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.

July 13, 2012

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PART I -OVERVIEW

1. On January 25, 2012, Terrace Bay Pulp Inc. ("**Terrace Bay**" or the "**Company**") sought and obtained protection from its creditors under the *Companies' Creditors Arrangement Act* (the "**CCAA**") pursuant to an order of the Honourable Mr. Justice Morawetz (as amended and restated, the "**Initial Order**") of the Ontario Superior Court of Justice (Commercial List) (the "**Court**").

2. Pursuant to the Initial Order, Ernst & Young Inc. was appointed as Monitor of the Company.

3. The Initial Order authorized the Company to conduct, with the assistance of the Monitor, and in consultation with the Province of Ontario as represented by the Minister of Northern Development and Mines (the "**Province**"), a sales process to solicit offers for all or substantially all of the assets and properties of the Company used in connection with its pulp mill operations (the "**Sales Process**")

in accordance with certain sales process terms as attached to Schedule A of the Initial Order (the "**Sales Process Terms**").

4. Prior to the issuance of the Initial Order, the Company determined that in order to best position the mill for survival for the long term, it must be sold to a better capitalized operator who could fund the necessary capital needs for the business. Additionally, the Company recognized that its cash resources were limited and there could be complexities in finalizing a sale to a party that would be interested in operating the mill. Aware of these dynamics, Terrace Bay obtained approval to conduct the Sales Process at the commencement of these CCAA proceedings.

5. The Company and the Monitor conducted a number of activities in furtherance of the Sales Process commencing immediately after the granting of the Initial Order, as outlined in detail in the Sixth Report of the Monitor dated July 12, 2012 (the "**Sixth Report**"). In brief summary, the Monitor received 13 non-binding letters of intent by the initial deadline of February 15, 2012 provided in the Sales Process Terms. All of the parties that submitted letters of intent were invited to do further due diligence and submit a binding offer by the March 16, 2012 deadline provided in the Sales Process Terms (the "**Bid Deadline**"). The Monitor received 8 binding offers by the Bid Deadline. Based on the analysis of the offers received, the Monitor and the Company, in consultation with the Province, determined that the offer of AV Terrace Bay Inc. (the "**Purchaser**"), was the best offer. The

ultimate parent of the Purchaser is Aditya Birla Management Corporation Private Ltd., one of the largest conglomerates in India.

Sixth Report at paras. 15-26, 43.

6. After identifying the Purchaser's offer as the superior offer in the Sales Process, and after extensive negotiations, the Company entered into an asset purchase agreement executed July 5, 2012 (the "**Purchase Agreement**") between the Company and Purchaser, for an effective purchase price in excess of $27 million, and now seeks Court approval of the Purchase Agreement in accordance with its terms.

7. The Purchaser's offer is the superior offer for the Purchased Assets which resulted from the extensive Sales Process which was conducted by the Company and the Monitor in accordance with the Sales Process Terms and in consultation with the Province, and is recommended by the Monitor for approval by the Court. The Monitor does not recommend that the Sales Process be varied in light of late bids received and described below.

8. The completion of the transaction contemplated by the Purchase Agreement (the "**Transaction**") would result in an expected restart of the Company's pulp mill (the "**Mill**") prior to October 2012, a significant investment to convert the Mill to

9. a dissolving pulp mill, continuation of the employment of most of the employees of the Company and the maximization of value for the benefit of the Company's stakeholders.

> Affidavit of Wolfgang Gericke sworn July 10, 2012 (the "**July 10 Gericke Affidavit**"), at para. 52.

10. This Factum is filed in support of the Company's motion for an Order, among other things:

    (a) approving the Transaction and the Purchase Agreement;

    (b) authorizing and directing the Company to take such additional steps and execute such additional documents as may be necessary to give effect to the Purchase Agreement;

    (c) upon delivery of the Monitor's Certificate to the Purchaser, vesting all of the Company's right, title and interest in and to the Purchased Assets (as defined in the Purchase Agreement) absolutely in the Purchaser, free and clear of and from any and all liens, charges and encumbrances, except for the permitted encumbrances set out in the vesting order;

    (d) declaring that the subdivision control provisions contained in the *Planning Act, R.S.O.* 1990, C.P.13 (the "***Planning Act***") do not apply to the vesting of title to the Real Property (as defined in the Purchase Agreement) in the Purchaser and that such vesting is not, for the purposes of Section 50(3) of the *Planning Act*, a conveyance by way of deed or transfer;

(e) extending the stay of proceedings to October 31, 2012 in order to conclude the Transaction and proceed with the disposition of the remaining assets of the Company (the "**Non-Business Assets**"); and

(f) sealing Confidential Appendix "E" to the Sixth Report.

PART II - FACTS

11. Pursuant to the Initial Order, Terrace Bay was authorized to conduct, with the assistance of the Monitor and in consultation with the Province, the Sales Process.

12. The Sales Process Terms set out a timetable for the solicitation of potential purchasers, the submission of non-binding letters of intent by February 15, 2012, the identification of qualified bidders, and a period of further due diligence followed by the submission of binding offers by the Bid Deadline.

July 10 Gericke Affidavit; Sixth Report, para. 15, Appendix A

13. By the Bid Deadline, the Monitor received eight binding offers. These offers included two offers from parties interested in restarting the Mill for the purpose of operating it as a going concern, as well as offers from six liquidation or decommissioning firms. Subsequent to the Bid Deadline, the Company and the Monitor undertook a process to clarify certain of the bids with the offering parties.

Sixth Report, at paras. 22 - 24.

14. The Monitor presented a summary of the offers to the Province and consulted with the Province.

Sixth Report, at para. 25.

15. Based on the analysis of the offers submitted, the Monitor and the Company, in consultation with the Province, concluded that the Purchaser's offer "was the superior offer, and provided the best opportunity to position the mill, once restarted, as a viable going concern operation for the long term."

Sixth Report, at para. 26.

16. In assessing the various bids, the Company and the Monitor, in consultation with the Province, considered the following factors:

(a) the value of the consideration proposed in the transaction;

(b) the level of due diligence required to be completed prior to closing;

(c) the conditions precedent to closing of a sale transaction;

(d) the impact on The Corporation of the Township of Terrace Bay (the "**Township**"), the community, and other stakeholders;

(e) the bidder's intended use for the Mill site including any future capital investment into the Mill ; and

(f) the ability to close the transaction as soon as possible, given the Company's limited cash flow.

Sixth Report, at para. 27.

<u>Late Bidders</u>

17. As set out in greater detail in the Sixth Report, four parties expressed an interest in Terrace Bay after the deadlines set out in the Sales Process Terms approved by the Court in the Initial Order (the "**Late Bidders**").

Sixth Report, at paras. 30 - 32.

18. The Monitor informed each of the Late Bidders that they could conduct due diligence, but their interest would only be entertained in the event the Company could not complete a transaction with the parties that submitted their offers in accordance with the Sales Process Terms.

Sixth Report, at para. 31.

19. The Monitor reviewed materials submitted by each Late Bidder. All of the offers made by Late Bidders, other than the offer described below of Tangshan Sanyou Xingda Chemical Fibre Co. Ltd. ("**Tangshan**"), were in the form of non-binding letters of intent and were subject to additional due diligence or other conditions.

Sixth Report, at paras. 30 - 33.

20. Tangshan, as one of the Late Bidders submitted a non-binding offer on July 5, 2012 (the "**Late Offer**"). The terms of the Late Offer were subject to change, and Tangshan required final approval from regulatory authorities in China before entering into a transaction.

Sixth Report, at paras. 35 and 37.

21. Before submission of the Late Offer, the Monitor had advised Recovery Partners Ltd., which submitted the Late Offer on Tangshan's behalf, that the Bid Deadline passed months before and the Company was far advanced in negotiating and settling a purchase agreement with a prospective purchaser who submitted an offer in accordance with the Sales Process Terms.

Sixth Report, at para. 35.

22. The Company executed the Purchase Agreement on July 5, 2012.

Sixth Report, at para. 36.

23. The Monitor received a second non-binding offer from Recovery Partners Ltd., on behalf of Tangshan, on July 10, 2012, and a binding offer (again, on Tangshan's behalf) on July 12, 2012 (the "**July Tangshan Offer**") for a purchase price of $35 million.

Sixth Report, at para. 38.

24. The Monitor's view is that it is not appropriate to vary the Sales Process Terms at this date or to recommend the July Tangshan Offer for following reasons:

(a) Terrace Bay, in consultation with the Province, has entered into a binding Purchase Agreement with the Purchaser, which does not permit termination by Terrace Bay to entertain a new offer;

(b) The fairness and integrity of the Sales Process is paramount to these proceedings and to alter the terms of the court-approved Sales Process Terms at this point would be unfair to the Purchaser and all of the other parties who participated in the Sales Process in compliance with the Sales Process Terms. For the Sales Process to be fair and have integrity, all bidding parties must be subject to the same rules;

(c) The Sales Process Terms have been widely known by all bidders and interested parties since the outset of the Sales Process in January 2012. Tangshan and its previous representatives had used the Data Room (as defined in the Sixth Report) and had conducted a tour of the Mill on or about May 16, 2012;

(d) The Sales Process Terms provide no bid protections for the potential purchaser. The Purchaser has relied upon the protections of the court-approved Sales Process Terms, and the oversight of the Monitor, to ensure that the Sales Process is fair to all parties and that a bidder cannot be "out-bid" at the last moment once the terms of its offer are made public;

(e) The Purchaser has incurred, and continues to incur, significant expenses in negotiating and fulfilling conditions under the Purchase Agreement. Terrace Bay has advised the Monitor that there is a significant risk that the Purchaser would drop out of the Sales Process if there was an attempt to amend the Sales Process Terms to pursue an open auction at this late stage;

(f) To consider any new bids at this stage may result in a delay in the timing of the sale of the assets of the Mill. In the view of the Monitor this poses a risk due to Terrace Bay's minimal cash position;

(g) The Province, with whom Terrace Bay is required to consult under the Sales Process Terms, and which has entered into an agreement with the Purchaser, supports the completion of the Transaction; and

(h) The Purchaser has made progress satisfying the conditions to closing, including meeting with Terrace Bay's employees and negotiating collective bargaining agreements with the unions.

Sixth Report, at para. 41.

25. On the afternoon of July 12, 2012, the Monitor, its counsel and counsel for the Province met with Tangshan, its counsel and Recovery Partners Ltd.. At this meeting, the Monitor indicated to Tangshan that its offer had not been submitted in accordance with the Sales Process Terms and could not be considered by the Company, but would be reported to the Court.

Sixth Report, at para. 40.

<u>The Purchaser</u>

26. The Company seeks approval of the Purchase Agreement. As set out in the affidavit of Wolfgang Gerick sworn July 10, 2012 (the "**July 10 Gericke Affidavit**"), the Purchaser is an affiliate of the Aditya Birla Group, a Fortune 500 company that intends to make a significant investment to restart the Mill by October 2012, and invest more than \$250 million to convert the Mill to produce dissolving grade pulp.

July 10 Gericke Affdiavit, at paras. 21 - 22.

Consideration

27. The purchase price payable for the Purchased Assets pursuant to the Purchase Agreement is the aggregate of (i) $2,000,000, plus or minus adjustments on Closing (as defined in the Purchase Agreement), and (ii) the amount of the Assumed Liabilities (as defined in the Purchase Agreement) (collectively, the "**Purchase Price**").

July 10 Gericke Affdiavit, at para. 31.

28. The obligation of the Company to complete the Transaction is conditional upon, among other things, that all amounts owing by the Company to the Province pursuant to a loan agreement dated as of September 15, 2010 (the "**Province Loan Agreement**"), be forgiven by the Province and all related security be discharged (the "**Province Loan Forgiveness**"). The Province Loan Agreement and the full advance of the loan amount was a condition of the implementation of the CCAA plan of the Company in its previous CCAA proceedings (the "**CCAA Plan**").

July 10 Gericke Affdiavit, at paras. 32 - 33.

29. The Province is the first secured creditor of Terrace Bay, and is owed in excess of $24,000,000, subject to any super-priority claims, including potential claims of the Township against the Real Property (as defined in the Purchase Agreement).

Sixth Report, at para. 72.

30. The Province Loan Forgiveness is an integral part of the Transaction. As the net sale proceeds, subject to any super-priority claims, flow to the Province in priority

to other creditors upon completion of the Transaction, the effective consideration for the Transaction is in excess of $27,000,000, namely the cash portion of the Purchase Price plus the Province Loan Forgiveness, plus the value of the Assumed Liabilities.

July 10 Gericke Affdiavit, at para. 33; Sixth Report, at para. 62.

31. In addition to its indebtedness to the Province, the Company also granted security for its indebtedness owing under the Plan Note dated as of September 15, 2010 (the "**Plan Note**"), entered into as a condition of the implementation of the CCAA Plan. The Plan Note was granted to holders of unsecured claims in relation to the CCAA Plan.

Sixth Report, at para. 11; July 10 Gericke Affidavit at para. 34.

32. The indebtedness under the Plan Note is fully subordinated to prior payment of all obligations under the Province Loan Agreement.

Sixth Report, at para. 11; July 10 Gericke Affidavit, para. 34.

33. As of January 18, 2012, construction lien claims in the amount of $9,199,572.63 had been registered against Terrace Bay's real property. All of the construction lien claims were registered subsequent to (i) the security registered by the Province in relation to the Province Loan Agreement, and (ii) the security registered by the Plan Note Trustee in relation to the Plan Note.

July 10 Gericke Affdiavit, at para. 35.

The Monitor Approves the Transaction

34. As set out in the Sixth Report, the Monitor recommends approval of the Transaction for the following reasons:

(a) Prior to seeking Court approval of the Transaction, the market was broadly canvassed by the Company, with the assistance of the Monitor;

(b) The Purchase Agreement will result in a cash purchase price of $2,000,000, and will see the forgiveness of the amount outstanding, plus accrued interest and costs, under the Province Loan Agreement;

(c) The Transaction contemplated by the Purchase Agreement and subsequent conversion of the Mill to a dissolving pulp mill will result in significant employment in the region, as well as a substantial capital investment which will benefit the community of Terrace Bay and surrounding communities for years to come;

(d) The Transaction will also see a major multinational corporation acquiring the Mill, and purchasing the pulp produced by the Mill (once converted to a dissolving pulp mill) as a production input into its global manufacturing business, which will greatly improve the stability of the Mill operations;

(e) The Transaction involves the expected reopening of the Mill in October, 2012, and the Purchaser will be re-hiring the employees of the Mill;

(f) The Monitor is aware of the Late Bids, including the July Tangshan Offer, and has consulted the Company and the Province in relation to same. The Sales Process was conducted in accordance with the Sales Process Terms and provided an adequate opportunity for interested parties (including Tangshan) to participate, conduct due diligence, and submit binding purchase agreements and deposits within Court-approved deadlines; and

(g) Several factors including, without limitation, the importance of maintaining the fairness and integrity of the Sales Process in relation to all parties, including the Purchaser, the terms of the Purchase Agreement, the fact it has taken many weeks to negotiate various issues and the importance of certainty in relation to closing and the closing date have all been considered by the Monitor.

Sixth Report, para. 94 - 100.

PART II — ISSUES

35. The issues on this motion are as follows:

(a) Should the Court approve the Transaction?

(b) Should the Court consider the Late Bids or the July Tangshan Offer?

(c) Should this Court grant an order vesting title in the Purchased Assets in the Purchaser, free and clear of all encumbrances, except for the permitted encumbrances set out in the vesting order?

(d) Should the Court declare that the subdivision control provisions contained in the *Planning Act* do not apply to the vesting of title to the Real Property (as defined in the Purchase Agreement) in the Purchaser and that such vesting is not, for the purposes of Section 50(3) of the *Planning Act*, a conveyance by way of deed or transfer?

(e) Should this Court authorize the sealing of Confidential Appendix "E" to the Sixth Report?

(f) Should this Court grant a stay extension until October 31, 2012?

PART III -- THE LAW AND ARGUMENT

A. THE TRANSACTION SHOULD BE APPROVED

36. This Court has the authority to approve a sale transaction pursuant to section 36 of the CCAA. Section 36(3) sets out a non-exhaustive list of factors for the Court to consider in determining whether to approve a sale transaction. It provides as follows:

> 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.

CCAA, 36(3).

37. The list of factors set out in section 36(3) 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.

> *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) ("***Soundair***"), at para. 16, Commercial List Book of Authorities, Tab 7.

38. The *Soundair* factors focus first and foremost on the "integrity of the process", which is integral to the administration of a sales process under the CCAA.

> *Soundair.*

39. In *Re AbitibiBowater Inc.,* the Court held that if a sale process leading to the proposed sale is fair, transparent and efficient, than "a court will not lightly interfere with the exercise of [the Debtor's and Monitor's] commercial and business judgment in the context of an asset sale." Similarly, in *Re Grant Forest Products Inc.,* the Court found "once a process has been put in place by Court Order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances."

> *Re Abitibi Bowater Inc.*, 2010 QCCS 1742 (Sup. Ct.) at para. 71; Book of Authorities Tab 2; *Re Grant Forest Products Inc.,* 2010 ONSC 1846 at para. 29; Book of Authorities Tab 3.

40. The Company submits that the Purchased Assets were marketed and the Purchase Agreement negotiated in a fair, transparent and commercially reasonable manner, consistent with the Sales Process Terms. The Purchase Agreement is the superior offer obtained in the robust, fair and transparent Sales Process.

(i) Effort to Obtain the Best Price

41. In the effort to obtain the best price for the Purchased Assets, the Company and the Monitor acted at all times in accordance with the Sales Process Terms and the Sales Process approved by the Court.

42. The Company and the Monitor, in consultation with the Province, undertook a detailed review and comparative analysis of all offers received, and determined that the Purchaser's offer was the superior offer.

43. The market for the Purchased Assets was sufficiently canvassed and parties who may have an interest were given a reasonable opportunity to review the opportunity and make an offer.

44. The Transaction, which is supported by the Monitor, involves effective consideration in excess of $27,000,000, plus the value of the Assumed Liabilities (as described in the Purchase Agreement).

45. The Company respectfully submits that it and the Monitor have taken all reasonable steps to obtain the best price, have followed the Sales Process Terms, and have not acted improvidently. The Company and the Monitor believe that the Purchase Price is reasonable in the circumstances.

(ii) Interests of the Parties

46. It is well established that the primary interest is that of the creditors of the debtor. An examination of the Sales Process, applying the *Soundair* test, is to primarily

be conducted from the perspective of those for whose benefit the Sales Process has been conducted.

Soundair, at paras. 39 & 41.

Creditors

47. The Province is the senior secured creditor of Terrace Bay which, in accordance with the Sales Process, was consulted throughout. The Province Loan Forgiveness is a key condition under the Purchase Agreement. As a result of the Province Loan Forgiveness, the potential distribution to other creditors of Terrace Bay in accordance with relative priorities is enhanced from the net proceeds of the Transaction and any net proceeds generated from the sale of the Non-Business Assets (subject to the Administration Charge and the Directors' Charge, as those terms are defined in the Initial Order, and any priority claims of the Township or other statutory priorites).

July 10 Gericke Affidavit, at para. 36.

Employees

48. The Purchase Agreement provides for the continued operation of the Mill, and the continuation of employment with the Purchaser for all of the employees of Terrace Bay who are subject to the collective bargaining agreements, and all Non—Unionized Employees (as defined in the Purchase Agreement) who accept offers of employment prior to the Closing.

July 10 Gericke Affidavit, at para. 37 - 37.

49. The Purchaser is required by the Purchase Agreement to establish new benefit plans for the Unionized Employees and the Non-Unionized Employees (as those terms are defined in the Purchase Agreement) on substantially similar terms to those currently in place.

July 10 Gericke Affidavit, at para. 37; Sixth Report at para. 68.

50. The Purchaser is required to offer employment to all Non-Unionized Employees (as defined in the Purchase Agreement), on terms and conditions that are no less favourable in the aggregate in terms of title, compensation, benefits, pension entitlements, hours of work and location, and with duties that are similar to the duties then being performed by such employees. Thus, the Transaction will provide for continuity of employment for most of the Company's employees.

July 10 Gericke Affidavit, at para. 38.

(iii) Efficacy and Integrity of the Process

51. The Company, with the assistance of the Monitor, marketed the Purchased Assets and sought bids from interested parties fairly and in accordance with the Sales Process. As described above, all interested parties were given the opportunity to participate in the Sales Process.

52. The Sales Process was a fair and effective process for maximizing realization of the Purchased Assets. The Purchased Assets have been appropriately marketed in accordance with the Sales Process Terms, the terms of the Purchase Agreement are fair and commercially reasonable, and the integrity of the Sales Process has been maintained throughout.

(iv) No Unfairness in Working Out the Process

53. The process followed by the Company in entering the Transaction was a just and fair one. The Company, with the assistance of the Monitor, made diligent and sufficient efforts to get the best price that it could for the Purchased Assets. The Company and the Purchaser followed the Sales Process which was fair to all persons who indicated an interest in bidding on the Purchased Assets.

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

54. The Transaction is therefore consistent with the *Soundair* principles and the Company respectfully requests that it be approved by this Court.

B. LATE BIDS SHOULD NOT BE CONSIDERED

55. It is settled law that unsuccessful bidders do not have standing to challenge a motion to approve a sale to another bidder. Unsuccessful bidders have no interest in the fundamental question of whether the court's approval is in the best interests of the parties directly involved in the sale.

> *SkyepharmaPLC v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 (C.A.) at paras. 24 - 32, Book of Authorities Tab 4 ("***SkypharmaPLC***"); *BDC Venture Capital Inc. v. Natural Convergence Inc.* (2009), 57 C.B.R. (5^{th}) 186 (C.A.) ("***BDC***") at para. 8, Book of Authorities Tab 5.

56. With respect to late bidders, courts have recognized the unfairness in re-opening a sales process for consideration of late bids. Potential purchasers must have confidence in the efficacy and integrity of a court-approved sales process.

> *Shape Foods Inc. (Receiver of) Re*, 2009 MBQB 171 ("***Shape Foods***") at para. 44, Book of Authorities Tab 6.

57. Even in circumstances where a late bid offers a higher purchase price than the selected successful bid, courts have found it inappropriate to re-open a sales process. This Court has held that to do otherwise would foster uncertainty in the bid process which would actually discourage bids from prospective purchasers and lessen the objective of obtaining the highest possible price in the marketplace.

> *1730960 Ontario Ltd., Re,* 2009 CarswellOnt 4235, 55 C.B.R. (5th) 265 (S.C.J. [Commercial List]), at para. 23, Book of Authorities Tab 7.

58. The situation that would be created if late bids were considered was aptly stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of Nova Scotia*, which has been oft cited:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and a higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard – this would be an intolerable situation.

> *Shape Foods* at para. 44.

59. In this case, the Company and the Monitor fully complied with all aspects of the Court-approved Sales Process, providing ample opportunity for prospective purchasers to participate, including Tangshan. There is no evidence of any unfairness in the conduct of the Sales Process.

60. As discussed in detail in paragraph 24 above, it would be unfair and objectionable to re-open the Sales Process at this stage for consideration of any Late Bids.

61. In this case, the only binding Late Bid submitted was the July Tangshan Offer. The July Tangshan Offer was submitted on July 12, 2012, nearly four months after the Bid Deadline, and two months after Tangshan conducted a tour of the Mill.

62. The Sales Process should not be re-opened to permit consideration of the July Tangshan Offer or any other Late Bid. To do so would offend the integrity of the Court-approved Sales Process.

63. In addition, the Company and the Monitor are of the view that the re-opening of the Sales Process, or a variation of the Sales Process Terms, could jeopardize the Transaction. A delay in the timing of the sale of the Mill may also jeopardize the Company, given its minimal cash position.

C. APPROVAL AND VESTING ORDER

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

65. All parties with a known interest in the Purchased Assets whose interests would be affected by the Approval and Vesting Order sought have been served with notice of this motion.

66. The Company therefore respectfully submits that the Approval and Vesting Order should be granted.

D. THE SUBDIVISION CONTROL PROVISIONS IN THE *PLANNING ACT* DO NOT APPLY TO THE TRANSACTION

67. Section 100 of the *Courts of Justice Act* (Ontario) (the **"CJA"**) provides that "a court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed."

> Courts of Justice Act, R.S.O. 1990, c.C-43, s.100.

68. Section 11 of the CCAA gives the Court authority, with various restrictions, to make any order that it considers appropriate in the circumstances.

> CCAA, s.11.

69. The *Planning Act* contains subdivision control provisions which prohibit an owner from selling part of its property while retaining an interest in abutting land without complying with the subdivision control provisions of the *Planning Act*. Specifically, "no person shall convey land by way of a deed or transfer" without obtaining consent under the *Planning Act*. The Purchase Agreement contemplates the vesting of title in the Purchaser of the Real Property as defined therein. Some of the Real Property abuts Excluded Real Property (as defined in the Purchase Agreement) which Excluded Real Property will subsequently be realized for the benefit of stakeholders of Terrace Bay.

> *Planning Act,* R.S.O. 1990, c.C-43, s.50(3).

70. In *Lama v. Coltsman*, a vesting order was made and registered in relation to land owned by a husband and wife, vesting the subject lands in the wife. The Court considered section 29(4) of the *Planning Act* (at it existed at the time of the

decision), which required consent where the grantor of a conveyance retains the fee in abutting land. The provision required that "no person shall convey...by way of a deed or transfer...unless the grantor by deed or transfer...does not retain the fee...with respect to, any land abutting the land...conveyed."

> *Lama v. Coltsman* (1978), 20 O.R. (2d) 98 (Co. Ct.) ("***Lama***"); Book of Authorities Tab 8.

71. The Court found the vesting of land by Court order does not constitute a "conveyance" by way of "deed or transfer", and therefore "a vesting order comes outside the purview of the *Planning Act*." Subsequent cases have confirmed this view.

> *Lama*; *Holmsten v. Karson Kartage Konstruction Ltd.*, [1997] O.J. No. 1352 (Gen. Div.); 33 O.R. (3d) 54 ("***Holmsten***") at para. 13 – 14, Book of Authorities Tab 9; *724597 Ontario Inc. v. Merol Power Corp.*, [2005] O.J. No. 4832 (S.C.J.); 37 R.P.R. (4^{th}) 191, at para. 14, Book of Authorities Tab 10.

72. The Township is aware that the Company is proceeding in this manner and has not objected.

> July 10 Gericke Affidavit, para. 27.

E. SEALING ORDER

73. The Company seeks to have **Confidential Appendix "E"** to the Sixth Report sealed, which includes a summary of offers received pursuant to the Sales Process.

74. 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;

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.

> *Re Nortel Networks Corp.* (2009), 56 C.B.R. (5^{th}) 224; 2009 CarswellOnt 4338 (Ont. Sup. Ct. J.) [Commercial List], at para 38; Book of Authorities Tab 11.

75. The information subject to the sealing request is highly 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.

> *Re SkyPower Corp.,* 2009 CarswellOnt 9415 (Ont. Sup. Ct. J.) [Commercial List] at para. 14, Book of Authorities Tab 12.

76. The preservation of the integrity of the Sales Process 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 prejudice the Company and its ability to effect a successful Transaction.

F. STAY OF PROCEEDINGS

77. Section 11.02 of the CCAA gives the Court discretion to grant or extend a stay of proceedings. Section 11.02(2) applies when a stay of proceedings is requested other than on an initial application.

CCAA, s.11.02(2).

78. Pursuant to section 11.02(3) of the CCAA, the Court must be satisfied that (a) circumstances exist that make the order appropriate, and (b) the applicant has acted, and is acting, in good faith and with due diligence.

CCAA, s.11.02(3).

79. Terrace Bay has been and continues to operate in good faith and with due diligence, with a view to completing the Transaction on or before July 31, 2012, and thereafter, in relation to the marketing of the remaining assets.

80. An extension of the stay of proceedings is necessary to provide the stability needed to continue the activities which have been ongoing following the granting of the Initial Order. In particular, stability and certainty is required while the Company works to complete the Transaction which would result in a restart of the Mill prior to October 2012, a significant investment being made to covert the Mill to a dissolving pulp mill, continuation of the employment of most of the employees of the Company and maximizing value for the benefit of the Company's stakeholders, and also to market the remaining assets.

July 10 Gericke Affidavit, at para. 52.

PART IV -- RELIEF REQUESTED

81. For the foregoing reasons, the Company respectfully requests that this Court grant an order, among other things, approving the Transaction and the relief requested in its Notice of Motion

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Pamela L.J. Huff / Marc Flynn / Kristina Desimini,
Lawyers for the Applicant

SCHEDULE "A"

LIST OF AUTHORITIES

1.	*Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1; 1991 CarswellOnt 205 (C.A)
2.	*AbitibiBowater Inc., Re,* 2010 QCCS 1742; 2010 CarswellQue 4082 (Sup. Crt.)
3.	*Grant Forest Products Inc., Re,* 2010 ONSC 1846; 2010 CarswellOnt 2445
4.	*Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234; 2000 CarswellOnt 466 (C.A.)
5.	*BDC Venture Capital Inc. v. Natural Convergence Inc.,* 2009 ONCA 665; 2009 CarswellOnt 5535
6.	*Shape Foods Inc. (Receiver of) Re*, 2009 MBQB 171; 2009 CarswellMan 312
7.	*1730960 Ontario Ltd., Re* (2009), 55 C.B.R. (5th) 265; 2009 CarswellOnt 4235 (SCJ)
8.	*Lama v. Coltsman* (1978), 20 O.R. (2d) 98; 1978 CarswellOnt 1454 (Co. Ct. J.)
9.	*Holmsten v. Karson Kartage Konstruction Ltd.* (1997), 33 O.R. (3d) 54; [1997] O.J. No. 1352 (Gen. Div.)
10.	*724597 Ontario Inc. v. Merol Power Corp.* (2005), 37 R.P.R. (4th) 191; 2005 CarswellOnt 6445 (SCJ)
11.	*Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 224; 2009 CarswellOnt 4838 (Sup. Ct. J.) [Commercial List]
12.	*SkyPower Corp., Re,* 2009 CarswellOnt 9415 (Sup. Ct. J.) [Commercial List]

SCHEDULE "B"

<u>RELEVANT STATUTES</u>

<u>*Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended:</u>

General power of court

11. Despite anything in the <u>*Bankruptcy and Insolvency Act*</u> or the <u>*Winding-up and Restructuring Act*</u>, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;
- (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. — other than initial application

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose, (*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

11.02 (3) The court shall not make the order unless

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction on disposition of business assets

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.

Planning Act, R.S.O. 1990, c. P. 13, as amended:

Subdivision Control

50. (3) No person shall convey land by way of a deed or transfer, or grant, assign or exercise a power of appointment with respect to land, or mortgage or charge land, or enter into an agreement of sale and purchase of land or enter into any agreement that has the effect of granting the use of or right in land directly or by entitlement to renewal for a period of twenty-one years or more unless,

(a) the land is described in accordance with and is within a registered plan of subdivision;

(b) the grantor by deed or transfer, the person granting, assigning or exercising a power of appointment, the mortgagor or chargor, the vendor under an agreement of purchase and sale or the grantor of a use of or right in land, as the case may be, does not retain the fee or the equity of redemption in, or a power or right to grant, assign or exercise a power of appointment in respect of, any land abutting the land that is being conveyed or otherwise dealt with other than land that is the whole of one or more lots or blocks within one or more registered plans of subdivision;

(c) the land or any use of or right therein is being acquired or disposed of by Her Majesty in right of Canada, Her Majesty in right of Ontario or by any municipality;

(d) the land or any use of or right therein is being acquired for the purpose of an electricity distribution line, electricity transmission line, hydrocarbon distribution line or hydrocarbon transmission line within the meaning of Part VI of the *Ontario Energy Board Act, 1998* and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;

(d.1) the land or any use of or right therein is being acquired, directly or by entitlement to renewal for a period of 21 or more years but not more than 50 years, for the purpose of a renewable energy generation facility or renewable energy project, and in respect of which the person acquiring the land or any use of or right therein has made a declaration that it is being acquired for such purpose, which shall be conclusive evidence that it is being acquired for such purpose;

(e) the land or any use of or right therein is being acquired for the purposes of flood control, erosion control, bank stabilization, shoreline management works or the preservation of environmentally sensitive lands under a project approved by the Minister of Natural Resources under section 24 of the *Conservation Authorities Act* and in respect of which an officer of the conservation authority acquiring the land or any use of or right therein has made a declaration that it is being acquired for any of such purposes, which shall be conclusive evidence that it is being acquired for such purpose;

(f) a consent is given to convey, mortgage or charge the land, or grant, assign or exercise a power of appointment in respect of the land or enter into an agreement in respect of the land;

(g) the land or any use of or right therein was acquired for the purpose of an electricity distribution line, electricity transmission line, hydrocarbon distribution line or hydrocarbon transmission line within the meaning of Part VI of the *Ontario Energy Board Act, 1998* and is being disposed of to the person from whom it was acquired; or

(h) the only use of or right in land that is granted is an easement or covenant under the *Conservation Land Act*. R.S.O. 1990, c. P.13, s. 50 (3); 1998, c. 15, Sched. E, s. 27 (4-6); 2006, c. 23, s. 21 (1); 2009, c. 12, Sched. K, s. 2 (1).

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

Vesting orders

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. R.S.O. 1990, c. C.43, s. 100.

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

Disclosure without knowledge or consent

7.(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is

(*c*) required to comply with a subpoena or warrant issued or an order made by a court, person or body with jurisdiction to compel the production of information, or to comply with rules of court relating to the production of records;

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.

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

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF TERRACE BAY PULP INC.
(Motion Returnable July 16, 2012)

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