its own proceeding against ESI and move for such interim injunctive relief in that proceeding.

49 Similarly, ESI's request for a stay of the Global Knowledge motion is adjourned to the hearing of the motion on December 21, 2009. At that time, ESI is at liberty to bring any motion in the proceeding to be commenced by Global Knowledge it may choose addressing the jurisdictional issues raised in its cross-motion in the present proceeding.

Issues On This Motion

50 Accordingly, the issues that are addressed on this motion are:

1. Is the BA Agreement assignable to Global Knowledge, on its terms or by order of this Court?

2. If it is, is Global Knowledge entitled to an order in connection with such assignment that permanently stays the exercise of any rights that ESI may have to terminate the BA Agreement based on the Insolvency Defaults?

51 The issue of the assignability of the BA Agreement has two elements — the assignability of the agreement as a matter of interpretation of the contract which, as noted, is governed by the laws of the Virginia, and the authority of the Court to authorize an assignment to Global Knowledge if the contract is not assignable on its terms. In view of the determination below regarding the authority of the Court to authorize an assignment, it is unnecessary to consider the assignabilty of the BA Agreement as a matter of contractual interpretation and I therefore decline to do so.

52 I would note, however, that if I had concluded that Global Knowledge was entitled to the requested relief effectively deleting the Insolvency Defaults, I would also have concluded, for the same reasons, that Global Knowledge was entitled to an order authorizing the assignment of the BA Agreement to the extent it was not otherwise assignable under the laws of Virginia.

Applicable Law

Authority Of The Court To Grant The Requested Relief

53 The Court has authority to authorize an assignment of an agreement to which a debtor under CCAA protection is a party and to permanently stay termination of the agreement by the other party to the contract by reason of either the assignment or any insolvency defaults that arose in the context of the CCAA proceedings: see *Playdium Entertainment Corp., Re*, [2001] O.J. No. 4459 (Ont. S.C.J. [Commercial List]).

54 In *Playdium*, Spence J. grounds that authority in the provisions of section 11(4)(c) of the CCAA and, al-

ternatively, in the inherent jurisdiction of the Court. The reasoning, which I adopt, is set out in paragraphs 32 and 42:

> So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s. 11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute....
>
> Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

Consideration Of The Applicable Standard In Previous Decisions

55 However, the test that must be satisfied in order to obtain an order authorizing assignment remains unclear after *Playdium*. In that decision, it was clear that the sale of the debtor's assets could not proceed without the requested order. This would seem to suggest that demonstration of that fact was the applicable test.

56 On the other hand, in para. 39, Spence J. quotes with approval a statement of Tysoe J. in *Woodward's Ltd., Re*, [1993] B.C.J. No. 42 (B.C. S.C.) that suggests that it may not be a requirement that the insolvent company would be unable to complete a proposed reorganization without the exercise of the Court's discretion. Tysoe J. framed the test as requiring a demonstration that the exercise of the Court's discretion be "important to the reorganization process". In my opinion, this is the governing test.

57 In addition, in para. 43 of *Playdium*, Spence J. appears to grant the requested relief after determining that the relief did not subject the third party to an inappropriate imposition or an inappropriate loss of claims having regard to the overall purpose of the CCAA of allowing businesses to continue.

58 Moreover, Spence J. also considered a number of factors in assessing whether the relief was consistent with the purpose and spirit of the CCAA: whether sufficient efforts had been made to obtain the best price such that the debtor was not acting improvidently; whether the proposal takes into consideration the interests of the parties; the efficacy and integrity of the process by which the offers were obtained; and whether there had been unfairness in the working out of the process.

Standard Applied On This Motion

59 It is clear from *Playdium* and *Woodwards* that the authority of the Court to interfere with contractual rights in the context of CCAA proceedings, whether it is founded in section 11(4) of the CCAA or the Court's inherent jurisdiction, must be exercised sparingly. Before exercising the Court's jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the CCAA proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. and any other factors that address the equity of the proposed assignment. The Court must also be satisfied that the requested relief does not adversely affect the

third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.

The Specific Legal Issue Presented On This Motion

60 This motion raises an important issue concerning the extent of the authority of the Court to authorize the assignment of a contract in the face of an objection from the other party to the contract. ESI argues that a Court should not permit a purchaser under a "liquidating CCAA" to "cherry pick" the contracts it wishes to assume.

61 Insofar as the result would be to prevent a debtor subject to CCAA proceedings from selling only profitable business divisions or would prevent a purchaser from deciding which business divisions it wishes to purchase, I do not think ESI's proposition is either correct or practical. The purpose of the CCAA is to further the continuity of the business of the debtor to the extent feasible. It does not, however, mandate the continuity of unprofitable businesses.

62 However, the situation in which a purchaser seeks to assume less than all of the contracts between a debtor and a particular third party with whom the debtor has a continuing or multifaceted arrangement is more problematic. In many instances in which a purchaser wishes to discriminate among contracts with the same third party, the Court will not exercise its authority under the CCAA, or its inherent jurisdiction, to authorize an assignment and/or permanently stay termination rights based on insolvency defaults. In such circumstances, the purchaser must assume all contracts with the third party or none at all.

63 There can be many reasons why it would be inappropriate or unfair to authorize the assignment of less than all of a debtor's contracts with a third party. In many instances, there is an interconnection between such contracts created by express terms of the contracts. Similarly, there may be an operational relationship between the subject-matter of such contracts even if there is no express contractual relationship. Courts are also reluctant to authorize an assignment that would prevent a counterparty from exercising set-off rights in contracts that are not to be assigned. In respect of financial contracts between the same parties, for example, it would be highly inequitable to permit a purchaser to take only "in the money" contracts leaving the counterparty with all of the "out of the money" contracts and only an unsecured claim against the debtor for its gross loss. It would also be inappropriate in many circumstances to permit a selective assignment of a debtor's contracts if the competitive position of the third party relative to the assignee would be materially and adversely affected, at least to the extent the third party is unable to protect itself against such result.

Analysis and Conclusions

Preliminary Observations

64 Before addressing the issues on this motion, I propose to set out the following observations which inform the conclusions reached below.

65 First, being a perpetual, royalty-free licence, the BA Agreement represents a valuable contract to Nexient except to the extent that ESI is entitled to terminate it. It represents part of the sales proceeds received in an earlier transaction by Nexient for the BA materials developed by a predecessor of Nexient. While there is an issue as to whether the current BA materials are still subject to the BA Agreement, that issue requires a determination of facts that cannot be made in the present proceeding. It must be addressed, if necessary, in another pro-

ceeding. For the purposes of this motion, I assume that such materials could be subject to the BA Agreement, which would therefore have significant value in Nexient's hands.

66 Second, Global Knowledge was well aware that ESI's position was that it had the right to terminate the BA Agreement. As a consequence, Global Knowledge was also well aware that ESI would use any means available to it to terminate the BA Agreement after it had been assigned to Global Knowledge if ESI and Global Knowledge were unable to establish a satisfactory working relationship. Global Knowledge did not, however, seek any protections against such action by ESI in either the APA or the Sale Order.

67 In particular, as mentioned, section 4.3 of the Sale Agreement provided that the obligation of the parties to close the Sale Transaction was subject to receipt of a vesting order of this Court satisfactory in form to both parties. However, the Sale Order that was actually sought by Nexient and Global Knowledge, and was granted by the Court, did not address deletion of any of ESI's termination rights based on the Insolvency Defaults.

68 There is no explanation in the record for the failure of the Sale Order to address this matter notwithstanding the fact that, as a matter of law as set out above, there could have been no misunderstanding as to the legal requirement for terms in the Sale Order imposing a permanent stay if, at the time of the sale approval hearing, Global Knowledge in fact intended to receive a transfer of the BA Agreement on such terms. As both parties were represented by experienced legal counsel, I assume the form of the Sale Order reflected a conscious decision on the part of Global Knowledge not to address this issue explicitly at the time of the hearing.

69 Third, while Nexient and Global Knowledge allege that their intention at the time of the hearing was that the BA Agreement was to be assigned on the basis that ESI's rights to terminate it on the basis of the Insolvency Defaults would be permanently stayed, there is no evidence of such intention in the record apart from Branson's bald statements to this effect in his affidavit, which is insufficient.

70 Moreover, the evidence of Branson exhibits a lack of precision regarding his understanding of the applicable law and Global Knowledge's intentions. In both his affidavit and the transcript of his cross-examination, Branson refers to his understanding that the stay in the Initial Order prevented ESI from terminating its contractual relationship with Nexient without an order of the Court. In his affidavit, he added that he understood that, as a consequence, to the extent that contracts did not contain restrictions on assignment, they could be assigned to the successful bidder and would remain in force and effect after the assignment. This implies that he thought the Initial Order would also prevent ESI from terminating its contractual relationship with Global Knowledge, as the assignee of the Nexient contracts, without a further order of the Court.

71 As *Playdium* demonstrates, there are two different issues involved here. The stay in the Initial Order did prevent ESI from terminating the BA Agreement under Ontario Law as long as the CCAA proceedings are continuing. Indeed, because delivery of the Termination Notice contravened the Initial Order, I think the Termination Notice must be regarded as totally ineffective under Ontario Law with the result that ESI could not rely on it subsequently if ESI became entitled to terminate the BA Agreement after the assignment to Global Knowledge or otherwise.

72 The stay did not, however, by itself have the consequence of staying enforcement of any right of ESI to terminate the BA Agreement based on the Insolvency Defaults after it had been assigned to Global Knowledge. That is, of course, the reason for the present motion. Any such order would constitute, in effect, a re-writing of the BA Agreement to remove ESI's rights. As *Playdium*illustrates, a further order of the Court would be required to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults. Not only did

Global Knowledge not seek such an order as mentioned above, it also did not require Nexient to give ESI formal notice of the Court hearing to approve the Sale Transaction.

73 In the absence of such notice, I do not think any order of this Court to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults would have been binding on ESI, even though ESI had not filed an appearance in the CCAA Proceedings and had been orally advised as to the date of the hearing. Nexient and Global Knowledge therefore cannot argue that ESI's failure to oppose the Sale Order at the hearing constituted "lying in the weeds," which disentitles ESI to sympathetic consideration on this motion. Moreover, in addition to the fact that it is not established on the record that either Nexient or Global Knowledge specifically advised ESI of an intention to seek an order permanently staying ESI's termination rights based on the Insolvency Defaults, the Sale Order does not have that effect in any event, as mentioned above. There was, therefore, nothing for ESI to oppose on this issue even if it had appeared at the approval hearing.

74 Fourth, given the structure of the Sale Transaction, there is no impact on the Sale Transaction of an exclusion of the BA Agreement from the Contracts assigned to Global Knowledge. Global Knowledge has already paid the purchase price under the Sale Agreement. The effect of section 2.7 of the APA is that there will no adjustment to the purchase price if, as transpired, Global Knowledge was unable to reach agreement with ESI on acceptable terms for the assignment of the BA Agreement. There is similarly no material impact on Nexient's customers - the BA product will be delivered in Canada by either Global Knowledge or ESI depending upon the outcome of this litigation. As such, at the present time, the requested relief will have no impact on the CCAA proceedings, or on the distributions realized by Nexient's creditors under these proceedings.

75 Fifth, although there is no contractual connection between the subject matter of the PM Agreement and the BA Agreement, there is a significant operational relationship between the PM and BA product lines. They comprise two of the three product lines of Nexient's BPI division. Both products are licenced by Nexient from ESI. In many instances, both products are marketed to the same customers. In addition, Nexient's facilitators provide educational services in respect of both products. There may also be certain economies of scale associated with offering both products. In her cross-examination, De Winter summarized the situation succinctly in stating that "one product line can't operate without the other".

76 There is also a significant business relationship between ESI and Nexient. Nexient was the Canadian distributor through which ESI marketed and sold its BA and PM products. At the present time, Nexient owes ESI in excess of $733,000 in respect of royalties payable under the PM Agreement. ESI says that this amount also includes royalties for two BA courses that are not governed by the BA Agreement. It also asserts that the BA materials described in the BA Agreement no longer are included in the current BA materials as a result of subsequent revisions. There are, therefore, several issues relating to the provision of the BA materials currently distributed by Nexient that would remain to be resolved if the BA Agreement were transferred to Global Knowledge.

77 Sixth, in his affidavit, Branson gave three reasons for Global Knowledge's decision not to assume the PM Agreement: (1) the PM Agreement terminates on December 31, 2009; (2) Global Knowledge would have to assume the amounts outstanding under the PM Agreement; and (3) Global Knowledge has access to similar course materials for which it would pay lower or no royalties. Although Branson says that the outstanding liability under the PM Agreement was not the principal factor in Global Knowledge's decision, it would appear that it was an important consideration.

78 There is no suggestion that Global Knowledge was unaware of the amount outstanding under the PM Agreement at a time of signing the APA or at the time of Closing. Although Global Knowledge did not decide against taking an assignment of the PM Agreement until later, it appears that, from the time of signing the APA if not earlier, Global Knowledge proceeded on the basis that it was not prepared to assume the PM Agreement unless ESI agreed to significantly different terms, including a reduction in the amount owing under the agreement and a reduction in the royalties payable for the PM materials. If it had intended instead to assume the PM Agreement with its outstanding liability, or to keep open that possibility, Global Knowledge could simply have provided for a reduction in the purchase price in such amount in the event it assumed the PM Agreement.

79 This is significant because, as discussed below, the issue before the Court would have been considerably different, and simpler, if Nexient had proposed to assign, and Global Knowledge had proposed to assume, both the PM Agreement and the BA Agreement as they stand. In such event, the question of whether a purchaser could "cherry pick" contracts of a debtor with the same third party on a sale of the debtor's assets would not have arisen. Moreover, given the expiry date of the PM Agreement and Global Knowledge's need to adapt the PM courses to which it had access, it would have been able to implement essentially the same business plan as it is currently proposing to implement without the need for any Court order provided its interpretation of the conflict provisions in the BA Agreement is correct. In such circumstances, the principal effect of assuming the PM Agreement would have been the assumption of the liability of approximately $733,000 owed to ESI, which Global Knowledge alleges was not the principal factor in its decision to reject the PM Agreement.

80 Seventh, Global Knowledge seeks relief that is related solely to the BA Agreement. It treats the BA Agreement and the PM Agreement as completely unrelated to each other. This treatment is not entirely unjustified in view of the wording of these agreements. Section 6.6.1 of the BA Agreement does not expressly refer to the provision of services or products that compete with PM products delivered under the PM Agreement. Whether this interpretation is affected by the course of dealing or the alleged "umbrella" agreement between the parties is not an issue that can be addressed on this motion.

81 However, given that, on this motion, Global Knowledge and Nexient seek relief that requires the exercise of the Court's discretion under section 11(4) of the CCAA or pursuant to its inherent jurisdiction, I think the contractual arrangements between the parties, while important, are not the only factors to be considered by the Court. Instead, the Court should look to the entirety of the arrangement between ESI and Nexient and assess (1) the extent of the adverse impact on ESI of the order sought by Nexient and Global Knowledge and (2) whether there are any alternatives to the proposed relief that achieve the same result with less encroachment on ESI's rights.

Analysis and Conclusions

82 The applicants' request for relief is denied for the following three reasons.

83 First, because of the structure of the Sale Transaction, the requested relief will not further the CCAA proceedings and will have no impact on Nexient or its stakeholders. The Sale Transaction has been completed and cannot be unwound. At the present time, the only impact of the proposed relief is to adversely affect ESI's rights to terminate the BA Agreement after the proposed assignment to Global Knowledge.

84 The evidence is, therefore, insufficient to satisfy the test noted by Spence J., and adopted above, that the requested order be important to the reorganization process. The time to request such relief was either at the time of negotiation of the Sale Agreement or at the time of the Sale Order. Given the terms of the Sale Transaction -

in particular, the fact that the purchase price has been paid and is not subject to adjustment in respect of any exclusion of assets - it is impossible to demonstrate that the requested order is important to the reorganization after closing of the Sale Transaction. The proposed relief also cannot satisfy the requirement that it adversely affect ESI's contractual rights only to the extent necessary to further the reorganization process. Accordingly, it also cannot be said that such interference with ESI's contractual rights does not entail an inappropriate imposition upon ESI.

85 Second, there is no evidence that Nexient and Global Knowledge intended at the time of entering into the Sale Transaction, or at the time of the approval hearing, to assign the BA Agreement to Global Knowledge on the basis of a permanent stay preventing ESI from terminating the BA Agreement based on the Insolvency Defaults. There is, therefore, no basis for an order rectifying the Sale Order to include such provisions at the present time. In reaching this conclusion, the following considerations are relevant.

86 The structure of the Sale Transaction contradicts the existence of the alleged intention. At Closing, Global Knowledge elected to treat all Contracts as "Excluded Assets". Consequently, given the structure of the Sale Transaction, Global Knowledge assumed the risk that it might be unable to reach an acceptable accommodation with ESI with whatever consequences that entailed. The evidence before the Court does not explain the thinking behind Global Knowledge's decision to take this calculated risk but the actual reason is irrelevant to the determination of this motion. It is impossible to conclude that the parties intended at the time of Closing to transfer the BA Agreement on the basis of a permanent stay given that Global Knowledge had not yet reached a conclusion as to whether it even wished to take the BA Agreement. The most that can be said is that the parties may have had an intention to transfer the BA Agreement on the basis of a permanent stay *if* Global Knowledge decided later to take an assignment. This does not constitute an intention at the time of the Court approval hearing. It also begs the question of why, even on such a conditional intention, the parties did not seek appropriate conditional relief at the time of the hearing on the Sale Order.

87 More generally, the evidence suggests that, at the time of Closing, Global Knowledge had not decided between two options — to attempt to renegotiate the BA Agreement and the PM Agreement on favorable terms, including the financial arrangements, or to assume the BA Agreement only and seek a Court order permanently staying ESI's rights of termination based on the Insolvency Defaults. Global Knowledge pursued the first option until the September 11, 2009 telephone conference, after which it appears to have decided to pursue the second. On this scenario, Global Knowledge cannot say that, at the time of Closing or of the Court approval hearing, it intended to take an assignment of the BA Agreement on the basis of a permanent stay.

88 In any event, to obtain rectification, Nexient and Global Knowledge must demonstrate that ESI shared the alleged intention, or alleged understanding, or that ESI acquiesced in the alleged intention or understanding. They cannot do so on the evidence before the Court.

89 It is impossible to infer from the relative significance of the BA Agreement to Nexient that all the parties must have understood that Global Knowledge would be receiving an assignment of the BA Agreement free of any risk of termination by ESI. The BA product line represented less than one-third of the total revenues of Nexient. There is no evidence in the record of its relative contribution to profit. The only evidence are unsupported statements in Branson's affidavit to the effect that the BA Agreement was a "highly material contract" in Global Knowledge's consideration of its bid for the Nexient assets. There is nothing in the description of the conversation between Elsey and Branson on or about August 17, 2009 or otherwise in the record to support Branson's statement.

90 Global Knowledge submits that this intention should be inferred from the fact that the Sale Transaction was on a "going-concern" basis. Such an inference might be reasonable if Global Knowledge was, in fact, purchasing all of the Nexient assets on a "going-concern" basis. Its failure to take all of the Contracts, including the PM Agreement, however, excludes such an inference in the present circumstances.

91 Third, Global Knowledge has failed to demonstrate circumstances that would justify the exercise of the Court's discretion to order a permanent stay against ESI in respect of its rights of termination based on the Insolvency Defaults in the BA Agreement given Global Knowledge's decision not to take an assignment of the PM Agreement. In reaching this conclusion, I have taken the following factors into consideration.

92 I acknowledge that there are factors weighing in favour of authorizing an assignment of the BA Agreement on the requested terms of a permanent stay against ESI. As mentioned, the BA Agreement appears to constitute a valuable asset of Nexient. It is in the interests of Nexient's creditors that value be received for such asset by way of an assignment. In addition, the sale price for the Nexient assets, including the BA Agreement, was arrived at in a sales process previously approved by this Court. There is no suggestion that the process lacked integrity, that the price for the assets did not represent fair market value or that it was an improvident sale.

93 However, by taking an assignment of the BA Agreement but not the PM Agreement, ESI is adversely affected in two respects.

94 First, in any negotiations between Global Knowledge and ESI relating to issues under the BA Agreement, including the two issues relating to the BA materials described above and the extent to which, if at all, the conflict provisions of section 6.2.1 of the BA Agreement prevent the marketing of Global Knowledge's PM products, ESI's bargaining position has been weakened by the exclusion of its claim for royalties owing under the PM Agreement.

95 Second, and more generally, ESI will be competitively disadvantaged in the Canadian marketplace if it is unable to deliver both its PM products and its BA products either directly or through a new "strategic partner". As discussed above, the evidence in the record indicates that there is a significant benefit to having a common entity market both BA products and PM products. This was reflected in Nexient's BPI business line and in Global Knowledge's own business plan, both of which involved marketing both product lines together.

96 This raises the issue of whether the Court should refuse to exercise its discretion to order a permanent stay of ESI's rights to terminate the BA Agreement based on the Insolvency Defaults in the circumstances in which Global Knowledge does not intend to take an assignment of the PM Agreement. In my view, such order should not be granted for three reasons.

97 First, as mentioned, in the present circumstances, the purposes of the CCAA will not be furthered by the proposed relief. Given the structure of the Sale Transaction, it is unnecessary to grant the requested relief to complete the Sale Transaction at the agreed sale price. Moreover, the effect of such an order would be to destroy the overall relationship between ESI and Nexient. rather than to continue the BPI business line of Nexient in its form prior to the CCAA proceedings.

98 Second, as mentioned, whether intentional or not, Global Knowledge is seeking to use the CCAA proceedings as a means of competitively disadvantaging ESI in Canada. ESI and Global Knowledge are already competitors in the United States. ESI will be competitively disadvantaged in Canada if it can offer only its PM products and not its BA products and Global Knowledge will be correspondingly advantaged. The Court's dis-

cretion should not be invoked to competitively disadvantage a licensor to the debtor in favour of a purchaser of the debtor's assets where the licensor has bargained for protection against such event in its contract with the debtor.

99 ESI bargained for the right to ensure that its BA courses and PM courses were marketed by an entity of its own choosing after an insolvency of Nexient through the inclusion of the insolvency termination provisions in the BA Agreement and PM Agreement. I do not think that the Court's authority should be invoked to remove that right as a result of Nexient's CCAA proceedings in the present circumstances where the PM Agreement is not to be assumed by Global Knowledge. ESI cannot expect to improve its competitive position as a result of the CCAA proceedings. Conversely, the Court's discretion should not be invoked in CCAA proceedings to weaken the competitive position of ESI in favour of a competitor.

100 Third, the discretion of the Court should not be invoked after failed negotiations between the purchaser and the third party respecting the feasibility of an on-going relationship. As mentioned above, Global Knowledge excluded the BA Agreement and the PM Agreement at Closing pending not only a review of the agreements themselves but, more importantly, pending the outcome of negotiations between Global Knowledge and ESI regarding the possibility of a workable relationship. Among other things, such a relationship required a renegotiation of the financial terms of the PM Agreement to the benefit of Global Knowledge that ESI was not prepared to accept. Those negotiations were conducted on the basis that the Sale Order did not include any terms providing for a permanent stay of ESI's termination rights in respect of the BA Agreement. In entering into the APA and closing on an unconditional basis, Global Knowledge accepted the risk that such negotiations would prove unsuccessful. It is not appropriate for the Court to exercise its discretion at this stage to re-write the terms of the BA Agreement to the detriment of ESI in order to adjust the financial benefits of the Sale Transition in favour of Global Knowledge. To do so would be to change the relative bargaining positions of the parties after their negotiations had terminated.

Conclusion

101 Based on the foregoing, I conclude that, while the Court has authority to authorize an assignment of the BA Agreement to Global Knowledge notwithstanding any provision to the contrary in that agreement, it should not exercise its discretion to authorize the proposed assignment on the basis requested by Global Knowledge, which involves the issue of a permanent stay against the exercise of any rights of ESI to terminate the BA Agreement based on the Insolvency Defaults.

Costs

102 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other party's submission to provide the Court with any reply submission they may choose to make. Submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

Motion dismissed.

END OF DOCUMENT

TAB 3

Court File No. 10-8699-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

THE HONOURABLE MR.	)	FRIDAY, THE 4th
	)	
JUSTICE MORAWETZ	)	DAY OF JUNE, 2010

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PLANET ORGANIC HEALTH CORP. AND DARWEN HOLDINGS LTD.

APPLICANTS

APPROVAL AND VESTING ORDER

THIS MOTION, made by Planet Organic Health Corp. and Darwen Holdings Ltd., (collectively, the "Applicants") for an order approving the acquisition (the "Acquisition") contemplated by an acquisition agreement among the Applicants and the Creditor (as that term is defined in the Acquisition Agreement) made as of May 19, 2010 and appended to the Affidavit of Darren Krissie sworn May 20, 2010 and as amended pursuant to the First Amendment to Acquisition Agreement dated June 1, 2010 and appended to the Affidavit of Darren Krissie sworn on June 3, 2010, together with such non-material amendments as may be consented to by the Monitor (defined below) (collectively, the "Acquisition Agreement"), and vesting in the Creditor all right, title and interest in and to the assets described in the Acquisition Agreement (the "Assets"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the material filed, including the Motion Record of the Applicants, the Third Report of the court-appointed monitor, Deloitte & Touche Inc. (the "Monitor"), the Responding Motion Record of 8000 Bathurst Street Realty Inc. and on hearing the submissions of counsel for the Applicants, counsel for the Monitor, counsel for the Creditor, counsel for 8000

Bathurst Street Realty Inc., and such other counsel as were present, and on being advised that the Service List was served with the Motion Record herein:

1. THIS COURT ORDERS that, if necessary, the time for service of the Notice of Motion and the Motion Record is hereby abridged so that this motion is properly returnable today and hereby dispenses with further service thereof.

2. THIS COURT ORDERS AND DECLARES that capitalized terms used herein that are not otherwise defined shall have the meanings set out in the Acquisition Agreement.

Approval and Vesting

3. THIS COURT ORDERS AND DECLARES that the Acquisition including, without limitation, the payment and acquisition contemplated in section 2.1 of the Acquisition Agreement is hereby approved, and that the Acquisition Agreement is in the best interests of the Applicants and their stakeholders. The execution of the Acquisition Agreement by the Applicants is hereby authorized and approved, and the Applicants are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of, or to further evidence or document, the Acquisition and for the conveyance of the Assets to the Creditor.

4. THIS COURT ORDERS that, upon satisfaction (or, where applicable, waiver) of the conditions set out in Article 6 of the Acquisition Agreement, the Monitor shall file with this Court a certificate substantially in the form attached as Schedule A hereto stating that all conditions precedent set out in Article 6 of the Acquisition Agreement have been satisfied (or, where applicable, waived by the Applicants or the Creditor in accordance with the terms of the Acquisition Agreement) (the "Monitor's Certificate"). For the purposes of the preparation of the Monitor's Certificate, the Monitor shall be entitled to rely upon information provided by the Applicants with respect to the satisfaction or waiver of the conditions set out in Article 6 of the Acquisition Agreement.

5. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's Certificate to the Creditor, all right, title and interest in and to the Assets described in the Acquisition Agreement shall vest absolutely in the Creditor, free and clear of and from any and

all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims"), whether such Claims came into existence prior to, subsequent to, or as a result of any previous orders of this Court, contractually, by operation of law or otherwise, including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Justice Mr. Justice Morawetz dated April 29, 2010; and (ii) all charges, security interests or claims evidenced by registrations including without limitation pursuant to the *Personal Property Security Act* (Ontario), the *Personal Property Security Act* (Alberta), *Personal Property Security Act* (British Columbia), *Personal Property Security Act* (Nova Scotia), *Personal Property Security Act* (Saskatchewan) or any other personal property registry system (all of which are collectively referred to as the "Encumbrances") and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Assets shall, upon the delivery of the Monitor's Certificate to the Creditor, be and are hereby expunged and discharged as against the Assets.

6. THIS COURT ORDERS that, subject to and in accordance with the restrictions in section 11.3 of the *Companies' Creditors Arrangement Act* (Canada) ("CCAA"), the Applicants are authorized and directed to assign the contracts, leases, agreements and other arrangements of which the Creditor takes an assignment on closing pursuant to and in accordance with the terms of the Acquisition Agreement (the "Contracts") and that such assignments are hereby approved and are valid and binding upon the counterparties notwithstanding any restriction or prohibition on assignment contained in any such Contracts.

7. THIS COURT ORDERS that from and after the Closing Date, subject to the CCAA, all Persons shall be deemed to have waived all defaults then existing or previously committed by the Applicants under, or caused by the Applicants under, and the non-compliance by the Applicants with, any of the Contracts arising solely by reason of the insolvency of the Applicants or as a result of any actions taken pursuant to the Acquisition Agreement or in these proceedings, and all notices of default and demands given in connection with any such defaults under, or non-compliance with, the Contracts shall be deemed to have been rescinded and shall be of no further force or effect.

8. THIS COURT ORDERS that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), and pursuant to any other similar provincial legislation, the Applicants are authorized and permitted to disclose and transfer to the Creditor all human resources and payroll information in the Applicants' records pertaining to the Applicants' past and current employees. The Creditor shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects in compliance with PIPEDA and other similar provincial legislation.

Cash Reserve

9. THIS COURT ORDERS that the Monitor shall establish a cash reserve in the amount of $2,031,281, as required under the Acquisition Agreement, on the Closing Date, using funds from the Cash and Cash Equivalents (the "Cash Reserve"), which Cash Reserve shall be held by the Monitor in a segregated account ("Cash Reserve Account") in trust for the benefit of Persons entitled to be paid the Cash Reserve Costs and the Creditor for the purpose of paying the Cash Reserve Costs in accordance with this Order.

10. THIS COURT ORDERS that the Cash Reserve Costs shall consist of the following obligations of the Applicants outstanding on the Closing Date:

(a) obligations secured by the Administration Charge to the extent required for the completion of the CCAA Proceeding in an amount not to exceed $300,000;

(b) obligations secured by the Directors' Charge including, legal fees and costs incurred by the directors and officers of the Applicants in connection with the conduct of the directors' and officers' claims process contemplated by the D&O Claims Procedure Order, that arose prior to the Closing Date, in an aggregate amount not to exceed $500,000;

(c) claims under subsections 6(5)(a) of the CCAA to the extent not paid by the Applicants on or before the Closing Date or assumed by the Creditor on the Closing Date, which amounts are expected not to exceed $75,000; and

(d) the obligation of the Applicants to pay the PCG Transaction Fee as defined in the Acquisition Agreement;

11. THIS COURT ORDERS that, as soon as reasonably possible following and in any event within fifteen (15) days of, the Closing Date, or by such later date as may be ordered by the

Court, the Monitor shall quantify, based on the books and records of the Creditor, the precise amount of each of the Cash Reserve Costs under paragraph 10(c) hereof. For such purpose, the Monitor shall be given access to the books and records of the Applicants and shall be entitled to rely exclusively thereon and, in particular, shall not be responsible for any errors therein or the impact of such errors on the Monitor's quantification of any such Cash Reserve Cost. Upon being provided with the Monitor's quantification of each such Cash Reserve Cost, the Creditor shall have ten (10) days to decide whether to agree to the Monitor's quantification of such Cash Reserve Cost, failing which agreement the amount of any such Cash Reserve Cost still in dispute shall be determined, on application of the Monitor, on notice to the Creditor, any affected directors and officers of the Applicants and any affected beneficiary of the Administration Charge, by Order of the Court. Once the amount of any such Cash Reserve Cost has either been agreed to or determined by the Court, as set forth above, the Monitor shall pay such claim from the Cash Reserve Account.

12. THIS COURT FURTHER ORDERS that, from time to time after the Closing Date, the Monitor shall reduce the amount of the Cash Reserve as and to the extent that the Monitor, the Creditor, any affected directors and officers of the Applicants and any affected beneficiary of the Administration Charge agree, or a Court determines, that it, or portions of it, are no longer required to satisfy Cash Reserve Costs by distributing to the Creditor the amount of such reductions. All right, title and interest in and to any amounts in the Cash Reserve Account that are not used to pay Cash Reserve Costs in accordance with this Order shall vest absolutely in the Creditor as at the Closing Date and shall be distributed to the Creditor in accordance with this paragraph.

13. THIS COURT FURTHER ORDERS that nothing in this Order shall affect the rights of counsel to the Applicants, the Monitor and counsel to the Monitor to use and apply the retainers received by them from the Applicants.

General

14. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Applicants and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of any of the Applicants;

the vesting of the Assets in the Creditor and the payment of any amounts contemplated by the Acquisition Agreement pursuant to this Order including, without limitation, the payment and acquisition contemplated in section 2.1(1) of the Acquisition Agreement, shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Applicants and shall not be void or voidable by creditors of the applicable Applicant, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance or other transfer at undervalue under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

15. THIS COURT ORDERS AND DECLARES that the Acquisition is exempt from the application of the *Bulk Sales Act* (Ontario).

16. THIS COURT ORDERS that the Exhibit "A" to the Affidavit of Tripp Baird sworn May 20, 2010 shall be segregated from other documents filed in connection with this motion and shall be sealed until the filing with the Court of the Monitor's Certificate in relation to the Acquisition or upon further Order of the Court.

17. THIS COURT ORDERS that the Applicants shall, subject to such requirements as are imposed by the CCAA, have the right to permanently or temporarily cease, downsize or shut down any of its business or operations in accordance with Acquisition Agreement.

18. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Applicants and their agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants, as may be

necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

19. THIS COURT ORDERS AND DECLARES that the actions and conduct of the Monitor in the CCAA proceedings from April 29, 2010 to the date of the Third Report, as more particularly set out in the First, Second and Third Reports, and the First, Second and Third Reports, be and are hereby approved and that the Monitor has satisfied all of its obligations from April 29, 2010 up to and including the date of the Third Report.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUN 0 4 2010

PER / PAR:

Schedule A – Form of Monitor's Certificate

Court File No. 10-8699-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PLANET ORGANIC HEALTH CORP. AND DARWEN HOLDINGS LTD.

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Mr. Justice Morawetz of the Ontario Superior Court of Justice (the "Court") dated April 29, 2010, Deloitte & Touche Inc. was appointed as the monitor of the Applicants (the "Monitor").

B. Pursuant to an Order of the Court dated June 4, 2010, the Court approved the acquisition agreement among Planet Organic Health Corp. and Darwen Holdings Ltd. (collectively, the "Applicants") and 7562578 Canada Inc. (the "Creditor") made as of May 19, 2010 and as amended pursuant to the First Amendment to Acquisition Agreement dated June 1, 2010, together with such non-material amendments as may be consented to by the Monitor (collectively, the "Acquisition Agreement") and provided for the vesting in the Creditor of all right, title and interest in and to the Assets, which vesting is to be effective with respect to the Assets upon the delivery by the Monitor to the Creditor of a certificate with this Court confirming that (i) the conditions to Closing as set out in Article 6 of the Acquisition Agreement have been satisfied or waived by the Applicants and the Creditor, (ii) the Applicants have been released from the guarantee agreement dated as of July 3, 2007 (the "Guarantee") in respect of

the amended and restated term loan agreement dated as of November 30, 2007 (as amended) (the "Term B Credit Agreement"), and (iii) the Transaction has been completed to the satisfaction of the Monitor.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Acquisition Agreement.

THE MONITOR CERTIFIES the following:

1. The conditions to Closing as set out in Article 6 of the Acquisition Agreement have been satisfied or waived by the Applicants and the Creditor.

2. The Applicants have been released from the Guarantee in respect of the Term B Credit Agreement.

3. The Transaction has been completed to the satisfaction of the Monitor.

4. This Certificate was delivered by the Monitor at ● [TIME] on ● [DATE].

Deloitte & Touche Inc., in its capacity as Monitor of the Applicants, and not in its personal capacity

Per: _____

Name:

Title:

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

AND IN THE MATTER OF PLANET ORGANIC HEALTH CORP. and DARWEN HOLDINGS LTD.

Court File No. 10-8699-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

MONITOR'S CERTIFICATE

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Lawyers for the Monitor

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

AND IN THE MATTER OF PLANET ORGANIC HEALTH CORP. and DARWEN HOLDINGS LTD.

Court File No. 10-8699-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER

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Lawyers for the Applicants

TAB 4

2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302

2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302

Playdium Entertainment Corp., 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 Playdium Entertainment Corporation et al.

Ontario Superior Court of Justice [Commercial List]

Spence J.

Heard: October 29 and 30, 2001
Judgment: November 2, 2001[FN*]
Docket: 01-CL-4037

Proceedings: additional reasons at [2001] CarswellOnt 4109 (Ont. S.C.J. [Commercial List])

Counsel: *Paul G. Macdonald, Alexander L. MacFarlane*, for Covington Fund I Inc.

Gary C. Grierson, J. Anthony Caldwell, for Famous Players Inc.

Craig J. Hill, for Pricewaterhouse Coopers Inc.

Roger Jaipargas, for Monitor

Gavin J. Tighe, for Toronto-Dominion Bank

Michael B. Rosztain, for Canadian Imperial Bank of Commerce

Geoff R. Hall, for Ontario Municipal Employees Retirement Board

David B. Bish, for Playdium Entertainment Corporation

Julian Binavince, for Cambridge Shopping Centres Limited

Subject: Corporate and Commercial; Insolvency

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Group of corporations which operated chain of cinemas attempted restructuring under Companies' Creditors Ar-

rangement Act, but no viable plan was arrived at — Corporations proposed that all their assets be transferred to new corporation, to be indirectly controlled by corporations' two primary secured creditors — Transaction would involve assignment of all material contracts of business, including agreement with film distribution company — Corporations were not in compliance with agreement, but proposed that new corporation would take steps to achieve compliance — Corporations brought application for court approval of proposed transfer — Application granted — Interim receiver appointed — Corporations did not have right to make assignment pursuant to s. 35 of agreement, because transfer was not to "affiliate" and film distribution company's consent to transfer was not unreasonably withheld — Film distribution company was entitled to look for better deal elsewhere in view of corporations' ongoing non-compliance with agreement — Court had jurisdiction to approve transfer, however, by reason of Companies' Creditors Arrangement Act — Appropriate to approve transfer in circumstances — Corporations had made sufficient effort to obtain best price and had not acted improvidently — Proposal took into account interests of trade creditors, employees and members of public — There had been no unfairness in process by which offer was obtained — Right of film production company to seek relief for default under agreement adequately addressed risk of new corporation's continuing non-compliance — Fact that film production company could obtain better deal with another entity did not furnish reason to refuse to approve transfer, especially since propriety of alternate transaction was in dispute — If transfer were not approved, likely that corporations would go into bankruptcy.

Cases considered by *Spence J.*:

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]) — considered

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) — followed

Dominion Stores Ltd. v. Bramalea Ltd. (1985), 38 R.P.R. 12 (Ont. Dist. Ct.) — considered

GATX Corp. v. Hawker Siddeley Canada Inc. (1996), 1 O.T.C. 322, 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) — referred to

T. Eaton Co., Re (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — considered

APPLICATION by corporations for approval of proposed transfer of assets.

***Spence J.*:**

1 These reasons are provided in brief form to accommodate the exigencies of this matter.

2 The Playdium corporations and entities (the "Playdium Group") have been engaged in restructuring efforts under the *Companies' Creditors Arrangement* Act (the "*CCAA*"). These efforts have been unsuccessful. It is now proposed that substantially all the Playdium assets will be transferred to a new corporation ("New Playdium") which will be indirectly controlled by Covington Fund I Inc. and Toronto-Dominion Bank. This transfer would be made in satisfaction of the claims of those two creditors and Canadian Imperial Bank of Commerce, the primary secured creditors and the only creditors with an economic interest in the Playdium Group.

3 The primary secured creditors intend that the Playdium Group's business will continue to be operated as a going concern. If successful, this would potentially save 300 jobs as well as various existing trade contracts and leases.

4 This transaction is considered to be the only viable alternative to a liquidation of Playdium Group and the adverse consequences that would flow from a liquidation. Interests of members of the public also stand to be affected, in respect of prepaid game cards and discount coupons, which are to be honoured by the new entity.

5 The proposed transaction would involve assignment to the new entity of the material contracts of the business, including the Techtown Agreement with Famous Players.

6 Playdium Group is not currently in compliance with the equipment supply provisions of s.9(e) of the Techtown Agreement. The new entity is to take steps, as soon as reasonably practicable, that are intended to achieve compliance with s.9(e). Famous Players disputes that the proposed steps will have that effect and opposes approval of the proposed assignment of the Techtown Agreement to the new entity.

7 Covington says that the assignment of the Techtown Agreement is a critical condition of the proposed transaction: without the assignment, the transaction cannot proceed.

8 Covington says that the structure of the proposed transaction is such that it does not require the consent of Famous Players. This is disputed by Famous Players, based on s.35 of the Agreement and the fact that the assignee is to be controlled by Covington and TD Bank.

9 Covington submits that it is in the best interests of all the shareholders that the proposed transaction, including the assignment of the Techtown Agreement, be implemented. Covington and TD Bank seek an order authorising the assignment and precluding termination of the Techtown Agreement by reason only of the assignment or certain defaults. Famous Players has not given any notice of default to date. The prohibition against termination for default is not to apply to a continuing default under para.9(e) of the Agreement.

10 The primary secured creditors also seek an extension of the existing stay until November 29, 2001 to finalize these transactions. To facilitate the transactions, Covington and TD Bank seek the appointment of Pricewaterhouse Coopers as Interim Receiver.

11 Based on the cases cited, including *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]), and the statutory provisions and text commentary cited, the court has the jurisdiction to grant the orders that are sought, and may do so over the objections of creditors or other affected parties. Also, the decision in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), supports the appointment of an interim receiver to do what

"justice dictates" and "practicality demands".

12 Famous Players says that no reason has been shown to expect the proposed course of action will bring the Techtown Agreement into compliance and make it properly operational; Covington has not shown it has expertise to bring to the business operations; the operations are grossly in default at present, and the indicated plans are inadequate to cure the default, which has serious adverse consequences to Famous Players.

The Relief Sought

13 The applicants revised the form of order that they seek, to provide (in paragraph 15) that a counterparty to a Material Agreement is not to be prevented from exercising a contractual right to terminate such an agreement as a result of a default that arises or continues to arise after the filing of the Interim Receiver's transfer certificate following completion of the contemplated transactions.

14 Famous Players moved for certain relief that was apparently formulated before the applicants' revisions to their draft order. From the submissions made at the hearing, I understand the position of Famous Players to be that it opposes the order sought by the applicants, at least insofar as it would approve the assignment of the Techtown Agreement, but the submissions of Famous Players did not address specifically the relief sought in their notice of motion, presumably because of the revision to the applicants' draft order as regards continuing defaults.

Section 35 of the Techtown Agreement

15 Section 35 permits an assignment to a Playdium affiliate. The proposed assignee is to be a new company, "New Playdium", to be incorporated on behalf of the Playdium Group, and to be owned by it at the precise time when the assignment occurs. The assignment will occur, it may be presumed, if and only if the contemplated transactions of transfer are completed. On completion of the contemplated transactions, New Playdium will be owned by a corporation controlled by Covington and TD Bank. That outcome reflects the purpose of the assignment, which is to transfer the benefit of the Techtown Agreement to the new owners. Accordingly the assignment, viewed in terms of its substance and not simply its momentary constituent formalities, is not a transfer to a Playdium affiliate. This view is in keeping with the decision in *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]).

16 Under s.35, the Agreement therefore may not be assigned without the consent of Famous Players, which consent may not be unreasonably withheld. Famous Players says that it has not been properly requested to consent and it has not received adequate financial information and assurances as to the provision of satisfactory management expertise and as to how the Agreement is to be brought into good standing.

17 The submission to the contrary is that the Agreement is really in the nature of a lease, not a joint venture involving the requirement for the provision to the venture of management services. This submission has some merit. Playdium seems principally to be required to supply game equipment. Section 26 of the Agreement disclaims any partnership or joint venture. If the business is to be sold to the new owners as a going concern, it would be likely to have the same competence as before, unless the contrary is shown, which is not so. Covington says that financial information was offered and not accepted and (although this is either disputed or not accepted) that no further request was made for it.

18 Reference was made to the decision in *Dominion Stores Ltd. v. Bramalea Ltd.* (1985), 38 R.P.R. 12 (Ont.

Dist. Ct.) that an assignment clause of this kind is to be construed strictly, as a restraint upon alienation, and its purpose is to protect the landlord as to the type of business carried on. The case also says that a refusal for a collateral purpose or unconnected with the lease is unreasonable.

19 On the material filed, Famous Players has the prospect of a better deal with Starburst and this must be considered a factor in their withholding of consent. It is also relevant that Playdium is not in compliance with the Agreement and it is not clear how soon compliance is intended to be achieved under the Covington proposal. It is not clearly unreasonable for a party in the position of Famous Players to look for a better deal when the counterparty is in a condition of continuing non-compliance.

20 The propriety of the proposed Starburst deal is disputed on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. The relevance of this dispute is considered below.

Whether Court should approve the Assignment of the Techtown Agreement

21 This is the pivotal issue in respect of the motion.

22 Famous Players objects to the assignment. Famous Players refuses its consent. With regard to s.35 of the Agreement, and without reference to considerations relating to *CCAA* (which are dealt with below), I cannot conclude that the withholding of consent is unreasonable. So s.35 does not provide any right of assignment.

23 If there were no *CCAA* order in place and Playdium wished to assign to the proposed assignees, it would not be able to do so, in view of Famous Players' withholding of its consent. The *CCAA* order affords a context in which the court has the jurisdiction to make the order. For the order to be appropriate, it must be in keeping with the purposes and spirit of the regime created by *CCAA*: see the *Red Cross* decision.

The factors to be considered

24 The applicants submit that it is clear from the Monitor's reports that a viable plan cannot be developed under *CCAA* and the present proposal is the only viable alternative to a liquidation in bankruptcy. The applicants say that the present proposal has the potential to save jobs and to benefit the interests of other stakeholders.

25 Famous Players submits that, on the basis of the *Red Cross* decision, the court should approve the appointment of an interim receiver with power to vest assets, in a *CCAA* situation, where there is no plan, only where certain appropriate circumstances exist as set out in *Red Cross*, and those circumstances do not exist here.

26 In this regard, the first factor mentioned in *Red Cross* is whether the debtor has made a sufficient effort to obtain the best price and has not acted unprovidently. Famous Players says that there has been no substantial effort to develop a plan to sell the business components (such as the LBE's) as going concerns, no tender process, no marketing effort and no expert analysis. From the reports of the monitor it appears efforts were made to find prospects to purchase debt or equity or assets and there was no indication of viable deals. Whether or not the best price has been obtained, on the material it appears the value of the assets would not satisfy the claims of the principal secured creditors. There is nothing to suggest that a better deal could be done without including the Techtown Agreement; according to the monitor it would have been a key part of any viable plan. Famous Players is not in the position of a creditor looking to be paid out, so its submissions as to the need to get the best price do not seem to be well addressed to its proper interest in this case, and the others who have appeared who are creditors are not objecting to the process and the result.

27 The second factor mentioned in the *Red Cross* decision is that the proposal should take into consideration the interests of the parties. The proposal has potential benefits for trade creditors, employees and members of the public which would flow from continuing the business operations as proposed.

28 The other two criteria in *Red Cross* are that the court is to consider the efficacy and integrity of the process by which the offers were obtained and whether there has been unfairness in the working out of the process. Famous Players says that, as regards its interests, there has been no participation afforded to it in designing the proposal, although the Techtown Agreement is said to be critical to the proposal, and nothing to show how or when the s.9(e) requirements will be brought into compliance. There were discussions between the parties in August but they did not lead to any productive result. It is true that it is not clear how or when compliance will be brought about. This point is considered below.

The effect on Famous Players

29 Famous Players says that if the applicants are given the relief they seek, the proposed transactions will close and the *CCAA* stay will be lifted — which would happen at the end of November, on the present proposal — and the prospect would be that Famous Players would then issue notices of default in respect of s.9(e), notice of termination would follow and the entire matter would end up in litigation within two months. That is possible. It is also possible that the parties would work out a deal. Covington is to invest about $3 million in the new entity so there will be an incentive for it to find ways to make the new business work.

30 If the parties cannot resolve their differences, then litigation might well result. Famous Players would be saved that prospect if the assignment were not to be approved and the companies instead were liquidated in bankruptcy. The delay occasioned by a further stay and subsequent litigation would also presumably result in increased losses of revenue to Famous Players compared to a full compliance situation or an immediate termination. There is nothing before the court to suggest that, if Famous Players has to resort to litigation and succeeds, it would not be able to recover from the new company. On this basis, the right of Famous Players to seek relief for a default seems to address adequately the risk of continuing non-compliance with s.9(e). Accordingly, the provision preserving that right is a key consideration in favour of the motion.

31 The other reason Famous Players evidently has for opposing the applicants' motion is that it could do a better deal with Starburst. If that were the only reason it had for withholding consent to an assignment of the Agreement, it would not be a reasonable basis for withholding consent under s.35 of the Agreement. It can be inferred from that consideration that it should also not be regarded as, by itself, a proper reason to allow the objection to stand in the way of the proposed assignment as part of the proposal to enable the business to continue.

32 Moreover, as noted above, the propriety of the Starburst transaction is disputed, on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. Based on the submissions before the court, the dispute could not be said to be without substance. If the proposed transactions are allowed to proceed and litigation ensues between Famous Players and New Playdium, there would presumably also be an opportunity for the dispute about the possible breach, and its implications for the propriety of the proposed deal between Starburst and Famous Players, to be pursued in litigation.

33 If instead the proposed transactions are precluded by a denial of the requested order, Playdium would go into bankruptcy and it would lose any opportunity to obtain the benefit of any rights it would otherwise have to oppose the proposed deal between Starburst and Famous Players. Allowing the Playdium transactions to proceed would effectively preserve those rights.

Conclusion

34 For the above reasons the motion of the applicants is granted. The initial order of this court made February 22, 2001 shall be continued to November 29, 2001, and the stay period provided for therein shall be extended to November 29, 2001. The parties may consult me about the other terms of the order, and costs.

Application granted.

FN* Additional reasons at 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]).

END OF DOCUMENT

TAB 5

2010 CarswellQue 11311, EYB 2010-181372, 72 C.B.R. (5th) 63

2010 CarswellQue 11311, EYB 2010-181372, 72 C.B.R. (5th) 63

White Birch Paper Holding Co., Re

In the Matter of the Plan of Arrangement and Compromise of: White Birch Paper Holding Company and White Birch Paper Company and Stadacona General Partner Inc. and Black Spruce Paper Inc. and F.F. Soucy General Partner Inc. and 3120772 Nova Scotia Company and Arrimage de Gros Cacouna Inc. and Papier Masson Ltée (Debtors) and Ernst & Young Inc. (Monitor) and Stadacona Partnership, Limited and F.F. Soucy Limited Partnership and F.F. Soucy, Inc. & Partners, Limited Partnership (Mises en Cause)

Quebec Superior Court

Robert Mongeon, J.C.S.

Judgment: September 28, 2010
Docket: C.S. Montréal 500-11-038474-108

Counsel: None given

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Debtor company experienced financial difficulties and sought protection under Companies' Creditors Arrangement Act — As part of its restructuring, debtor company contemplated sale of all its assets — Stalking horse bidding process was initiated, with corporation B as stalking horse bidder — Use of credit was permitted as part of bidding process by parties and monitor — Bidding procedures were further approved by US bankruptcy court and by Superior Court of Quebec — Date of September 17, 2010 was set as limit to submit qualified bid under stalking horse bidding procedures — On September 17, 2010, group of investors, corporation S, comprising of former lenders of B, submitted qualified bid — On September 21, 2010, auction was commenced and winning bid was B's bid — Debtor company brought motion seeking Superior Court's approval of sale of assets to B — Motion granted — In accordance with s. 36 of Act, Court approved sale and ordered that all debtor's rights, title, benefit and interest in and to assets should vest in purchaser, free and clear of any security interests or charges — Therefore, B should become sole purchaser and acquirer of debtor company's assets.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Divers

Compagnie débitrice a connu des problèmes financiers et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Dans le cadre de sa restructuration, la compagnie débitrice a envisagé la possibilité de vendre tous ses actifs — Processus de soumission d'amorce a été lancé, la société B

agissant à titre de soumissionnaire d'amorce — Recours au crédit a été permis dans le cadre du processus de soumission d'amorce par les parties et le contrôleur — Processus d'appel d'offres a de plus été approuvé par un tribunal américain de faillite et par la Cour supérieure du Québec — Date du 17 septembre 2010 a été fixée comme échéance pour la soumission d'offres conformes dans le cadre du processus de soumission d'amorce — Groupe d'investisseurs, la société S, composée d'anciens investisseurs de B, a, le 17 septembre 2010, soumis une offre conforme — Examen des offres a débuté le 21 septembre 2010 et la soumission de B a été choisie — Compagnie débitrice a déposé une requête demandant à la Cour supérieure d'approuver la vente des actifs à B — Requête accueillie — En conformité avec l'art. 36 de la Loi, la Cour a approuvé la vente et a ordonné que tous les droits, titres et intérêts dans et sur les actifs soient transférés à l'acheteur libres de toute sûreté ou charge — Par conséquent, B devrait devenir le seul acheteur et acquéreur des actifs de la compagnie débitrice.

Statutes considered:

Bank Act, S.C. 1991, c. 46

Generally — referred to

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

Generally — referred to

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

Generally — referred to

s. 11.3 [en. 1997, c. 12, s. 124] — pursuant to

s. 36 — referred to

Forêts, Loi sur les, L.R.Q., c. F-4.1

s. 38 — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5

s. 7(3)(c) — considered

Personal Property Security Act, S.N.S. 1995-96, c. 13

Generally — referred to

Trade-marks Act, R.S.C. 1985, c. T-13

Generally — referred to

MOTION by debtor company seeking approval of sale of all its assets.

***Robert Mongeon, J.C.S.*:**

Approval and Vesting Order

CONSIDERING the Debtors' "*Motion to Approve the Sale of Substantially All the WB Group's Assets*" (the "*Motion*") in respect of a sale transaction contemplated by an asset sale agreement (the "*Sale Agreement*") dated August 10, 2010 and amended on August 23, August 31, 2010 and September 23, 2010, amongst White Birch Paper Company and the other entities identified therein as sellers (collectively, the "*Sellers*"), as sellers, and BD White Birch Investment LLC (the *"Purchaser"*) and such other Person(s) as it may designate (each, a *"Designated Purchaser"*), as purchaser, for the sale of substantially all of the Assets of the Sellers, and all of its terms, conditions, schedules, exhibits and related and ancillary agreements (collectively, the *"Transaction"*), and the Report dated September 23, 2010 (the *"Report"*) of Ernst & Young Inc. in its capacity as the monitor (the *"Monitor"*) of the Debtors and the Mises en Cause;

CONSIDERING the representations made by counsel; and

GIVEN the provisions of the CCAA and, in particular, Section 36 thereof;

WHEREFORE, THE COURT:

1 *GRANTS* the Motion;

2 *DECLARES* sufficient the service and notice of the Motion and hereby dispenses with further service thereof;

3 *ORDERS* that capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Sale Agreement;

4 *ORDERS AND DECLARES* that the Sale Agreement and all of its terms and conditions (including all schedules and exhibits thereto and related and ancillary agreements and all schedules and exhibits thereto) and the Transaction are hereby fully and finally approved. The execution, delivery and performance of the Sale Agreement and the Transaction (with any such amendments as the parties thereto may agree to in accordance with the terms thereof) by the Debtors and the Mises en Cause party thereto is hereby authorized and approved, and the Debtors and the Mises en Cause and the Monitor are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets to the Purchaser or a Designated Purchaser;

5 *ORDERS* that the Debtors and the Mises en Cause are authorized and directed to perform their obligations under the Sale Agreement and in respect of the Transaction;

6 *ORDERS AND DECLARES* that, subject to paragraph 16 of this Order, upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the *"Monitor's Certificate"*), all of the Debtors' and the Mises en Cause's right, title, benefit and interest in and to the Assets shall vest abso-

lutely in the Purchaser or a Designated Purchaser, free and clear of and from any and all right, title, interest, security interests (whether contractual, statutory, or otherwise), hypothecs (legal or contractual), prior claims, mortgages, pledges, deeds of trust, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens (statutory or otherwise), executions, levies, charges, or other financial or monetary claims, options, rights of first offer or first refusal, real property licenses, encumbrances, conditional sale arrangements, leasing agreements or other similar restrictions of any kind, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured, legal, possessory or otherwise (collectively, the *"Claims"*), including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Robert Mongeon, J.S.C. dated February 24, 2010 or any other Order of this Honourable Court in these proceedings; (ii) all charges, security interests or claims evidenced by registrations pursuant to the Registre des droits personnels et réels mobiliers (Québec), the Personal Property Security Act (Nova Scotia), the *Bank Act (Canada)* or any other personal property registry system, or recorded with the Canadian Intellectual Property Office pursuant to the Trade-marks Act (Canada); and (iii) all Excluded Liabilities (all of which are collectively referred to as the *"Encumbrances"*, but excluding Permitted Encumbrances (other than those Permitted Encumbrances specified in clause (i) of the definition of Permitted Encumbrances in the Sale Agreement and any other Permitted Encumbrances specifically contemplated to be discharged by this Order)). For greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Assets shall, upon delivery of the Monitor's Certificate, be and are hereby expunged and discharged as against the Assets. Counsel for the Purchaser and any agents appointed by such counsel may, immediately following the Closing of the Transaction, proceed with the discharge of such Claims and Encumbrances including, without limitation, the electronic discharge of any financing statements, UCC registrations, mortgages or other registrations in respect thereof;

7 *ORDERS* that for the purposes of determining the nature and priority of Claims and Encumbrances, the proceeds from the sale of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets (other than the Wind-Down Amount and the Reserve Payment Amount) shall stand in the place and stead of the Assets, and that from and after the delivery of the Monitor's Certificate, all Claims and Encumbrances (other than the D & O Charge and the Administrative Charge) shall attach to the proceeds from the sale of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets (other than the Wind-Down Amount and the Reserve Payment Amount) with the same priority as they had with respect to the Assets immediately prior to the sale, as if the Debtors' and the Mises en Cause's right, title and interest in and to the Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale;

8 *ORDERS* that the Monitor shall administer the Wind-Down Amount in accordance with the provisions of the Sale Agreement including, without limitation, Section 5.18 thereof;

9 *ORDERS* that: (i) all right, title and interest in and to any portion of the Wind-Down Amount that is not used to pay costs associated with winding-down the Sellers' estate in accordance with Section 5.18 of the Sale Agreement shall vest absolutely in the Purchaser as at the Closing Date and shall promptly be distributed to the Purchaser; and (ii) the Wind-Down Amount shall not be considered to be proceeds of sale of the Assets and the Claims and Encumbrances shall not attach to the Wind-Down Amount;

10 *ORDERS* that upon the delivery of the Monitor's Certificate to the Purchaser: (i) the Administration Charge provided for in the Initial Order be and is hereby released, expunged and discharged; and (ii) the D&O Charge provided for in the Initial Order be and is hereby released, expunged and discharged;

11 *ORDERS* the Land Registrar of the Land Registry Office for the Registry Division of Témiscouata, upon presentation of the Monitor's Certificate, in the form appended as Schedule "A" hereto, and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser or a Designated Purchaser (as the case may be) as the absolute owner in regards to the immovable listed in Schedule "B" hereto which are located in Rivière-du-Loup, in the Province of Québec (being hereinafter described as the *"Rivière-du-Loup Property"*); and (ii) proceed with the reduction and cancellation of any and all Encumbrances but only insofar as concerns the Rivière-du-Loup Property as described in Schedule "B", including, without limitation, the following registrations published at the said Land Registry Office for the Registration Division of Témiscouata:

(i) a hypothec charging buildings only granted in favour of White Birch Paper Company by F.F. Soucy General Partner Inc./Commandité F.F. Soucy Inc. for an amount of $250,000,000 and registered at the office of the Registration Division of Témiscouata on April 7, 2005 under number 12 195 029;

(ii) a hypothec granted for an amount of $250,000,000 in favour of White Birch Paper Company by F.F. Soucy, Inc. & Partners, Limited Partnership/F.F. Soucy, inc. & associés, Société en commandite and registered at the office of the Registration Division of Témiscouata on April 7, 2005 under number 12 195 030;

(iii) a first hypothec granted for an amount of $550,000,000 and a second hypothec granted pursuant to the same deed for an amount of $250,000,000 granted in favour of Credit Suisse First Boston, Toronto Branch, by White Birch Paper Company and registered at the office of the Registration Division of Témiscouata on April 7, 2005 under number 12 195 031;

(iv) a legal hypothec (construction) granted for an amount of $2,692,455.81 registered by Service d'impartition Industriel Inc. against F.F. Soucy S.E.C., as owner, and registered at the office of the Registration Division of Témiscouata on November 18, 2009 under number 16 731 954;

(v) a legal hypothec (construction) granted for an amount of $2,692,455.81 registered by Service d'impartition Industriel Inc. against F.F. Soucy S.E.C., as owner, and registered at the office of the Registration Division of Témiscouata on November 27, 2009 under number 16 758 360;

(vi) a hypothec on a universality of immovables granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch, by White Birch Paper Company registered at the office of the Registration Division of Témiscouata on March 4, 2010 under number 16 979 262;

(vii) a hypothec on the universality of immovables granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch, by F.F. Soucy L.P./F.F. Soucy S.E.C. and registered at the office of the Registration Division of Témiscouata on March 4, 2010 under number 16 979 263; and

(viii) a prior notice of the exercise of a sale under judicial authority registered by Service d'impartition Industriel Inc. against F.F. Soucy S.E.C., as owner, registered at the office of the Registration Division of Témiscouata on April 21, 2010 under number 17 095 095 and on June 15, 2010 under number 17 281 485, which registrations refer to the legal hypothecs registered under numbers 16 731 954 and 16 758 360 referred to above;

12 *ORDERS* the Land Registrar of the Land Registry Office for the Registry Division of Québec, upon presentation of the Monitor's Certificate, in the form appended as Schedule "A" hereto, and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser or a Designated Purchaser (as the case may be) as the absolute owner in regards to the immovables listed in Schedule "C" hereto which are located in Québec City, in the Province of Québec (being hereinafter described as the *"Quebec City Properties"*); and (ii) proceed with the reduction and cancellation of any and all Encumbrances but only insofar as concerns the Québec City Properties as described in Schedule "C", including, without limitation, the following registrations published at the said Land Registry Office for the Registration Division of Quebec:

(i) a hypothec on a universality of immovables granted for an amount of $550,000,000 in favour of Credit Suisse First Boston Toronto Branch by Stadacona L.P./Stadacona S.E.C. and Stadacona General Partner Inc./Commandité Stadacona Inc. pursuant to a deed registered at the office of the Registration Division on April 7, 2005 under number 12 195 317;

(ii) a hypothec on a universality of immovables granted for an amount of $250,000,000 in favour of Credit Suisse First Boston Toronto Branch by Stadacona L.P./Stadacona S.E.C. and Stadacona General Partner Inc./Commandité Stadacona Inc. pursuant to a deed registered at the office of the Registration Division on April 7, 2005 under number 12 195 318;

(iii) a legal hypothec (construction) for an amount of $2,067,704.24 in favour of KSH Solutions Inc. against Stadacona S.E.C. and Commandité Stadacona Inc. and registered at the office of the Registration Division on May 19, 2006 under number 13 298 021;

(iv) a prior notice of the exercise of a sale by judicial authority in favour of OSLO Construction Inc. against Stadacona S.E.C., owner, and Commandité Stadacona Inc., owner, registered on August 2, 2006 under number 13 534 837, this prior notice being in reference to a legal hypothec that was registered at the office of the Registration Division under number 13 126 592 which has been totally discharged;

(v) a prior notice of the exercise of a sale by judicial authority in favour of KSH Solutions Inc. against Stadacona S.E.C. and Commandité Stadacona Inc. registered at the office of the Registration Division on October 20, 2006 under number 13 742 043, this prior notice being in reference of the legal hypothec registered under number 13 298 021 referred to in Section (iii) above;

(vi) a hypothec on a universality of property granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch by Stadacona General Partner Inc./Commandité Stadacona inc. pursuant to a deed registered at the office of the Registration Division on March 4, 2010 under number 16 977 835; and

(vii) a hypothec on a universality of property granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch by Stadacona L.P./Stadacona S.E.C. pursuant to a deed registered at the office of the Registration Division on March 4, 2010 under number 16 977 836;

13 *ORDERS* the Land Registrar of the Land Registry Office for the Registry Division of Papineau, upon presentation of the Monitor's Certificate, in the form appended as Schedule "A" hereto, and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser or a Designated Purchaser (as the case may be) as the absolute owner in regards to the immovables listed in Schedule

"D" hereto which are located in Gatineau, in the Province of Québec (being hereinafter described as the *"Gatineau Property"*); and (ii) proceed with the reduction and cancellation of any and all Encumbrances but only insofar as concerns the Gatineau Property as described in Schedule "D", including, without limitation, the following registrations published at the said Land Registry Office for the Registration Division of Papineau:

(i) a hypothec in the amount of $550,000,000 by Papier Masson Ltée in favour of Crédit Suisse, Toronto Branch, in its quality of *"fondé de pouvoir"*, registered on January 25, 2006 under number 13 011

629;

(ii) a hypothec in the amount of $250,000,000 by Papier Masson Ltée in favour of Crédit Suisse, Toronto Branch, in its quality of *"fondé de pouvoir"*, registered on January 25, 2006 under number 13 011 630;

(iii) a legal hypothec in the amount of $1,808,000 in favour of Hydro-Québec, registered on September 2, 2009 under number 16 512 303 against the part of the Property known as lot 2 469 374 and located at the civic address 2 Montreal Road West, City of Gatineau;

(iv) a legal hypothec in the amount of $3,205,539.79 in favour of Hydro-Québec, registered on November 20, 2009 under number 16 737 683 against the part of the Property known as lot 2 469 374 and located at the civic address 2 Montreal Road West, City of Gatineau; and

(v) a hypothec in the amount of $200,000,000 by Papier Masson Ltée in favour of Crédit Suisse AG, Toronto Branch, registered on March 4, 2010 under number 16 977 911;

14 *ORDERS* the Québec Personal and Movable Real Rights Registrar, upon presentation of the required form with a certified copy of this Order and the Monitor's Certificate, to reduce the scope of the hypothecs listed in Schedule "E" hereto in connection with the Assets and to cancel, release and discharge all of the Encumbrances from the Assets in order to allow the transfer to the Purchaser or a Designated Purchaser (as the case may be) of the Assets free and clear of any and all Encumbrances created by those hypothecs;

15 *ORDERS* the officer responsible for the register of timber supply and forest management agreements according to article 38 of the Forest Act (Quebec), upon presentation of a true copy of this vesting order, to proceed with the cancellation and discharge of all the Encumbrances from the timber supply and forest management agreements of the Sellers, including, without limitation, the following registrations:

(i) a hypothec on the CAAF #00205081602 granted by Stadacona S.E.C. in favour of Credit Suisse First Boston Toronto Branch dated 2005-04-06 and registered on November 18, 2005 under number 002 05 11 18 01;

(ii) a hypothec on the CAAF #00205081602 granted by Stadacona S.E.C. in favour of Credit Suisse First Boston Toronto Branch dated 2005-04-06 and registered on November 18, 2005 under number 002 05 11 18 02.

16 *ORDERS* that, pursuant to section 11.3 of the CCAA, and subject to paragraph 17 of this Order, the Debtors and the Mises en Cause are authorized and directed to assign the Debtors' and the Mises en Cause's respective rights and obligations under the contracts, leases and agreements and other arrangements of which the Purchaser, or a Designated Purchaser takes an assignment on Closing pursuant to and in accordance with the terms of the Sale Agreement (the *"Designated Seller Contracts"*, as defined in and pursuant to the terms of the

Sale Agreement) and that such assignments are hereby approved and are valid and binding upon the counterparties to the Designated Seller Contracts (the *"Counterparties"*) notwithstanding any restriction or prohibition on assignment contained in any such Designated Seller Contract; provided, however, that, the effectiveness of the assignment of any such Designated Seller Contract pursuant to this Order and the Sale Agreement shall be conditioned upon payment in full of the Cure Cost, if any, payable in respect of any such Designated Seller Contract (as determined by agreement among the parties or order of this Court);

17 *ORDERS* that the Cure Cost payable in respect of any Designated Seller Contract shall be as agreed between the Purchaser and the Counterparty, failing which the Purchaser or the Counterparty shall be entitled to apply to this Court for an order determining the amount of such Cure Cost and, if such application is made, the assignment of such Designated Seller Contract shall not become effective until (i) such Cure Cost shall have been determined by a final, non-appealable order of this Court and (ii) such Cure Cost shall have been paid in full to the Counterparty; provided, however, that, nothing in this Order shall affect or limit the Purchaser's right under the Sale Agreement to elect in its sole discretion, at any time at least five (5) business days prior to Closing, to exclude any contract, lease, agreement or other arrangement from being a Designated Seller Contract under the terms of the Sale Agreement;

18 *ORDERS* that, from and after the Closing Date, all Persons shall be deemed to have waived all defaults then existing or previously committed by the Debtors or the Mises en Cause under, or caused by the Debtors or the Mises en Cause under, and the non-compliance of the Debtors or the Mises en Cause with, any of the Designated Seller Contracts arising solely by reason of the insolvency of the Debtors or the Mises en Cause or as a result of any actions taken by the Debtors or the Mises en Cause pursuant to the Sale Agreement or in these proceedings, and all notices of default and demands given in connection with any such defaults under, or noncompliance with, any of the Designated Seller Contracts shall be deemed to have been rescinded and shall be of no further force or effect;

19 *ORDERS AND DIRECTS* the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof;

20 *ORDERS* that neither the Purchaser nor any Designated Purchaser nor any affiliate thereof shall assume or be deemed to assume any liabilities or obligations whatsoever of any of the Debtors or the Mises en Cause (other than as expressly assumed in relation to any Designated Seller Contracts assigned pursuant to this Order and under the terms of the Sale Agreement), including without limitation, any liabilities or obligations in respect of, in connection with or in relation to: (i) any Seller Employee Plans (other than a Transferred Employee Plan); (ii) any and all termination, severance or related amounts which any current or former employee of the Debtors or the Mises en Cause (other than the Transferred Employees who become employees of the Purchaser or a Designated Purchaser on Closing as provided for in the Sale Agreement) could at any time assert against any of the Debtors or the Mises en Cause; or (iii) any and all former, current or future employees of the Debtors or the Mises en Cause (other than the Transferred Employees who become employees of the Purchaser or a Designated Purchaser on Closing as provided for in the Sale Agreement);

21 *ORDERS* that the Purchaser and any Designated Purchasers, and their respective affiliates and officers, directors, employees, delegates, agents and representatives shall, effective immediately upon Closing of the Transaction, be and be deemed to be irrevocably and unconditionally fully and finally released of and from any and all claims, obligations or liabilities whatsoever arising from any event, fact, matter or circumstance occurring or existing on or before the Closing Date in relation to or in connection with the Debtors or the Mises en

Cause or their respective present or past businesses, properties or assets, including, without limitation, any and all claims, obligations or liabilities whatsoever, whether known, anticipated or unknown, in relation to or in connection with the Seller Employee Plans (other than any Transferred Employee Plans) and the former, current or future employees of the Debtors and the Mises en Cause (other than any Transferred Employees who become employees of the Purchaser or a Designated Purchasers on Closing in accordance with the terms and conditions of the Sale Agreement) and provided that the foregoing shall not operate to release the Purchaser or any Designated Purchaser from any liabilities or obligations expressly assumed under the terms of the Sale Agreement;

22 *ORDERS* that, notwithstanding:

(i) the pendency of these proceedings;

(ii) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Debtors or the Mises en Cause and any bankruptcy order issued pursuant to any such applications; and

(iii) any assignment in bankruptcy made in respect of any of the Debtors or the Mises en Cause;

the provisions of the Sale Agreement and the Transaction, and the vesting of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets in the Purchaser or a Designated Purchaser pursuant to this Order and all other transactions contemplated thereby shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Debtors or the Mises en Cause and shall not be void or voidable by creditors of any of the Debtors or the Mises en Cause, nor shall they constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other challengeable, voidable or reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation;

23 *ORDERS* that the Sale Agreement and any related or ancillary agreements shall not be repudiated, disclaimed or otherwise compromised in these proceedings;

24 *ORDERS* that, pursuant to clause 7(3)(c) of the Personal Information Protection and Electronic Documents Act (Canada) and any substantially similar legislation, the Debtors and the Mises en Cause are authorized and permitted to disclose and transfer to the Purchaser or any Designated Purchaser all Employee Records. The Purchaser or any Designated Purchaser shall maintain and protect the privacy of any personal information contained in the Employee Records and shall be entitled to collect and use the personal information provided to it for the same purpose(s) as such information was used by the Debtors and the Mises en Cause;

25 *ORDERS* that forthwith upon receipt of the proceeds from the sale of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets, and prior to payment or repayment of any other claims, interests or obligations of or against the Debtors or the Mises en Cause, all outstanding Obligations (as defined in the Interim Financing Credit Agreement (as defined in the Initial Order of this Court dated February 24, 2010)) owed by the Debtors or the Mises en Cause under the Interim Financing Credit Agreement will be repaid in full and in cash from the proceeds of the sale of the Assets (other than the Wind-Down Amount and the Reserve Payment Amount) pursuant to the Sale Agreement;

26 *ORDERS* that all Persons shall co-operate fully with the Debtors and the Mises en Cause, the Purchaser,

any Designated Purchaser, their respective Affiliates and the Monitor and do all such things that are necessary or desirable for purposes of giving effect to and in furtherance of this Order, the Sale Agreement and the Transaction;

27 *THIS COURT HEREBY REQUESTS* the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or elsewhere, including the United States Bankruptcy Court for the Eastern District of Virginia, to give effect to this Order and to assist the Debtors, the Mises en Cause and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtors, the Mises en Cause and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Debtors, the Mises en Cause and the Monitor and their respective agents in carrying out the terms of this Order;

28 *ORDERS* that this Order shall have full force and effect in all provinces and territories in Canada;

THE WHOLE *without* COSTS.

Motion granted.

END OF DOCUMENT

TAB 6

CANADA

SUPERIOR COURT
(Commercial Division)
The *Companies' Creditors Arrangement Act*

PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
No.: 500-11-038474-108

MONTRÉAL, this 28th day of SEPTEMBER, 2010

IN THE PRESENCE OF:
THE HONOURABLE ROBERT MONGEON, J.S.C.

IN THE MATTER OF THE PLAN OF ARRANGEMENT AND COMPROMISE OF:

WHITE BIRCH PAPER HOLDING COMPANY

-and-

WHITE BIRCH PAPER COMPANY

-and-

STADACONA GENERAL PARTNER INC.

-and-

BLACK SPRUCE PAPER INC.

-and-

F.F. SOUCY GENERAL PARTNER INC.

-and-

3120772 NOVA SCOTIA COMPANY

-and-

ARRIMAGE DE GROS CACOUNA INC.

-and-

PAPIER MASSON LTÉE

Debtors

-and-

ERNST & YOUNG INC.

Monitor

-and-

STADACONA LIMITED PARTNERSHIP

-and-

F.F. SOUCY LIMITED PARTNERSHIP

-and-

F.F. SOUCY, INC. & PARTNERS, LIMITED PARTNERSHIP

Mises en Cause

APPROVAL AND VESTING ORDER

CONSIDERING the Debtors' "*Motion to Approve the Sale of Substantially All the WB Group's Assets*" (the "**Motion**") in respect of a sale transaction contemplated by an asset sale agreement (the "**Sale Agreement**") dated August 10, 2010 and amended on August 23, August 31, 2010 and September 23, 2010, amongst White Birch Paper Company and the other entities identified therein as sellers (collectively, the "**Sellers**"), as sellers, and BD White Birch Investment LLC (the

"Purchaser") and such other Person(s) as it may designate (each, a **"Designated Purchaser"**), as purchaser, for the sale of substantially all of the Assets of the Sellers, and all of its terms, conditions, schedules, exhibits and related and ancillary agreements (collectively, the **"Transaction"**), and the Report dated September 23, 2010 (the **"Report"**) of Ernst & Young Inc. in its capacity as the monitor (the **"Monitor"**) of the Debtors and the Mises en Cause;

CONSIDERING the representations made by counsel; and

GIVEN the provisions of the CCAA and, in particular, Section 36 thereof;

WHEREFORE, THE COURT:

[1] **GRANTS** the Motion;

[2] **DECLARES** sufficient the service and notice of the Motion and hereby dispenses with further service thereof;

[3] **ORDERS** that capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Sale Agreement;

[4] **ORDERS AND DECLARES** that the Sale Agreement and all of its terms and conditions (including all schedules and exhibits thereto and related and ancillary agreements and all schedules and exhibits thereto) and the Transaction are hereby fully and finally approved. The execution, delivery and performance of the Sale Agreement and the Transaction (with any such amendments as the parties thereto may agree to in accordance with the terms thereof) by the Debtors and the Mises en Cause party thereto is hereby authorized and approved, and the Debtors and the Mises en Cause and the Monitor are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the

conveyance of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets to the Purchaser or a Designated Purchaser;

[5] **ORDERS** that the Debtors and the Mises en Cause are authorized and directed to perform their obligations under the Sale Agreement and in respect of the Transaction;

[6] **ORDERS AND DECLARES** that, subject to paragraph 16 of this Order, upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the "**Monitor's Certificate**"), all of the Debtors' and the Mises en Cause's right, title, benefit and interest in and to the Assets shall vest absolutely in the Purchaser or a Designated Purchaser, free and clear of and from any and all right, title, interest, security interests (whether contractual, statutory, or otherwise), hypothecs (legal or contractual), prior claims, mortgages, pledges, deeds of trust, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens (statutory or otherwise), executions, levies, charges, or other financial or monetary claims, options, rights of first offer or first refusal, real property licenses, encumbrances, conditional sale arrangements, leasing agreements or other similar restrictions of any kind, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured, legal, possessory or otherwise (collectively, the "**Claims**"), including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Robert Mongeon, J.S.C. dated February 24, 2010 or any other Order of this Honourable Court in these proceedings; (ii) all charges, security interests or claims evidenced by registrations pursuant to the Registre des droits personnels et réels mobiliers (Québec), the Personal Property Security Act (Nova Scotia), the *Bank Act (Canada)* or any other personal property registry system, or recorded with the Canadian Intellectual Property Office

pursuant to the Trade-marks Act (Canada); and (iii) all Excluded Liabilities (all of which are collectively referred to as the "**Encumbrances**", but excluding Permitted Encumbrances (other than those Permitted Encumbrances specified in clause (i) of the definition of Permitted Encumbrances in the Sale Agreement and any other Permitted Encumbrances specifically contemplated to be discharged by this Order)). For greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Assets shall, upon delivery of the Monitor's Certificate, be and are hereby expunged and discharged as against the Assets. Counsel for the Purchaser and any agents appointed by such counsel may, immediately following the Closing of the Transaction, proceed with the discharge of such Claims and Encumbrances including, without limitation, the electronic discharge of any financing statements, UCC registrations, mortgages or other registrations in respect thereof;

[7] **ORDERS** that for the purposes of determining the nature and priority of Claims and Encumbrances, the proceeds from the sale of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets (other than the Wind-Down Amount and the Reserve Payment Amount) shall stand in the place and stead of the Assets, and that from and after the delivery of the Monitor's Certificate, all Claims and Encumbrances (other than the D & O Charge and the Administrative Charge) shall attach to the proceeds from the sale of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets (other than the Wind-Down Amount and the Reserve Payment Amount) with the same priority as they had with respect to the Assets immediately prior to the sale, as if the Debtors' and the Mises en Cause's right, title and interest in and to the Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale;

[8] **ORDERS** that the Monitor shall administer the Wind-Down Amount in accordance with the provisions of the Sale Agreement including, without limitation, Section 5.18 thereof;

[9] **ORDERS** that: (i) all right, title and interest in and to any portion of the Wind-Down Amount that is not used to pay costs associated with winding-down the Sellers' estate in accordance with Section 5.18 of the Sale Agreement shall vest absolutely in the Purchaser as at the Closing Date and shall promptly be distributed to the Purchaser; and (ii) the Wind-Down Amount shall not be considered to be proceeds of sale of the Assets and the Claims and Encumbrances shall not attach to the Wind-Down Amount;

[10] **ORDERS** that upon the delivery of the Monitor's Certificate to the Purchaser: (i) the Administration Charge provided for in the Initial Order be and is hereby released, expunged and discharged; and (ii) the D&O Charge provided for in the Initial Order be and is hereby released, expunged and discharged;

[11] **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Témiscouata, upon presentation of the Monitor's Certificate, in the form appended as Schedule "A" hereto, and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser or a Designated Purchaser (as the case may be) as the absolute owner in regards to the immovable listed in Schedule "B" hereto which are located in Rivière-du-Loup, in the Province of Québec (being hereinafter described as the **"Rivière-du-Loup Property"**); and (ii) proceed with the reduction and cancellation of any and all Encumbrances but only insofar as concerns the Rivière-du-Loup Property as described in Schedule "B",

including, without limitation, the following registrations published at the said Land Registry Office for the Registration Division of Témiscouata:

(i) a hypothec charging buildings only granted in favour of White Birch Paper Company by F.F. Soucy General Partner Inc./Commandité F.F. Soucy Inc. for an amount of $250,000,000 and registered at the office of the Registration Division of Témiscouata on April 7, 2005 under number 12 195 029;

(ii) a hypothec granted for an amount of $250,000,000 in favour of White Birch Paper Company by F.F. Soucy, Inc. & Partners, Limited Partnership/F.F. Soucy, inc. & associés, Société en commandite and registered at the office of the Registration Division of Témiscouata on April 7, 2005 under number 12 195 030;

(iii) a first hypothec granted for an amount of $550,000,000 and a second hypothec granted pursuant to the same deed for an amount of $250,000,000 granted in favour of Credit Suisse First Boston, Toronto Branch, by White Birch Paper Company and registered at the office of the Registration Division of Témiscouata on April 7, 2005 under number 12 195 031;

(iv) a legal hypothec (construction) granted for an amount of $2,692,455.81 registered by Service d'impartition Industriel Inc. against F.F. Soucy S.E.C., as owner, and registered at the office of the Registration Division of Témiscouata on November 18, 2009 under number 16 731 954;

(v) a legal hypothec (construction) granted for an amount of $2,692,455.81 registered by Service d'impartition Industriel Inc. against F.F. Soucy S.E.C., as owner, and registered at the office of

the Registration Division of Témiscouata on November 27, 2009 under number 16 758 360;

(vi) a hypothec on a universality of immovables granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch, by White Birch Paper Company registered at the office of the Registration Division of Témiscouata on March 4, 2010 under number 16 979 262;

(vii) a hypothec on the universality of immovables granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch, by F.F. Soucy L.P./F.F. Soucy S.E.C. and registered at the office of the Registration Division of Témiscouata on March 4, 2010 under number 16 979 263; and

(viii) a prior notice of the exercise of a sale under judicial authority registered by Service d'impartition Industriel Inc. against F.F. Soucy S.E.C., as owner, registered at the office of the Registration Division of Témiscouata on April 21, 2010 under number 17 095 095 and on June 15, 2010 under number 17 281 485, which registrations refer to the legal hypothecs registered under numbers 16 731 954 and 16 758 360 referred to above;

[12] **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Québec, upon presentation of the Monitor's Certificate, in the form appended as Schedule "A" hereto; and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser or a Designated Purchaser (as the case may be) as the absolute owner in regards to the immovables listed in Schedule "C" hereto which are located

in Québec City, in the Province of Québec (being hereinafter described as the **"Quebec City Properties"**); and (ii) proceed with the reduction and cancellation of any and all Encumbrances but only insofar as concerns the Québec City Properties as described in Schedule "C", including, without limitation, the following registrations published at the said Land Registry Office for the Registration Division of Quebec:

(i) a hypothec on a universality of immovables granted for an amount of $550,000,000 in favour of Credit Suisse First Boston Toronto Branch by Stadacona L.P./Stadacona S.E.C. and Stadacona General Partner Inc./Commandité Stadacona Inc. pursuant to a deed registered at the office of the Registration Division on April 7, 2005 under number 12 195 317;

(ii) a hypothec on a universality of immovables granted for an amount of $250,000,000 in favour of Credit Suisse First Boston Toronto Branch by Stadacona L.P./Stadacona S.E.C. and Stadacona General Partner Inc./Commandité Stadacona Inc. pursuant to a deed registered at the office of the Registration Division on April 7, 2005 under number 12 195 318;

(iii) a legal hypothec (construction) for an amount of $2,067,704.24 in favour of KSH Solutions Inc. against Stadacona S.E.C. and Commandité Stadacona Inc. and registered at the office of the Registration Division on May 19, 2006 under number 13 298 021;

(iv) a prior notice of the exercise of a sale by judicial authority in favour of OSLO Construction Inc. against Stadacona S.E.C., owner, and Commandité Stadacona Inc., owner, registered on August 2, 2006 under number 13 534 837, this prior notice being in reference to a legal hypothec that was registered at the office of the Registration

Division under number 13 126 592 which has been totally discharged;

(v) a prior notice of the exercise of a sale by judicial authority in favour of KSH Solutions Inc. against Stadacona S.E.C. and Commandité Stadacona Inc. registered at the office of the Registration Division on October 20, 2006 under number 13 742 043, this prior notice being in reference of the legal hypothec registered under number 13 298 021 referred to in Section (iii) above;

(vi) a hypothec on a universality of property granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch by Stadacona General Partner Inc./Commandité Stadacona inc. [redacted] Division on March 4, 2010 under number 16 977 835; and

(vii) a hypothec on a universality of property granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch by Stadacona L.P./Stadacona S.E.C. pursuant to a deed registered at the office of the Registration Division on March 4, 2010 under number 16 977 836;

[13] **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Papineau, upon presentation of the Monitor's Certificate, in the form appended as Schedule "A" hereto, and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser or a Designated Purchaser (as the case may be) as the absolute owner in regards to the immovables listed in Schedule "D" hereto which are located in Gatineau, in the Province of Québec (being hereinafter described as

the **"Gatineau Property"**); and (ii) proceed with the reduction and cancellation of any and all Encumbrances but only insofar as concerns the Gatineau Property as described in Schedule "D", including, without limitation, the following registrations published at the said Land Registry Office for the Registration Division of Papineau:

(i) a hypothec in the amount of $550,000,000 by Papier Masson Ltée in favour of Crédit Suisse, Toronto Branch, in its quality of *"fondé de pouvoir"*, registered on January 25, 2006 under number 13 011 629;

(ii) a hypothec in the amount of $250,000,000 by Papier Masson Ltée in favour of Crédit Suisse, Toronto Branch, in its quality of *"fondé de pouvoir"*, registered on January 25, 2006 under number 13 011 630;

(iii) a legal hypothec in the amount of $1,808,000 in favour of Hydro-Québec, registered on September 2, 2009 under number 16 512 303 against the part of the Property known as lot 2 469 374 and located at the civic address 2 Montreal Road West, City of Gatineau;

(iv) a legal hypothec in the amount of $3,205,539.79 in favour of Hydro-Québec, registered on November 20, 2009 under number 16 737 683 against the part of the Property known as lot 2 469 374 and located at the civic address 2 Montreal Road West, City of Gatineau; and

(v) a hypothec in the amount of $200,000,000 by Papier Masson Ltée in favour of Crédit Suisse AG, Toronto Branch, registered on March 4, 2010 under number 16 977 911;

[14] **ORDERS** the Québec Personal and Movable Real Rights Registrar, upon presentation of the required form with a certified copy of this Order and the Monitor's Certificate, to reduce the scope of the hypothecs listed in Schedule "E" hereto in connection with the Assets and to cancel, release and discharge all of the Encumbrances from the Assets in order to allow the transfer to the Purchaser or a Designated Purchaser (as the case may be) of the Assets free and clear of any and all Encumbrances created by those hypothecs;

[15] **ORDERS** the officer responsible for the register of timber supply and forest management agreements according to article 38 of the Forest Act (Quebec), upon presentation of a true copy of this vesting order, to proceed with the cancellation and discharge of all the Encumbrances from the timber supply and forest management agreements of the Sellers, including, without limitation, the following registrations:

(i) a hypothec on the CAAF #00205081602 granted by Stadacona S.E.C. in favour of Credit Suisse First Boston Toronto Branch dated 2005-04-06 and registered on November 18, 2005 under number 002 05 11 18 01;

(ii) a hypothec on the CAAF #00205081602 granted by Stadacona S.E.C. in favour of Credit Suisse First Boston Toronto Branch dated 2005-04-06 and registered on November 18, 2005 under number 002 05 11 18 02.

[16] **ORDERS** that, pursuant to section 11.3 of the CCAA, and subject to paragraph 17 of this Order, the Debtors and the Mises en Cause are authorized and directed to assign the Debtors' and the Mises en Cause's respective rights and obligations under the contracts, leases and agreements and other arrangements of which the Purchaser, or a

Designated Purchaser takes an assignment on Closing pursuant to and in accordance with the terms of the Sale Agreement (the "**Designated Seller Contracts**", as defined in and pursuant to the terms of the Sale Agreement) and that such assignments are hereby approved and are valid and binding upon the counterparties to the Designated Seller Contracts (the "**Counterparties**") notwithstanding any restriction or prohibition on assignment contained in any such Designated Seller Contract; provided, however, that, the effectiveness of the assignment of any such Designated Seller Contract pursuant to this Order and the Sale Agreement shall be conditioned upon payment in full of the Cure Cost, if any, payable in respect of any such Designated Seller Contract (as determined by agreement among the parties or order of this Court);

[17] **ORDERS** that the Cure Cost payable in respect of any Designated Seller Contract shall be as agreed between the Purchaser and the Counterparty, failing which the Purchaser or the Counterparty shall be entitled to apply to this Court for an order determining the amount of such Cure Cost and, if such application is made, the assignment of such Designated Seller Contract shall not become effective until (i) such Cure Cost shall have been determined by a final, non-appealable order of this Court and (ii) such Cure Cost shall have been paid in full to the Counterparty; provided, however, that, nothing in this Order shall affect or limit the Purchaser's right under the Sale Agreement to elect in its sole discretion, at any time at least five (5) business days prior to Closing, to exclude any contract, lease, agreement or other arrangement from being a Designated Seller Contract under the terms of the Sale Agreement;

[18] **ORDERS** that, from and after the Closing Date, all Persons shall be deemed to have waived all defaults then existing or previously committed by the Debtors or the Mises en Cause under, or caused by the Debtors or

the Mises en Cause under, and the non-compliance of the Debtors or the Mises en Cause with, any of the Designated Seller Contracts arising solely by reason of the insolvency of the Debtors or the Mises en Cause or as a result of any actions taken by the Debtors or the Mises en Cause pursuant to the Sale Agreement or in these proceedings, and all notices of default and demands given in connection with any such defaults under, or non-compliance with, any of the Designated Seller Contracts shall be deemed to have been rescinded and shall be of no further force or effect;

[19] **ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof;

[20] **ORDERS** that neither the Purchaser nor any Designated Purchaser nor any affiliate thereof shall assume or be deemed to assume any liabilities or obligations whatsoever of any of the Debtors or the Mises en Cause (other than as expressly assumed in relation to any Designated Seller Contracts assigned pursuant to this Order and under the terms of the Sale Agreement), including without limitation, any liabilities or obligations in respect of, in connection with or in relation to: (i) any Seller Employee Plans (other than a Transferred Employee Plan); (ii) any and all termination, severance or related amounts which any current or former employee of the Debtors or the Mises en Cause (other than the Transferred Employees who become employees of the Purchaser or a Designated Purchaser on Closing as provided for in the Sale Agreement) could at any time assert against any of the Debtors or the Mises en Cause; or (iii) any and all former, current or future employees of the Debtors or the Mises en Cause (other than the Transferred Employees who become employees of the Purchaser or a Designated Purchaser on Closing as provided for in the Sale Agreement);

[21] **ORDERS** that the Purchaser and any Designated Purchasers, and their respective affiliates and officers, directors, employees, delegates, agents and representatives shall, effective immediately upon Closing of the Transaction, be and be deemed to be irrevocably and unconditionally fully and finally released of and from any and all claims, obligations or liabilities whatsoever arising from any event, fact, matter or circumstance occurring or existing on or before the Closing Date in relation to or in connection with the Debtors or the Mises en Cause or their respective present or past businesses, properties or assets, including, without limitation, any and all claims, obligations or liabilities whatsoever, whether known, anticipated or unknown, in relation to or in connection with the Seller Employee Plans (other than any Transferred Employee Plans) and the former, current or future employees of the Debtors and the Mises en Cause (other than any Transferred Employees who become employees of the Purchaser or a Designated Purchasers on Closing in accordance with the terms and conditions of the Sale Agreement) and provided that the foregoing shall not operate to release the Purchaser or any Designated Purchaser from any liabilities or obligations expressly assumed under the terms of the Sale Agreement;

[22] **ORDERS** that, notwithstanding:

(i) the pendency of these proceedings;

(ii) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Debtors or the Mises en Cause and any bankruptcy order issued pursuant to any such applications; and

(iii) any assignment in bankruptcy made in respect of any of the Debtors or the Mises en Cause;

the provisions of the Sale Agreement and the Transaction, and the vesting of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets in the Purchaser or a Designated Purchaser pursuant to this Order and all other transactions contemplated thereby shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Debtors or the Mises en Cause and shall not be void or voidable by creditors of any of the Debtors or the Mises en Cause, nor shall they constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other challengeable, voidable or reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation;

[23] **ORDERS** that the Sale Agreement and any related or ancillary agreements shall not be repudiated, disclaimed or otherwise compromised in these proceedings;

[24] **ORDERS** that, pursuant to clause 7(3)(c) of the Personal Information Protection and Electronic Documents Act (Canada) and any substantially similar legislation, the Debtors and the Mises en Cause are authorized and permitted to disclose and transfer to the Purchaser or any Designated Purchaser all Employee Records. The Purchaser or any Designated Purchaser shall maintain and protect the privacy of any personal information contained in the Employee Records and shall be entitled to collect and use the personal information provided to it for the same purpose(s) as such information was used by the Debtors and the Mises en Cause;

[25] **ORDERS** that forthwith upon receipt of the proceeds from the sale of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets, and prior to payment or repayment of any other claims, interests or obligations of or against the Debtors or the Mises en Cause, all outstanding Obligations (as defined in the Interim Financing Credit Agreement (as defined in the Initial Order of this Court dated February 24, 2010)) owed by the Debtors or the Mises en Cause under the Interim Financing Credit Agreement will be repaid in full and in cash from the proceeds of the sale of the Assets (other than the Wind-Down Amount and the Reserve Payment Amount) pursuant to the Sale Agreement;

[26] **ORDERS** that all Persons shall co-operate fully with the Debtors and the Mises en Cause, the Purchaser, any Designated Purchaser, their respective Affiliates and the Monitor and do all such things that are necessary or desirable for purposes of giving effect to and in furtherance of this Order, the Sale Agreement and the Transaction;

[27] **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or elsewhere, including the United States Bankruptcy Court for the Eastern District of Virginia, to give effect to this Order and to assist the Debtors, the Mises en Cause and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtors, the Mises en Cause and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Debtors, the Mises en Cause and the Monitor and their respective agents in carrying out the terms of this Order;

[28] **ORDERS** that this Order shall have full force and effect in all provinces and territories in Canada;

THE WHOLE without **COSTS.**

MONTRÉAL, this 28th day of SEPTEMBER, 2010

THE HONOURABLE ROBERT MONGEON, J.S.C. J.S.C.

COPIE CONFORME

Greffier adjoint

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

Court File No. CV-11-9159CL

AND IN THE MATTER OF A PLAN OR COMPROMISE OR ARRANGEMENT OF PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST, PRISZM INC., AND KIT FINANCE INC, APPLICANTS

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding Commenced at Toronto

BRIEF OF AUTHORITIES
(11.3 CCAA Assignment Motion Returnable May 30, 2011)

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