CANADA

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

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
No.: 500-11-038474-108

**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. (1985), c. C-36:**

**ESTATE WBPHC COMPANY (f.k.a. WHITE BIRCH PAPER HOLDING COMPANY)**

-and-

**ESTATE WBPC COMPANY (f.k.a. WHITE BIRCH PAPER COMPANY)**

-and-

**ESTATE SGPI INC. (f.k.a. STADACONA GENERAL PARTNER INC.)**

-and-

**ESTATE BSPI INC. (f.k.a BLACK SPRUCE PAPER INC.)**

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**ESTATE FFSGPI INC. (f.k.a. F.F. SOUCY GENERAL PARTNER INC.)**

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**3120772 NOVA SCOTIA COMPANY**

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**ESTATE GCSI INC. (f.k.a. ARRIMAGE DE GROS CACOUNA INC.)**

-and-

**ESTATE PML INC. (f.k.a. PAPIER MASSON LTÉE)**

Debtors

-and-

**ERNST & YOUNG INC.**

Monitor

-and-

**SSEC S.E.C. (f.k.a. STADACONA LIMITED PARTNERSHIP)**

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**FFS S.E.C (f.k.a. F.F. SOUCY LIMITED PARTNERSHIP)**

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**NORMANDIN BEAUDRY ACTUAIRES INC.**, in its capacity as provisional administrator for the seven former pension plans of the Debtors

Mises en Cause

-and -

**UNIFOR** and its local sections 11, 137, 200, 250, 299, 625, 627, 905 and 1104 previously named **(S.E.C.P. - QUÉBEC)**

- and-

**REGROUPEMENT DES EMPLOYÉS RETRAITÉS DE WHITE BIRCH-STADACONA**

-and-

**BD WHITE BIRCH INVESTMENT LLC, STADACONA WB LIMITED PARTNERSHIP, F.F. SOUCY WB LIMITED PARTNERSHIP and PAPIER MASSON WB LIMITED PARNERSHIP**

Petitioners

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**_DE BENE ESSE_ INTERVENTION AND/OR DECLARATION OF THE MONITOR PURSUANT TO ARTICLE 175 C.C.P.**

**WITHOUT CONTESTING OR ACQUIESCING TO THE CONCLUSIONS SOUGHT BY WAY OF THE MOTION FOR DECLARATORY RELIEF JUDGMENT (NO. # 241), THE MONITOR HEREBY WISHES TO STATE:**

Background

1. On February 24, 2010:

   1.1 this Court issued an order (the "**Initial Order**") extending the protection of the *Companies' Creditors Arrangement Act* (the "**CCAA**") to the Debtors and the Mises en Cause (collectively, "**WB Canada**"), appointing Ernst & Young Inc. as Monitor to WB Canada (the "**Monitor**") and declaring with respect to special cost payments in relation to the existing defined benefit pension plans of WB Canada:

   > [20] **ORDERS** that notwithstanding any other provision of this Order, the Petitioners and the Partnerships shall not during the Stay Period make any past service contributions (now due or to become due) or special payments to funded pension plans maintained by the Petitioners or the Partnerships (the "**Pension Plans**").
   >
   > [21] **ORDERS** that none of the Petitioners, the Partnerships, or the Directors shall have or incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any Person to make

any contributions (now due or to become due) or payments, other than current service cost contribution obligations "**Current Contributions**"), that they had or might otherwise have become required to make to any Pension Plans maintained by a Petitioner or by a Partnership.

1.2 Bear Island Paper Company, LLC ("**Bear Island**"), a subsidiary of White Birch Paper Holding Company, commenced proceedings in virtue of Chapter 11 of the *U.S. Bankruptcy Code* (WB Canada and Bear Island, collectively referred to as "**WB Group**");

1.3 White Birch Paper Company and five of its Canadian affiliates also applied for relief under the provisions of Chapter 15 of the *US Bankruptcy Code* before the Bankruptcy Court for the Eastern District of Virginia (the "**US Bankruptcy Court**") in case number 10-31234 –DOT (cases 10-31202-DOT and 10-31234 – DOT, collectively referred to as the "**US Proceedings**"), ultimately resulting in giving full force and effect to the Initial Order in the United States;

2. On September 28, 2010, this Court issued an Order approving the sale of substantially all of WB Group's assets (the "**Sale Order**") to BD White Birch Investment LLC ("**BDWBI**"), the whole as contemplated by an asset sale agreement dated August 10, 2010, as amended from time to time (the "**ASA**");

3. The Purchase Price, as defined in the ASA, to be paid thereunder includes:

3.1 a $ 78,000,000 credit bid against the assets of WB Canada charged in favour of the First Lien Secured Creditors;

3.2 the assumption of Assumed Liabilities (as defined in the ASA);

3.3 payment of the Cash Component (as defined in the ASA) in the amount of $ 90,000,000;

3.4 payment of the Reserve Payment Amount (as defined in the ASA);

3.5 the Fixed Cash Amount (as defined in the ASA) not to exceed US $4,500,000;

3.6 the payment of all requisite filing fees;

3.7 the delivery of the Wind-Down Amount (as defined in the ASA), including the Canadian Wind-Down Amount (as defined in the ASA) in the amount of $ 3,000,000 and the U.S. Wind-Down Amount (as defined in the ASA) in the amount of $ 600,000;

4. The closing of the transaction contemplated by the ASA (the "**Sale Transaction**") was delayed principally due to difficulties in agreeing to new pension plans acceptable to BDWBI;

5. As of February 24, 2010 and up until their termination in contemplation of the closing of the Sale Transaction, WB Canada maintained seven (7) defined benefit pension plans in total, including three (3) defined benefit pension plans for its non-unionized workforce and four (4) defined benefit pension plans for its unionized workforce: there were two (2) pension plans for each of Debtors' three (3) plants in Quebec, i.e. Stadacona, Papier Masson and F.F. Soucy, save that there were two (2) different plans for the unionized workforce of F.F. Soucy (mill and office);

6. On October 7, 2011, this Court rendered an Order granting the Monitor's Motion for Directions with respect to the ongoing efforts to resolve the Estate Allocation Issues (as defined below);

7. On April 20, 2012, this Court rendered a decision dismissing the various Motions seeking declaratory relief and modification of the Initial Order, the whole as more fully set out in BDWBI's Motion for Directions and for Declaratory Relief (# 241, the "**BDWBI Motion**"). Only the *Regroupement des employés retraités de la White Birch* – Stadacona (the "**Regroupement**") filed a Motion for leave to appeal, which it subsequently abandoned;

8. On July 13, 2012, WB Canada and the Union executed letters of understandings on terms acceptable to BDWBI with respect to unionized employees of Papier Masson (R-3), F.F. Soucy - Sections 625 and 905 (R-4), Stadacona (R-5) and F.F. Soucy - Section 627 (R-6). These letters of understandings provide *inter alia* for the termination of the existing pension plans and the creation of new pension plans as of the closing date for the benefit of WB Canada's unionized employees (R-3 to R-6, para. 2.3);

9. The closing of the Sale Transaction occurred on September 13, 2012, such that:

   9.1 all the former pension plans in favour of unionized and non-unionized employees were terminated in contemplation of closing;

   9.2 the assets of the WB Group were transferred to new entities designated by BDWBI; and

   9.3 the Debtors subsequently changed names as reflected in the Court's heading;

10. As the parties were unable to resolve prior to the closing the proper allocation of the net proceeds of the Sale Transaction and other issues having an impact on the allocation of certain common expenses of the WB Group, they entered into various escrow agreements and a reservation of rights of rights agreement to deal with the release of the funds to be held in escrow pending mutually satisfactory resolution of, or final binding decisions by this Court and the US Bankruptcy Court with respect to, the "Estate Allocation Issues", as defined in said agreements as follows:

> ***WHEREAS**, the Parties have been unable to consensually resolve, among other items, (a) the allocation of the Cash Component (as defined in the Purchase Agreement) between the estate of the U.S. Seller (the "**U.S. Estate**") and the estates of the Canadian Sellers (the "**Canadian Estates**"), (b) the repayment obligations between the U.S. Seller and the Canadian Sellers under the DIP Credit Facility, including without limitation any alleged subrogation rights of the U.S. Seller against the Canadian Sellers, (c) any alleged setoff rights of White Birch Paper Company whereby any subrogation claim could be setoff against all or a part of the Intercompany Claim, (d) the interpretation of the Purchase Agreement, including section 5.17 thereof, (e) whether the Intercompany Claim should be disallowed or recharacterized as equity, (f) allocation of fees, and expenditures, including but not limited to professional fees, expenses and expenditures, between the U.S. Seller and the Canadian Sellers (collectively, along with any other issues raised or to be raised by any Party which could affect Estate Allocation or distribution of proceeds, whether previously identified or not, the "**Estate Allocation Issues**")*

11. Following the closing of the Sale Transaction, two important issues remain to be resolved, namely:

11.1 the creation of the new pension plans, as contemplated by the letters of understanding (R-3 to R-6); and

11.2 the resolution of the Estate Allocation Issues;

12. On October 10, 2012, this Court approved the Cross-Border Insolvency Protocol, which had been previously approved by the US Bankruptcy Court on March 25, 2010, the whole as it appears from the Court record;

13. As previously explained, the Monitor has not been involved at all in the negotiations of the July 13, 2012 letters of understanding (R-3 to R-6) and the subsequent negotiations surrounding the creation and implementation of the new pension plans, but has nevertheless monitored the situation and reported to the Court thereon on a regular basis and, when it considered it necessary or beneficial to the proper restructuring process, has made representations concerning same, including before the Court of Appeal in relation to the Order rendered by this Court on March 20, 2013, in connection with the Regroupement's Motion for instructions. The Monitor refers this Court to its previous reports:

13.1 paragraphs 18 to 22 of the June 26, 2012 report: copy of the relevant extracts is communicated as **Exhibit M-1**;

13.2 paragraphs 23 to 29 of the July 20, 2012 report: copy of the relevant extracts is communicated as **Exhibit M-2**;

13.3 paragraphs 29 to 31 of the September 12, 2012 report: copy of the relevant extracts is communicated as **Exhibit M-3**;

13.4 paragraph 43 of the November 28, 2012 report: copy of the relevant extract is communicated as **Exhibit M-4**;

13.5 paragraphs 13 to 17 of the March 12, 2013 report: copy of the relevant extract is communicated as **Exhibit M-5**;

13.6 paragraphs 13 to 16 of the June 5, 2013 report: copy of the relevant extract is communicated as **Exhibit M-6**;

13.7 paragraphs 13 to 16 of the September 23, 2013 report: copy of the relevant extract is communicated as **Exhibit M-7**;

13.8 paragraphs 13 to 16 of the January 10, 2014 report: copy of the relevant extract is communicated as **Exhibit M-8**;

14. On or about February 6, 2014, the Union (by way of a "*Requête pour instructions*", the "**Union Motion**") and the Regroupement (by way of a "*Requête en demande d'instructions amendée*", the "**Regroupement Motion**") filed Motions seeking declaratory relief with respect to the creation and implementation of new pension plans as provided by the July 13, 2012 letters of understanding (R-3 to R-6);

15. On February 10, 2014, counsel for BDWBI confirmed to this Court that BDWBI and the Union had finally reached agreements concerning the terms of the new pension plans

with respect to unionized employees as provided by the July 13, 2012 letters of understanding (P-3 to P-6), which only needed to be memorialized in writing and filed with the Régie des rentes du Québec, and that BDWBI would have been prepared to commit to finalize and file same within an approximate two-week delay, save for the potential impact in this matter of the decision rendered on January 24, 2014 in the *Timminco* matter, 500-11-043844-121, leave to appeal 500-09-024225-146;

16. Shortly thereafter, Petitioners filed the BDWBI Motion and announced that BDWBI would not continue negotiating a proposed settlement of the Estate Allocation Issues pending a satisfactory resolution of its Motion;

17. On February 14, 2014, Justice Robert Mongeon ordered to have the Union Motion, Regroupement Motion and BDWBI Motion (collectively the "**Motions**") be heard on an expedited basis as part of a joint hearing;

18. As stated in its latest reports dated September 23, 2013 and January 10, 2014, the Monitor felt optimistic at the time about the prospects of finally reaching a mutually satisfactory resolution of the Estate Allocation Issues and as such is of the view that the Motions should be heard as soon as possible;

19. The Monitor has reviewed the BDWBI's Motion and takes exception with:

    19.1 paragraph 27, inasmuch as it seems to consider the potential creditor recovery from the Canadian and US Estates as part of the Purchaser's $ 132 M maximum cash outlay under the ASA;

    19.2 paragraph 37, inasmuch as it attempts to link the proper resolution of the Estate Allocation Issues, which is concerned with the fair allocation of proceeds and expenses between the Canadian and U.S. Estates, and the satisfaction of BDWBI's obligations as Purchaser pursuant to the ASA and the July 13, 2012 letters of understanding (R-3 to R-6);

20. The Monitor is of the view that BDWBI as Purchaser should not delay the creation and implementation of the new pension plans with respect to unionized employees as provided by the July 13, 2012 letters of understanding (R-3 to R-6), should this Court declare that the *Timminco* ruling is not applicable to the Debtors' unionized employees given *inter alia* the execution and the wording of said July 13, 2012 letters of understanding (R-3 to R-6);

21. The Monitor is unaware of the commitments made, if any, by BDWBI in favour of the active and retired non-unionized employees with respect to the creation of new pension plans;

22. The Monitor has no formal position with respect to the Union Motion and the Regroument Motion, save that it is concerned about the delays in implementing the new pension plans as provided by the July 13, 2012 letters of understanding (R-3 to R-6);

**WHEREFORE MAY IT PLEASE THE COURT TO:**

**RECEIVE** the present *De Bene Esse* Intervention and/or Declaration of the Monitor;

**THE WHOLE**, without costs.

Montreal, this March 26, 2014

Norton Rose Fulbright Canada LLP

**NORTON ROSE FULBRIGHT CANADA** LLP
Attorneys for the Monitor

## NOTICE OF PRESENTATION

**TO: SERVICE LIST**

**TAKE NOTICE** of the foregoing present *De Bene Esse* Intervention and/or Declaration of the Monitor will be presented for adjudication before the Honourable Robert Mongeon, J.S.C., at **[a date and in a room to be determined]** of the Montreal Courthouse, located at 1 Notre-Dame Street East, Montreal, Quebec, H2Y 1B6.

**DO GOVERN YOURSELVES ACCORDINGLY.**

Montreal, March 26, 2014

Norton Rose Fulbright Canada LLP

**NORTON ROSE FULBRIGHT CANADA** LLP
Attorneys for the Monitor

NO: 500-11-038474-108

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**UNIFOR** and its local sections 11, 137, 200, 250, 299, 625, 627, 905 and 1104 previously named **(S.E.C.P. - QUÉBEC) ET AL.**

Petitioners

**_DE BENE ESSE_ INTERVENTION AND/OR DECLARATION OF THE MONITOR PURSUANT TO ARTICLE 175 C.C.P.**

**ORIGINAL**


BO-0042 # 01014931-0010

Mtre Sylvain Rigaud

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CANADA

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**LIST OF EXHIBITS**
**(*DE BENE ESSE* INTERVENTION AND/OR DECLARATION OF THE MONITOR PURSUANT TO ARTICLE 175 C.C.P.)**

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Montreal, this March 26, 2014

Norton Rose Fulbright Canada LLP

**NORTON ROSE FULBRIGHT CANADA** LLP
Attorneys for the Monitor

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