CANADA

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

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

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

-and-

SYNDICAT CANADIEN DES COMMUNCATIONS, DE L'ÉNERGIE ET DU PAPIER (SCEP-QUÉBEC) and its local sections 11, 137, 200, 250, 299, 625, 627, 905 and 1104

Petitioner

CONTESTATION AND ARGUMENT PLAN OF THE DEBTORS IN RESPECT OF THE MOTION OF THE SCEP-QUÉBEC

IN SUPPORT OF THEIR CONTESTATION, THE DEBTORS (THE "WB GROUP") RESPECTFULLY SUBMIT AS FOLLOWS:

1. By way of the present Contestation and Argument Plan, the WB Group sets forth its reasons for contesting the motion brought by the Petitioner, Syndicat canadien des communcations, de l'énergie et du papier (SCEP-QUÉBEC) and its local sections 11, 137, 200, 250, 299, 625, 627, 905 and 1104 (the "**Union**", and with respect to its motion, the "**Union Motion**");

2. The WB Group has no knowledge of the veracity of the assertions set forth at paragraph 1 of the Union Motion;

3. The WB Group denies paragraphs 2, 9, 10, 11, 17, 18, 19, 20, 22, 23, 24, 26, 28, 29, 31, 32, 33, 34, 37, 38, 39 and 40 of the Union Motion;

4. The WB Group denies, as drafted, paragraphs 4 and 5 of the Union Motion;

5. The WB Group admits paragraphs 3, 6, 7, 8, 12, 13, 14, 15, 16 and 25 of the Union Motion;

6. The WB Group takes note of the Union's admission, at paragraph 14, that negotiations are ongoing, in stark contrast to the false and misleading contrary statement contained notably at paragraph 4 and 49 of the Union Motion;

7. With regard to paragraph 40 of the Motion, the WB Group once again repeats that there has been no lock-out, but merely an announcement that the Stadacona mill will be shut down, and adds that it too wishes (and indeed insists) that activities proceed normally at the other two (2) mills during the negotiation process;

8. With regard to paragraph 41 of the Motion, the WB Group points out that the Union has gone to great lengths in its Motion to assert that a lock-out would be contrary to the CCAA and the Initial Order. At the same time, the Union seeks to have the stay lifted in order to permit a strike at all White Birch mills, which would inevitably have the effect of crippling the company, triggering a default under the DIP, and ensuring an immediate bankruptcy. It has done so without so much as an allegation of any justification for such a strike. Indeed, the test for a lifting of the stay has clearly not been met, notably as no prejudice has been alleged, nor could be alleged, with regard to the employees at the two (2) mills that remain open;

9. With regard to the remaining paragraphs of the Union Motion, the WB Group refers to the exhibits, and denies anything not strictly in compliance therewith;

AND FOR FURTHER PROOF, THE WB GROUP SETS FORTH AS FOLLOWS:

NEGOTIATIONS WITH THE UNION

10. The WB Group, in conjunction with the Monitor and various other parties, have been working diligently throughout the stay period, in an effort to achieve a successful reorganization of their affairs;

11. Following a court-approved sale process, a stalking horse bidder was identified and an auction was held. At the conclusion of the auction, BD White Birch Investment LLC ("**BDWBI**") emerged as the highest and otherwise best bidder, and the sale of the WB Group's assets to BDWBI was approved by this Court;

12. The sale of the WB Group's assets to BDWBI is governed by the terms of the Asset Sale Agreement (the "**ASA**"), dated as of August 10th, 2010, as amended, which also received the approval of this Court;

13. As appears from the terms of the ASA, the sale to BDWBI is conditional, *inter alia*, upon the following:

> "***8.3 Conditions to Purchaser's Obligation.***
>
> *The Purchaser's obligation to effect, and to cause the relevant Designated Purchasers to effect, the Closing shall be subject to the fulfillment (or express written waiver by the Purchaser), at or prior to the Closing, of each of the following additional conditions:*

[...]

(f) Collective Labor Agreements. Collective Labor Agreements (whether in the form of new agreements or modifications to existing or expired agreements) shall have been reached between, on the one hand, the Sellers for the benefit of the Purchaser or relevant Designated Purchaser and, on the other hand, all applicable unions and collective bargaining agents that are acceptable to the Purchaser, in its sole discretion (including, without limitation, as to pension and retiree matters after Closing and as to the Purchaser, its officers, directors, employees, agents or delegates not having any Liabilities with respect to the existing or expired Collective Labor Agreements), and that may be assumed by the Purchaser at Closing, and the requisite majority of members in each applicable union shall have voted to ratify and accept such Collective Labor Agreement."

14. In the Fall of 2010, negotiations towards the renewal of the collective bargaining agreements began on a local level with each of the relevant locals of the Union. An agreement has been reached on "local issues" in each mill. The only remaining issue is the treatment of pension plans and the wages;

15. WB Group and BDWBI spent considerable time analyzing projections for the business to determine what the business could afford to provide to the employees in terms of pension plans after the closing. It was clear from the outset that the Union wanted to bargain on a pattern consistent with the manner in which AbitibiBowater ("**Abitibi**") had dealt with its pension plans;

16. After analyzing the Abitibi model carefully with the assistance of actuaries and lawyers, the WB Group and BDWBI realized that the Abitibi model does not meaningfully address the pension deficit, but rather pushes the problem out for 10 year or less. Proceeding with the Abitibi model would mean that BDWBI would inject $100 million of new money never to get a return on it and only to have a further insolvency in the future - something no prudent investor would do;

17. Having determined that the Abitibi model did not work for the WB Group, but knowing that the Union would likely want defined benefit pension plans for their employees, the WB Group devised a proposal which would provide for the termination of the existing pension plans, the establishment of new defined benefit pension plans and a funding budget to permit the Union to provide additional compensation (on top of the current service obligations) to the retirees and active workers to help to compensate them for the losses they would suffer as a result of the termination of the existing pension plans. This process took some time, and included actuaries of the WB Group and BDWBI speaking with the actuaries for the Union to help them understand the basis of the proposal;

18. Since April of 2011, the WB Group, with the consent of BDWBI, has made multiple offers to the Union and in each instance the Union has refused to even negotiate the terms of those proposals, instead demanding simply that the Abitibi model be applied to preserve 100% of their pension plans. Given the position of the Union, the negotiation

process was suspended on October 11, 2011 at the suggestion of the conciliator who had been appointed by the Ministry of Labour at the request of the WB Group.

DETERIORATING MARKETS

19. As negotiations continued, and as the deadlock persisted, economic conditions continued to deteriorate both globally and with respect to the North American newsprint industry;

20. Industry reports demonstrate that demand for newsprint is 7.2% below 2010 on a year to date basis, while it is 10.5% below for the month of October 2011 as compared to October 2010;

21. Over the longer term, demand has decreased by 60% since 2000, and capacity has decreased in consequence. Numerous plants have closed across North America, resulting in a decrease in capacity by approximately 7.3 million tons of newsprint;

22. Despite various recent mill closures, expected and publicly announced price increases of approximately 5% failed to materialize in the Summer of 2011;

23. The WB Group believes that the outlook for the industry is poor, and it is expected that current market conditions will not improve in the near future;

24. Such deteriorating economic conditions impacted the WB Group's financial performance, making an already precarious situation more severe;

SHUTDOWN OF THE STADACONA MILL

25. Of the WB Group's three (3) Quebec mills, the Stadacona mill has persistently been the worst performer, due to a number of factors;

26. Although the Stadacona mill has traditionally under-performed, as compared with the other WB Group mills, and has thus always weighed upon the overall financial performance of the WB Group, its continued operation could be justified, as it was until recently generally EBITDA neutral to EBITDA positive;

27. Despite the fact that past service contributions have been suspended, over the past six (6) months the Stadacona mill has operated at a loss;

28. Indeed, over the said six month period, the Stadacona mill lost approximately four million one hundred and fifty thousand dollars ($4,150,000);

29. In comparison, even in the present environment, the Soucy and Masson mills are cashflow positive and remain profitable (albeit, once the fact that they are not obligated to pay any of their past service contributions is taken into consideration);

30. In evaluating the performance of each of its mills, the WB Group looks principally at the production cost per ton of paper produced as well as man hours per ton;

31. The production costs at Stadacona, with regard to newsprint, are approximately eleven (11%) to fifteen percent (15%) higher than at the other two (2) WB Group mills in Québec, due notably to higher fiber costs (due to the need to use a portion of recycled fibers), higher chemical costs, higher labour costs (due to more unionized employees needed to produce a ton of paper) and higher maintenance and repair costs (due to the fact that the equipment is older);

32. In addition, the Stadacona mill requires approximately 20% more man hours per ton to produce newsprint than do the other Quebec mills of the WB Group;

33. In light of this, the Stadacona mill is simply not profitable in the current economic circumstances;

34. Once it began accumulating losses, particularly in the present circumstances, the WB Group could not justify operating the Stadacona mill. Faced with deadlocked negotiations, no immediate prospect of a resolution (and thus of a closing of the sale transaction with BDWBI) and, most importantly, with economic conditions that pushed the Stadacona mill into a loss position, the WB Group had little choice but to take action;

35. Closing the Stadacona mill had been contemplated for some period of time, due to its chronic under-performance. However, it was the accumulation of losses, combined with the deadlocked labour negotiations, that caused the WB Group to overcome its reservations about closing a mill (and the impact it would necessarily have upon the workforce) in order to ensure that the overall success of the WB Group's reorganization efforts was not put in peril;

36. The closure of the Stadacona mill not only allows the WB Group to stop incurring operating losses, it will also permit the other two (2) Quebec mills to improve their performance, as they will cease to "*subsidize*" the Stadacona mill and will be in a position to benefit from the more profitable contracts that currently have been attributed by the WB Group to the Stadacona mill;

37. This will protect the WB Group's finances and offer it the opportunity to continue to operate pending an eventual resolution and sale to BDWBI;

THE UNION'S FALSE AND MISLEADING STATEMENTS REGARDING STADACONA

38. In the Union Motion, the Union made various false and misleading statements regarding the status of the Stadacona mill and the reasons for its closure;

39. Notably, the Union focused upon the fact that the Stadacona mill was allegedly operating at full capacity, pointed to ongoing hiring, and asserted that these were indications that the decision to close was not made on the basis of economic factors;

40. However, in reality, and as explained herein, it is not the level of production at the mill which drives a decision as to whether to continue operating, but rather whether the mill is generating profits or incurring losses;

41. Thus, regardless of whether it was operating at full or partial capacity, the WB Group's decision to temporarily close the Stadacona mill stemmed from the losses it was incurring and from the fact that it was expected to continue to operate at a loss for the foreseeable future;

MILL SHUTDOWNS ARE PERMITTED UNDER THE CCAA

42. In announcing the shutdown of the Stadacona mill, the WB Group complied fully with the text and the spirit of both the Initial Order and the CCAA;

43. The Initial Order granted by this Honourable Court explicitly permits, at Section 26(i), the WB Group to "*permanently or temporarily cease, downsize or shutdown any of their operations, mills or mills, as they deem appropriate and make provision for the consequences thereof in the plan*";

44. The text of Section 26, which is based upon the standard Initial Order, makes it clear that the ability to downsize or shutdown mills is granted in order "*to facilitate the orderly restructuring*" of the WB Group's business;

45. Indeed, Canadian courts have established that the stay granted pursuant to the CCAA is designed to permit debtor company(ies) to restructure their business affairs, and that such restructuring will often require the elimination of certain elements of the debtor's operations;

46. The words of Justice Tysoe in *Doman Industries*, 2004 BCSC 733 **[Tab 1 of the WB Group's Authorities]**, are very instructive in this regard:

> "*In many reorganizations under the CCAA, it is necessary for the insolvent company to restructure its business affairs as well as its financial affairs. Even if the financial affairs are restructured, the company may not be able to survive because portions of the business will continue to incur ongoing losses. In such cases, it is appropriate for the court to authorize the company to restructure its business operations, either during the currency of the CCAA proceedings or as part of a plan of arrangement. The process is commonly referred to as a downsizing if it involves certain aspects of the business coming to an end.* [...]"

47. Unfortunately, downsizing may have a negative impact on various parties, including employees;

48. Canadian courts have nevertheless confirmed that the objective of the CCAA is to facilitate a plan, and that downsizing can therefore proceed during the stay period, despite the regrettable effect it may have upon employees, for instance, *Nortel Networks Corporation (Re)*, 55 CBR (5th) 68, Morawetz, J. **[Tab 2 of the WB Group's Authorities]**:

> "*[77]* [...] *The statute is aimed at facilitating a plan of compromise or arrangement. This may require adjustments to the operations in a number of areas, one of which may be a downsizing of operations which may involve a reduction in the workforce. These adjustments may be*

> *painful but at the same time may be unavoidable. The alternative could very well be a bankruptcy which would leave former employees, both unionized and non-unionized, in the position of having unsecured claims against a bankrupt debtor.*"

49. In reality, mill shutdowns are a common feature of reorganizations under the CCAA;

50. We note, for instance, that Abitibi shut down two (2) of its mills (Gatineau and Dolbeau), first temporarily, in 2009, and then permanently, in 2010;

THE SHUTDOWN OF THE STADACONA MILL IS NOT A "*DISGUISED*" LOCK-OUT

51. The shutdown of the Stadacona mill is attributable to the factors set forth above;

52. The decision to shut down does not constitute a "*disguised*" lock-out (to the extent such a concept exists) and is not a negotiating tactic;

53. The Union has offered absolutely no evidence of any kind to refute or call into question the WB Group's justifications for its business decision;

54. The workers at the Stadacona mill are, regretfully, going to be affected by the negative performance of the Stadacona mill, in comparison to the other WB Group mills, and by the deteriorating economic conditions;

55. In opting to shut down the Stadacona mill, the WB Group certainly did not intend to shut out these employees, and hopes that they will be able to recommence work once circumstances permit the Stadacona mill to be operated without incurring a loss. However, it must be said that, it is possible that the Stadacona mill may never re-open if the WB Group is unable to find a way to do so on a profitable basis;

THE STADACONA MILL COULD HAVE BEEN SHUT DOWN EVEN IF NO ORDER PURSUANT TO THE CCAA WAS IN PLACE

56. The WB Group has established that the decision to shut down the Stadacona mill was made within the parameters of (and indeed further to) the initial Order and the CCAA, is temporary, and is justifiable in view of the circumstances, as set forth above;

57. However, even if it were motivated by other considerations, and even if no Initial Order permitting the shutdown were in place, the WB Group could nevertheless opt to cease operations at the Stadacona mill;

58. The Supreme Court of Canada has indeed clearly established this right, pursuant to Quebec law, on several occasions;

59. Notably, the Supreme Court confirmed in *Plourde* v. *Wal-Mart Canada Corp*, [2009] 3 S.C.R. 465 **[Tab 3 of the WB Group's Authorities]**, that nothing could oblige an employer to remain in business, and that dismissal of employees following such closure will be considered to have been made for "*good and sufficient reasons*";

60. In its decision in *Wal-Mart*, which reaffirmed its previous decision in I.A.T.S.E., *Stage Local 56* v. *Société de la Place-des-Arts de Montréal*, [2004] 1 S.C.R. 43, the Supreme Court stated that the following passage from a judgment of the Superior Court of Quebec in *City Buick Pontiac (Montreal) Inc.* v. *Roy*, [1981] T.T. 22, represented the unanimous opinion of the Supreme Court:

> *"[41] In Place des Arts, at para. 28, the judgment of our Court adopted and expressly agreed with certain observations made by Judge Lesage in City Buick, in the context of the s. 17 presumption:*
>
> *[TRANSLATION] In our free enterprise system, there is no legislation to oblige an employer to remain in business and to regulate his subjective reasons in this respect. If an employer, for whatever reason, decides as a result to actually close up shop, the dismissals which follow are the result of ceasing operations, which is a valid economic reason not to hire personnel, even if the cessation is based on socially reprehensible considerations. What is prohibited is to dismiss employees engaged in union activities, not to definitively close a business because one does not want to deal with a union or because a union cannot be broken, even if the secondary effect of this is employee dismissal.*
>
> *[Emphasis added; italics in original deleted; p. 26.]*
>
> *Accordingly, these words can no longer be dismissed as merely the expression of the Quebec Labour Court in 1981. The words express the unanimous view of the Supreme Court of Canada in 2004."*

61. In light of this, even if no stay pursuant to the CCAA was in place, and even if it were to be demonstrated that the WB Group's motivations were closing the Stadacona mill are other than those set forth above, no court would be entitled to order the WB Group to reopen or maintain operations;

62. Furthermore, even if this Court were to determine that it was entitled to order the WB Group to maintain operations at the Stadacona mill, it is respectfully submitted that this Court must refuse, as to do so would be to force the WB Group to incur further losses, and thus to encounter even more significant economic difficulties;

63. Having not yet been able to close the transaction with BDWBI, and faced with an impasse in negotiations with the Union, the WB Group must be permitted to take those measures necessary to ensure its ability to continue to operate for the benefit of all of its employees and other stakeholders;

THE STAY PREVENTING THE UNION FROM EXERCISING ITS RIGHT TO STRIKE MUST BE MAINTAINED

64. It is not denied by the Union that the stay established by virtue of the Initial Order applies to the Union and its members, and serves to stay their right to strike;

65. Indeed, the exercise of a right to strike, like all other maneuvers by the Union, is a "*proceeding*" against the WB Group and is therefore stayed;

66. See *Hawkair* at paragraph 109 **[Tab 4 of the WB Group's Authorities]** (below) *Canwest Global Communications Corp. (Re.)*, (2011) 75 CBR (5th) 156 **[Tab 5 of the WB Group's Authorities]**, *Guelph Products Collins & Aikman*, [2009] DLRD No. 850 **[Tab 6 of the WB Group's Authorities]**;

67. Nevertheless, to the extent this Court declines to order that operations be maintained at all WB Group mills until such time as a collective agreement is concluded, the Union requests a lifting of the stay in order to permit members of the Union <u>at all WB Group mills</u> to exercise their right to strike;

68. As noted above, it seeks permission to exercise such right despite having characterized the purported lock-out by the WB Group as being contrary to the CCAA and to the Initial Order;

69. Having first attacked this purported i nitiative, the Union proceeded t o request this Court's assistance in doing precisely what it alleges the WB Group did, and thus the Union has sought to escalate matters (and obtain an even greater negotiating advantage), by obtaining the right to strike <u>at all WB Group mills</u>;

70. At no time does it so much as assert any type of unfair conduct, on the part of WB Group, with regard to the unionized employees at the two other Quebec mills;

71. Nevertheless, the Union wishes to permit such employees to strike as revenge against the WB Group;

72. What the Union proposes would have an extremely destructive (and most likely fatal) impact upon the WB Group, its reorganization efforts, and thus the interests of its creditors and other stakeholders (including the Union members themselves);

73. Indeed, granting the Union's request to lift the stay in order to permit the exercise of the unionized employees' right to strike would violate the fundamental principles of the CCAA;

74. In this respect, the WB Group refers notably to the decision of Justice Burnyeat in the matter of *Hawkair Aviation Services Ltd*, 2006 BCSC 669 **[Tab 4 of the WB Group's Authorities]**. In that case, the Court considered a request to lift the stay in order to permit the employees of the debtor company to proceed with a certification application pursuant to the *Canada Labour Code*. The Court confirmed that a certification application would constitute a proceeding against the company, and thus determined that the stay applied thereto. The Court then considered whether the stay should be lifted, and in order to do so, reviewed case law relating to the purpose of the CCAA and of the stay of proceedings. The Court cited the criteria to be considered in deciding upon a motion to lift the stay, and then concluded that the stay should not be lifted as the Court was satisfied "*that the filing of the certification application has and will seriously impair the ability*

of the company to focus and concentrate on its efforts to bring forward the applying of reorganization.";

75. In the present case, the consequences of a lifting of the stay to permit the Union to commence a strike is exponentially more serious. The strike at all of the WB Group mills would paralyze its operations, cut off all revenues and alienate clients;

76. Moreover, without revenues, the WB Group would be unable to respect its obligations, notably to the DIP Lenders pursuant to the interim financing agreement, making a default inevitable;

77. Bankruptcy would almost certainly result from such a situation, to the significant detriment of all stakeholders, including the unionized employees;

78. What's more, the threat of a strike, to the extent the Union is permitted to use it, would be a tool to obtain an undue advantage over other creditors, once again in clear breach of the principles underpinning the CCAA;

79. The Quebec Court of Appeal has ruled, notably in the matter of *Syndicat des employé(e)s de CFAP-TV (TQS–Québec), section locale 3946 du syndicat canadien de la fonction publique* v. *TQS Inc.*, 45 CBR (5th) 1 **[Tab 8 of the WB Group's Authorities]**, that employees are not entitled to special treatment and must make sacrifices like all other creditors in the context of a CCAA reorganization;

80. In the present case, granting the Union the ability to exercise its right to strike, during the stay period, at all of the WB Group mills, would place the Union into a position far more powerful than any other creditor;

81. In fact, to quote Your Lordship, from the decision of this Court on the last Union motion in this matter, 2010, Q.C.C.S. 2590 **[Tab 9 of the WB Group's Authorities]**, the effect of granting the Union's request would be "*tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the Union with a veto with regard to the restructuring process*";

WHEREFORE MAY IT PLEASE THE COURT TO:

GRANT the present written Contestation;

DISMISS the Petitioner's "*Requête pour jugement déclaratoire et modification de l'Ordonnance initiale ayant été prolongée le 18 novembre 2011*";

THE WHOLE WITH COSTS.

Montreal, this 25th day of November, 2011

Stikeman Elliott LLP

STIKEMAN ELLIOTT LLP
Attorneys for the Debtors