Court File No. CV-12-9566-00CL

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 TERRACE BAY PULP INC.

Applicant

FACTUM OF TERRACE BAY PULP INC.
(Returnable May 12, 2014)
(Re: Approval of Sale of Certain Non-Mill Property, Interim Distribution and Discharge of Unsold Property Lien Claims)

May 8, 2014

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PART I - OVERVIEW

1. The Initial Order[1] in this CCAA proceeding authorized Terrace Bay Pulp Inc. ("**Terrace Bay**" or the "**Company**") to conduct a sales process to solicit offers for its assets used in connection with its pulp manufacturing business (the "**Mill Property**"). An asset purchase agreement providing for the sale of substantially all of the Mill Property was approved by the Court on July 19, 2012 and the sale of the Mill Property closed on July 23, 2012.[2]

2. In accordance with an order of the Court dated May 16, 2013 (the "**May Order**"), certain proceeds from the sale of the Mill Property were distributed to the Trustee on account of Terrace Bay's obligations under the secured Plan Note. The Monitor continues to hold the remainder of the net proceeds of sale from the Mill Property in trust (the "**Trust**

[1] All capitalized terms used but not defined herein have the meaning given in the Affidavit of Wolfgang Gericke sworn May 5, 2012 (the "**Gericke Affidavit**"), which is at Tab 2 of the Company's Motion Record.
[2] Gericke Affidavit at paras. 4-6.

Funds").[3] The relief sought on this motion includes an order authorizing distribution of the Trust Funds.

3. In addition to the Mill Property, the Initial Order also authorized the Company, with the assistance of the Monitor, to market for sale certain ancillary assets not used in connection with the Company's business (the "**Non-Mill Property**"). The Non-Mill Property is comprised of extensive real property in and around the Township of Terrace Bay, much of which is vacant lands.[4]

4. After completing a sale process, Terrace Bay has now entered into four purchase agreements (the "**Purchase Agreements**"), which collectively provide for the sale of almost all of the land that comprises the Non-Mill Property (collectively, the "**Sold Property**").[5] Approval of the four sale transactions contemplated by the Purchase Agreements (the "**Sale Transactions**") is sought on this motion.

5. The relief sought on this motion also includes authorization to distribute the net proceeds of sale of the closed Sale Transactions (the "**Sale Proceeds**") to the Trustee on account of Terrace Bay's obligations under the secured Plan Note.

6. Various construction liens have been registered against title to the Non-Mill Property (the "**Non-Mill Property Lien Claims**"). The relief sought on this motion includes orders addressing these liens. For the reasons set out below, it is Terrace Bay's position that the Non-Mill Property Lien Claims are not valid claims against the Non-Mill Property and, even if valid and enforceable, the Non-Mill Property Lien Claims rank in priority behind

[3] May Order, Appendix "J" to the Gericke Affidavit.
[4] Gericke Affidavit at para. 7.
[5] Gericke Affidavit at para. 14.

the Plan Note Charge. Terrace Bay's obligations under the Plan Note Charge will not and cannot be paid in full.

7. In summary, this Factum is filed in support of the Company's motion for orders, among other things:

(a) approving the Sale Transactions and vesting the applicable Sold Property in the applicable Purchaser, free and clear of all liens and encumbrances other than certain permitted encumbrances;

(b) declaring that, other than in relation to the Administration Charge, the Plan Note Charge has priority over all other claims, security, liens and encumbrances of any kind (including without limitation, the various construction liens registered against title to the Sold Property) (collectively, the "**Subordinate Claims**"), against, affecting or relating to the Sale Proceeds and the Trust Funds, and that the Sale Proceeds and the Trust Funds may be distributed by the Company without regard to and in priority to the Subordinate Claims;

(c) directing the Monitor to release to Terrace Bay the Sale Proceeds and Trust Funds, in the form of one or more payments, up to the aggregate amount of the Sale Proceeds and Trust Funds (the "**Interim Distributions**"), the amount and timing of which payments shall be in the discretion of the Monitor, and further ordering and directing Terrace Bay to pay the Interim Distributions to the Trustee, in trust for the Beneficiaries, on account of the Company's obligations under the Plan Note;

(d) ordering and directing that the Unsold Property Lien Claims be discharged and expunged from title to the Unsold Property; and

(e) directing that Confidential Appendices "B" and "C" to the Twelfth Report and the Cash Purchase Prices and Deposits shall remain confidential, sealed and segregated from and not form part of the permanent court record pending further order of the Court.

PART II – FACTS

Sale Process

8. Paragraphs 20-22 of the Twelfth Report summarize the sale process activities originally undertaken by Terrace Bay and the Monitor with respect to implementing a sale of the Non-Mill Property during the period through March, 2013 (the "**Original Sale Process**"). The Original Sale Process ultimately led to the execution of a purchase agreement on May 22, 2013 between Terrace Bay and a prospective purchaser (the "**First Prospective Purchaser**").[6]

9. On or about September 24, 2013, the First Prospective Purchaser elected not to waive its due diligence condition and the purchase agreement between Terrace Bay and the First Prospective Purchaser was terminated.[7]

10. The Company and the Monitor then conducted a limited re-canvassing of the market for the Non-Mill Property (the "**Refreshed Sale Process**"). With respect to the extent and

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[6] Gericke Affidavit at para. 8.
[7] Gericke Affidavit at para. 9.

length of the Refreshed Sale Process, the Endorsement of the Honourable Mr. Justice Morawetz dated October 28, 2013 (the "**October Endorsement**") stated:

> It seems to me that the proper balance point is such that the Applicant/Monitor should have a period of time to recanvass the market – with the emphasis of the marketing process being concentrated on parties who showed original interest. In my view this limited recanvassing can be completed in 30-45 days.[8]

11. The activities completed in the Refreshed Sale Process are summarized at paragraphs 25-27 of the Twelfth Report and are consistent with the October Endorsement.

12. After reviewing and analyzing each of the LOIs received by the deadline of December 6, 2013, Terrace Bay and the Monitor selected a combination of four offers. Collectively, the four Sale Transactions represent the best offer or combination of non-overlapping offers received in the Refreshed Sale Process.[9]

13. Details of all LOIs received in the Refreshed Sale Process are included in Confidential Appendix "B" to the Twelfth Report. Further details with respect to the Sale Transactions are provided in the Gericke Affidavit at paragraphs 21-46 and Confidential Appendix "C" to the Twelfth Report.

Non-Mill Property Lien Claims

Background – The Mill Property Lien Claims

14. Numerous construction liens were registered against title to Terrace Bay's Mill Property related to services and materials supplied in respect of the Mill Property between June

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[8] Gericke Affidavit at para. 11; October Endorsement, Exhibit "B" to Gericke Affidavit.
[9] Gericke Affidavit at para. 14 and 21.

and December 2011. These Mill Property Lien Claims were discharged as against the Mill Property in connection with the sale of the Mill Property in July 2012.[10]

15. In the May Order, it was ordered and declared that, other than the priority of the Administration Charge and claims secured by the Administration Charge, the Plan Note Charge had priority over all other claims, security, liens and encumbrances of any kind against the proceeds of sale of the Mill Property, including without limitation the Mill Property Lien Claims.[11]

16. The May Order also authorized an interim distribution of the proceeds of sale from the Mill Property to the Trustee on account of Terrace Bay's obligations under the Plan Note. The relief sought on this motion with respect to the Non-Mill Property Lien Claims is essentially the same as the relief granted in the May Order with respect to the Mill Property Lien Claims.[12]

The Non-Mill Property Lien Claims Relate to the Same Improvements

17. The Non-Mill Property Lien Claims are summarized in a chart at Exhibit "K" to the Gericke Affidavit. They relate solely to the same three improvements, work, services and materials as the Mill Property Lien Claims. No work or services relating to any of the Non-Mill Property Lien Claims relate to the Non-Mill Property: they all relate to services and materials provided in respect of the Mill Property between June and December 2011.[13]

[10] Gericke Affidavit at para. 48.
[11] Gericke Affidavit at para. 49; May Order, Exhibit "J" to Gericke Affidavit.
[12] Gericke Affidavit at para. 50 and 56; May Order, Exhibit "J" to Gericke Affidavit.
[13] Gericke Affidavit at paras. 54 and 57.

18. All of the Non-Mill Property Lien Claims arose and were registered on title subsequent to registration of the Plan Note Charge on September 15, 2010.[14]

19. Counsel to Terrace Bay has sent numerous correspondence to counsel for the Non-Mill Property Lien Claimants setting out Terrace Bay's position in respect of the Non-Mill Property Lien Claims and requesting that the liens be discharged voluntarily from title to the Non-Mill Property. In response, most of the Non-Mill Property Lien Claimants have voluntarily discharged their respective Non-Mill Property Lien Claims and/or advised that they do not oppose the relief sought on this motion. However, certain Non-Mill Property Lien Claims remain registered against title to the Non-Mill Property.[15]

20. The Non-Mill Property Lien Claims are divided into two categories: (i) the "**Sold Property Lien Claims**" are the Non-Mill Property Lien Claims that are registered against title to the Sold Property; and (ii) the "**Unsold Property Lien Claims**" are the Non-Mill Property Lien Claims that are registered against title to the Non-Mill Property which is not subject to any of the Sale Transactions.

Secured Claims Against the Sold Property

21. The only known secured claims or encumbrances against the Sold Property are the Administration Charge, the Plan Note Charge and the Sold Property Lien Claims. All property taxes and mining taxes with respect to the Sold Property are current.[16]

22. The Plan Note Charge is a result of Terrace Bay's previous CCAA proceeding, which commenced in March 2009 (the "**First CCAA Proceeding**"). In the First CCAA

[14] Gericke Affidavit at para. 55.
[15] Gericke Affidavit at paras. 58-60.
[16] Gericke Affidavit at para. 64.

Proceeding, Terrace Bay successfully implemented a plan of compromise or arrangement that was approved by the Court and Terrace Bay's creditors and implemented in September 2010 (the "**CCAA Plan**"). The CCAA Plan provided that unsecured creditors of Terrace Bay were to participate (on a *pro rata* basis) in the Plan Note. The Plan Note is secured against all of Terrace Bay's assets by the Plan Note Charge, which was registered against title to all of Terrace Bay's real and personal property including the Sold Property on September 15, 2010.[17]

23. At the commencement of these CCAA proceedings, the amount payable under the Plan Note was $10 million. After the prior distributions authorized by the May Order, the current outstanding principal amount owing under the Plan Note is approximately $8,175,000.[18]

24. The aggregate of the Sale Proceeds, Trust Funds and any other proceeds realized from the remaining assets of Terrace Bay will be insufficient to repay the obligations owing under the Plan Note in full.[19]

25. The Monitor has reviewed the Plan Note Charge and the other security held by the Trustee as set out in the Sixth Report and Ninth Report of the Monitor dated July 12, 2012 and May 14, 2013, respectively.[20]

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[17] Twelfth Report of the Monitor dated May 5, 2014 ("**Twelfth Report**") at paras. 3-5; Gericke Affidavit at para. 55.
[18] Twelfth Report at paras. 5 and 18.
[19] Gericke Affidavit at para. 68; Twelfth Report at para. 46.
[20] Twelfth Report at para. 46.

PART II — ISSUES

26. The issues on this motion are as follows:

(a) Should the Sale Transactions be approved?

(b) Should title in the applicable Sold Property be vested in the applicable Purchaser, free and clear of all encumbrances, except for the permitted encumbrances set out in the draft vesting orders?

(c) Should the Unsold Property Lien Claims be discharged and expunged from title to the Unsold Property?

(d) Should the Court declare that, other than in relation to the Administration Charge, the Plan Note Charge has priority over all Subordinate Claims relating to the Sale Proceeds and the Trust Funds, and authorize the proposed Interim Distributions?

(e) Should Confidential Appendices "B" and "C" to the Twelfth Report and the Cash Purchase Prices and Deposits remain sealed and confidential?

PART III -- THE LAW AND ARGUMENT

A. THE SALE TRANSACTIONS SHOULD BE APPROVED

27. Pursuant to section 36 of the CCAA, this Court has the authority to approve the Sale Transactions. Section 36(3) sets out a non-exhaustive list of factors for the Court to consider in determining whether to approve a sale transaction:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.[21]

28. The list of factors set out in section 36(3) of the CCAA largely overlaps with the criteria established in *Royal Bank v. Soundair Corp.* ("***Soundair***"), a case decided before the enactment of section 36(3) which has been applied in the context of sale approvals in CCAA proceedings. *Soundair* summarized the factors a Court should consider when assessing whether to approve a transaction to sell assets:

(a) whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.[22]

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[21] *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, s. 36(3) ("***CCAA***").
[22] *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) at para. 16, Commercial List Book of Authorities, Tab 7.

(i) Effort to Obtain the Best Price

29. In an effort to obtain the best price for the Sold Property, the Company and the Monitor completed the robust Original Sale Process. The Company and the Monitor determined that the First Prospective Purchaser's offer was the best offer submitted in the Original Sale Process.

30. After the First Prospective Purchaser's offer was terminated, the Company and the Monitor completed the Refreshed Sale Process in accordance with the October Endorsement. Collectively, the four Sale Transactions represent the best offer or combination of non-overlapping offers received in the Refreshed Sale Process.

31. The Company respectfully submits that, with the Monitor's assistance, it has taken all reasonable steps to obtain the best price in the circumstances, has acted in accordance with the prior orders and endorsements of this Court, and has not acted improvidently.

(ii) Interests of the Parties

32. The only parties with an economic interest in the outcome of the sale process are the Beneficiaries of the Plan Note.

(iii) Efficacy and Integrity of the Process

33. The Company, with the assistance of the Monitor, marketed the Sold Property and sought bids from interested parties fairly and in accordance with the October Endorsement. All parties who previously showed an interest in the Sold Property were given the opportunity to participate in the Refreshed Sale Process.

34. The Original Sale Process and Refreshed Sale Process were both fair and effective processes for maximizing realization of the Sold Property in the circumstances. The Sold Property has been appropriately marketed and the integrity of the Original Sale Process and Refreshed Sale Process has been maintained throughout.

(iv) No Unfairness in Working Out of the Process

35. The process followed by the Company in entering into the Sale Transactions was just and fair. The Company, with the assistance of the Monitor, made diligent and sufficient efforts to get the best price that it could for the Sold Property. The Company and the Purchaser followed the Original Sale Process and Refreshed Sale Process, which were fair to all persons who indicated an interest in bidding on any of the Sold Property.

(v) Conclusion with Respect to the *Soundair* Principles

36. The Company therefore submits that the Sale Transactions are consistent with the *Soundair* principles and respectfully requests that they be approved.

B. APPROVAL AND VESTING ORDERS

37. A condition of closing each Sale Transaction is that the Approval and Vesting Order (as defined each Purchase Agreement) shall be issued and entered by the Court. The Company therefore seeks the Approval and Vesting Orders from this Court to facilitate the closing of the Sale Transactions.

38. All parties with a known interest in the Sold Property whose interests would be affected by the Approval and Vesting Orders sought have been served with notice of this motion.

Notice of this motion was also served on the relevant governmental parties who might assert a statutory priority or trust claim against the Sold Property.

39. The Company therefore respectfully submits that the Approval and Vesting Orders should be granted.

C. DISCHARGE OF THE NON-MILL PROPERTY LIEN CLAIMS

40. The Non-Mill Property Lien Claims are not valid claims against the Non-Mill Property because the improvements that these liens relate to were all improvements to the Mill Property, not the Non-Mill Property.

41. Pursuant to section 47(1) of the *Construction Lien Act* (Ontario) ("***CLA***"), this Court has the jurisdiction to discharge construction liens upon any proper ground.[23]

42. While it is submitted that all Non-Mill Property Lien Claims are invalid, the discharges sought on this motion are only with respect to the Unsold Property Lien Claims. The Sold Property Lien Claims will be discharged as against the Sold Property by operation of the Approval and Vesting Orders (if such orders are granted). The Sold Property Lien Claims remain as against the Sale Proceeds in the priority to which they are entitled. Accordingly, the relief sought in respect of the Sold Property Lien Claims is, as described below, a declaration of priority and authorization to distribute the Sale Proceeds to the Plan Note Trustee, without regard to the Subordinate Claims, including the Sold Property Lien Claims.

43. Section 14 of the CLA sets out how a lien is created in a premises:

[23] *Construction Lien Act*, R.S.O. 1990, c. C.30 ("***CLA***"), s. 47(1).

> A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner <u>in the premises improved</u> for the price of those services or materials.[24]

44. The CLA defines "premises" to include: (a) the improvement, (b) all materials supplied to the improvement, and (c) the land occupied by the improvement, or enjoyed therewith, or the land upon or in respect of which the improvement was done or made.[25]

45. The Non-Mill Property is not the land upon or in respect of which any of the improvements identified by the Non-Mill Property Lien Claims was done or made. Therefore, the only way that the Non-Mill Property Lien Claims could be asserted against the Non-Mill Property is if the Non-Mill Property was "*enjoyed therewith*" the land occupied by the improvements.

46. The question of whether a particular parcel of land is so connected with another as to be "enjoyed therewith," and therefore lienable with the other land, is decided upon the particular facts and circumstances of each case.[26]

47. Factors considered by courts in this analysis have included:

(a) whether the lands are geographically removed from one another or physically connected with one another;[27]

(b) whether the lands' uses are for a common purpose or are separate and severable;[28] and

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[24] CLA, s. 14(1) (emphasis added).
[25] CLA, s. 1(1) (emphasis added).
[26] *Lake of the Woods Electric (Kenora) Ltd. v. Kenora Prospectors & Miners Ltd.,* 1996 CarswellOnt 1325 (Ont. Ct. J. (Gen. Div.)) at para. 60 ("***Lake of the Woods***"), Schedule "C" hereto; *Phoenix Drywall v. Mississauga Rest Home Two Inc.*, 1988 CarswellOnt 766 (Ont. Supreme Ct., High Court of Justice) at para. 15 ("***Phoenix Drywall***"), Schedule "C" hereto.
[27] *Lake of the Woods, supra* at para. 60;*Phoenix Drywall, supra* at para. 17.

(c) whether the improvement was intended to benefit both lands.[29]

48. While certain of the Non-Mill Property is geographically located next to the Mill Property, much of the Non-Mill Property is located a significant distance from the Mill Property, some of which is separated from the Mill Property by lakes and includes certain islands.[30] It cannot be said that all Non-Mill Property is physically connected or adjacent to the Mill Property.

49. Further, the uses of the Mill Property and Non-Mill Property are separate and severable. The Mill Property was the location where Terrace Bay's pulp manufacturing business was conducted. The Non-Mill Property includes an airstrip, a golf course and is otherwise comprised of vast vacant lands, none of which have any relation to Terrace Bay's former business operations.

50. The improvements referenced in the Non-Mill Property Lien Claims relate to three categories of improvements: (a) two projects aimed at improving the environmental performance of the Mill Property and increasing the power generated from renewable resources at the mill; (b) the repair and replacement of a blow tank that exploded at the mill in 2011 and related damage; and (c) claims relating to other work performed at the Mill Property, mainly relating to the annual shutdown of the mill.[31]

51. None of these improvements were intended to benefit the Non-Mill Property.

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[28] *Lake of the Woods, supra* at para. 60; *Phoenix Drywall, supra* at paras. 15 and 17.
[29] *Phoenix Dryall*, supra at para. 18.
[30] See Appendix "A" to the Twelfth Report for a sketch of the Non-Mill Property and surrounding areas.
[31] Gericke Affidavit at para. 57.

52. Accordingly, the Non-Mill Property cannot be considered to have been "enjoyed therewith" the Mill Property. Therefore, the Non-Mill Property is not properly lienable for improvements made to the Mill Property and the Non-Mill Property Lien Claims should be discharged.

D. PRIORITY OF PLAN NOTE CHARGE AND INTERIM DISTRIBUTIONS

53. As set out above, the only known secured claims or encumbrances against the Sold Property are the Administration Charge, the Plan Note Charge and the Sold Property Lien Claims.

54. For the reasons set out below, the Company submits that, pursuant to subsection 78(3) of the CLA, the Plan Note Charge has priority over the Sold Property Lien Claims with respect to the Sold Property and the Sale Proceeds.[32]

55. Section 78 of the CLA sets out the priority scheme as between construction liens and other charges against real property. Subsection 78(1) of the CLA provides that construction liens have priority over all other charges against the real property to which improvements have been made unless an exception is found elsewhere in section 78.

56. Subsection 78(3) of the CLA provides the following exception:

> Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first

[32] For the purposes of this priority analysis only, it is assumed that the Sold Property Lien Claims are valid under the CLA. This assumption is made so that, in the event the Court determines that the Sold Property Lien Claims do not have sufficient priority to entitle them to any distribution of the Sale Proceeds, the Company need not incur the cost of reviewing each Sold Property Lien Claim for validity and quantum. The Company reserves its right to review the validity and quantum of the Sold Property Lien Claims in the event that they are found to have sufficient priority to entitle the applicable lien claimants to any distribution.

lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

(a) the actual value of the premises at the time when the first lien arose; and

(b) the total of all amounts that prior to that time were,

(i) advanced in the case of a mortgage, and

(ii) advanced or secured in the case of a conveyance or other agreement.

Timing of Registration of Plan Note Charge vs. Timing of First Lien Arising

57. The first question arising from the application of subsection 78(3) of the CLA is one of timing. If the Plan Note Charge was registered on title to the Real Property prior to the time when the first Sold Property Lien Claim arose in respect of the relevant improvement(s), then the Plan Note has priority over the Construction Lien Claims.

58. Under the CLA, a person's lien arises upon the person's first supply of services or materials to the improvement.[33] The Sold Property Lien Claims state that they each relate to services and materials provided between June and December 2011. The commencement of work indicated in the Sold Property Lien Claim registrations range between June 6, 2011 and November 2, 2011.[34]

59. As the Plan Note Charge was registered on title to the Sold Property on September 15, 2010, prior to any of the Sold Property Lien Claims arising, the Plan Note Charge has priority over the Sold Property Lien Claims up to the maximum amount set out below.

[33] CLA, s.15.

[34] Exhibit "K" to Gericke Affidavit.

Quantum of the Priority of the Plan Note Charge

60. The second question arising from the application of subsection 78(3) of the CLA is one of quantum. The Plan Note Charge has priority over the Sold Property Lien Claims up to the maximum of the lesser of two amounts set out at subsections 78(3)(a) and (b).

61. In particular, the quantum of the priority of the Plan Note Charge is limited to the lesser of:

(i) the actual value of the Sold Property at the time when the first Sold Property Lien Claim arose;[35] and

(ii) the total of all amounts that prior to that time were (a) advanced in the case of a mortgage; and (b) advanced or secured in the case of a conveyance or other agreement.[36]

62. As described above, the Sold Property Lien Claims arose between June and December, 2011. The precise value of the Sold Property (the majority of which is vast vacant lands) at that time is not known. The only evidence to support the value of the Sold Property is the price at which the Purchasers are willing to purchase the Sold Property in the open market. At the time of the Refreshed Sale Process, this is the quantum of the Sale Proceeds. There have been no improvements or changes to the Sold Property that would be known to have materially affected the value of the Sold Property since the first lien arose (since the lien claims relate to the Mill Property and the nature of the Sold Property is mainly vacant lands).

63. The amount secured by the Plan Note Charge at the relevant time was $10 million.

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[35] CLA, s.78(3)(a).
[36] CLA, s.78(3)(b).

64. The lesser of these two amounts is the value of the Sold Property, reasonably represented by the Sale Proceeds. Accordingly, pursuant to subsection 78(3) of the CLA, the Plan Note Charge has priority over the Sold Property Lien Claims up to at least the quantum of the Sale Proceeds.

65. Accordingly, the Sale Proceeds ought to be distributed to the Trustee on account of Terrace Bay's obligations under the Plan Note, in priority to and without regard to the Sold Property Lien Claims.

E. SEALING AND CONFIDENTIALITY ORDER

66. The Company seeks to have Confidential Appendices "B" and "C" to the Twelfth Report and the Cash Purchase Prices and Deposits remain confidential, sealed and segregated from the permanent court record pending further order of the Court. The appendices include a summary of offers received in the Refreshed Sale Process and the purchase prices and deposits to be paid pursuant to the Purchase Agreements.

67. In *Re Nortel,* the Court set out the test for a sealing order as articulated by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance).* A sealing order should only be granted where:

(a) an order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.[37]

68. The information subject to the sealing request is sensitive commercial information. Courts have recognized that disclosure of this type of information in the context of a public and court supervised sales process could be harmful to stakeholders.[38]

69. The salutary effects of sealing this information outweighs the public interest in open and accessible court proceedings, as this type of information would not otherwise be available to the public in the context of a private sale process, and its disclosure would negatively affect the Company's ability to obtain the best price for the Sold Property in the event that any of the Sale Transactions do not close for any reason.

PART IV -- RELIEF REQUESTED

70. For the foregoing reasons, the Company respectfully requests that this Court grant orders approving the Sale Transactions, authorizing the Interim Distributions, discharging the Unsold Property Lien Claims, and the other relief requested in its Notice of Motion

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Michael McGraw / Jenna Willis,
Lawyers for the Applicant

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[37] Re Nortel Networks Corp. (2009), 56 C.B.R. (5th) 224; 2009 CarswellOnt 4838 (Ont. Sup. Ct. J.) [Commercial List], at para 38; Schedule "C" hereto.

[38] Re SkyPower Corp., 2009 CarswellOnt 9415 (Ont. Sup. Ct. J.) [Commercial List] at para. 14; Schedule "C" hereto.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)
2. *Lake of the Woods Electric (Kenora) Ltd. v. Kenora Prospectors & Miners Ltd.,* 1996 CarswellOnt 1325 (Ont. Ct. J. (Gen. Div.))
3. *Phoenix Drywall v. Mississauga Rest Home Two Inc.*, 1988 CarswellOnt 766 (Ont. Supreme Ct., High Court of Justice)
4. *Re Nortel Networks Corp.*, 2009 CarswellOnt 4838 (Ont. Sup. Ct. J.) [Commercial List]
5. *Re SkyPower Corp.,* 2009 CarswellOnt 9415 (Ont. Sup. Ct. J.) [Commercial List]

SCHEDULE "B"

RELEVANT STATUES

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

Section 36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

Construction Lien Act, R.S.O. 1990, c. C.30

Section 1. (1) In this Act, ...

"premises" includes,

(a) the improvement,

(b) all materials supplied to the improvement, and

(c) the land occupied by the improvement, or enjoyed therewith, or the land upon or in respect of which the improvement was done or made;

Section 14. (1) A person who supplies services or materials to an improvement for an owner, contractor or subcontractor, has a lien upon the interest of the owner in the premises improved for the price of those services or materials.

Section 47. (1) Upon motion, the court may,

(a) order the discharge of a lien;

(b) order that the registration of,

(i) a claim for lien, or

(ii) a certificate of action,

or both, be vacated;

(c) declare, where written notice of a lien has been given, that the lien has expired, or that the written notice of the lien shall no longer bind the person to whom it was given; or

(d) dismiss an action,

upon any proper ground and subject to any terms and conditions that the court considers appropriate in the circumstances.

Section 78. (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

(a) the actual value of the premises at the time when the first lien arose; and

(b) the total of all amounts that prior to that time were,

(i) advanced in the case of a mortgage, and

(ii) advanced or secured in the case of a conveyance or other agreement.

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

(a) at the time when the advance was made, there was a preserved or perfected lien against the premises; or

(b) prior to the time when the advance was made, the person making the advance had received written notice of a lien.

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

> (a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and
>
> (b) the amount received is not subject to any lien existing at the date of the trustee's appointment.

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

> (a) the postponed lien; and
>
> (b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5).

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983.

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

> (a) a bond of an insurer licensed under the Insurance Act to write surety and fidelity insurance; or
>
> (b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the Bank Act (Canada),

in a form prescribed is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit.

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer.

Court File No. CV-12-9566-00CL

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 TERRACE BAY PULP INC.

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

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