Court File No. CV-15-11082-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

RESOURCE CAPITAL FUND V L.P.

Applicant

- and -

FIRST NICKEL INC.

Respondent

APPLICATION UNDER SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c.B-3, AS AMENDED AND SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. 1990, C. C.43, AS AMENDED

BOOK OF AUTHORITIES OF THE APPLICANT
(Comeback Hearing)

September 3, 2015

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I N D E X

Tab

TAB 1

CITATION: CCM Master Qualified Fund v. blutip Power Technologies, 2012 ONSC 1750
COURT FILE NO.: CV-12-9622-00CL
DATE: 20120315

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

RE: CCM Master Qualified Fund, Ltd., Applicant

AND:

blutip Power Technologies Ltd., Respondent

BEFORE: D. M. Brown J.

COUNSEL: L. Rogers and C. Burr, for the Receiver, Duff & Phelps Canada Restructuring Inc.

A. Cobb and A. Lockhart, for the Applicant

HEARD: March 15, 2012

REASONS FOR DECISION

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

[1] By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

[2] D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

[3] The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii)

$47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

[4] At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

[5] As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

[6] Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.[1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

[7] The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element

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[1] (1991), 7 C.B.R. (3d) 1 (C.A.).

of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,[2] *BIA* proposals,[3] and *CCAA* proceedings.[4]

[8] Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.[5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

[9] The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

[10] Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

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[2] *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 2.
[3] *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 15.
[4] *Re Brainhunter* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J.), para. 13; *Re White Birch Paper Holding Co.*, 2010 QCCS 4382, para. 3; *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), para. 2, and (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.); *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.).
[5] Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding – Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

B.2 Stalking horse credit bid

[11] The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate. The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

[12] The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

[13] The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.[6]

C. Analysis

[14] Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

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[6] *Re Parlay Entertainment*, 2011 ONSC 3492, para. 12; *Re White Birch Paper Holding Co.*, 2010 QCCS 4915, paras. 4 to 7; *Re Nortel Networks Corp.* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J.), para. 12.

[15] In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

[16] Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.[7]

[17] For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

[18] Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

[19] As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

[20] Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

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[7] *Re Indalex Ltd.*, 2009 CarswellOnt 4262 (S.C.J.), para. 7; *Re Graceway Canada Co.*, 2011 ONSC 6403, para. 5; *Re Parlay Entertainment Inc.*, 2011 ONSC 3492, para. 58.

[21] I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc. (Re)*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> ...
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.[8]

[22] In my view those comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

[23] In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the

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[8] 2012 ONSC 1299 (CanLII).

granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

[24] The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

[25] May I conclude by thanking Receiver's counsel for a most helpful factum.

(original signed by)
D. M. Brown J.

Date: March 15, 2012

TAB 2


Original
1993 CarswellOnt 1830
Ontario Court of Justice (General Division) [Commercial List]

St. Mary's Paper Inc., Re

1993 CarswellOnt 1830, [1993] O.J. No. 2286, 107 D.L.R. (4th) 715, 15 O.R. (3d) 359, 1 C.C.P.B. 27, 43 A.C.W.S. (3d) 137

In The Matter of the Bankruptcy of St. Mary's Paper Inc.

Farley J.

Heard: September 27, 1993
Judgment: September 28, 1993
Docket: B144/93, 93-CQ-36459

Counsel: *John A. MacDonald* for Ernst & Young Inc.
Steven G. Golick for trustee of the estate of the bankrupt.
Robert W. Staley for Price Waterhouse Limited.
John R. Varley for the replacement Administrator of the pension plans of the bankrupt.
Clifton P. Prophet for the employees (union and non-unionized)

Subject: Insolvency; Corporate and Commercial

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

***Farley J.*:**

1 I was requested to render my decision in this matter, if at all possible, within several days as I was advised that it would have an impact upon sale as a going concern negotiations now underway. The Trustee moved for directions concerning pension obligations alleged by the Administrator to be owed by the Trustee and for a declaration that the Trustee is not liable for any pension obligations under either the union pension plan or non-union plan. The Administrator's position was that the Trustee was liable for all pension plan obligations (including current obligations which the Trustee has been making but as well special payment contributions which would amortize unfunded plan liabilities in the plans as most recently determined by actuarial reports submitted pursuant to the pension legislation plus possible exposure for a solvency deficiency, if any, in the event the plans were wound up). The Administrator's position was that the Trustee was exposed to these liabilities and obligations on either of two bases:

1. There was a statutory obligation upon the Trustee as an employer to make such payments pursuant to the *Pension Benefits Act*, R.S.O. 1990, Ch. P. 3 (Act) and the regulations thereunder, Regulation 909, R.R.O. 1990, as amended (Regulations).

2. An analysis of *Re White Motor Corporation of Canada Limited* (1980), 36 C.B.R. 238 (Ont. S.C.) would lead to the conclusion of such liability.

Facts

2 Attached to these reasons is a copy of the Trustee's Third Report dated September 22, 1993 (not including the exhibits thereto).

Is the Trustee An Employer Having Obligations Pursuant to the Plans?

3 There can be no doubt but that the Trustee is an employer of the unionized and non-unionized workers at the undertaking. It offered employment to these persons after the termination of their employment as a result of the bankruptcy. It did so to maintain the undertaking as a going concern as it viewed that a going concern sale would maximize the proceeds for the estate. There was some suggestion in June 29th letter from Trustee's counsel to the Pension Commission of Ontario that:

> As a goodwill gesture, the Trustee paid prebankruptcy current service employer contributions to the Union and Non-Union Plans and since the bankruptcy has, on a voluntary basis, continued to make such contributions. The Trustee has not, is not prepared and is not obligated, to make any special payments which St. Marys was obligated to make.

4 However, it seems reasonably clear that rather than a straight goodwill gesture, the payment of the current amounts were part of the arrangement with these employees to keep working under the new arrangement with the Trustee. The Trustee appears to have been quite up-front as to what it was prepared to do in its re-engagement letter with the employees:

> The Trustee will not be responsible for any obligations of St. Marys to you such as termination pay, severance pay or unfunded pension plan liabilities. In this regard, a proof of claim has been forwarded to you so that you may register your claim against St. Marys.
>
> Your continuing to work will indicate your agreement to the arrangements set out in this letter.

5 While it is clear that the Trustee became a "generic" employer - did the Trustee become an employer within the meaning of the Act and Regulations so that it would be subjected to additional pension responsibilities beyond the current service payments which it agreed to make and has in fact made.

6 Section 1 of the Act provides a definition of "employer":

> S. 1 In this Act...
>
> > "employer", in relation to a member or a former member of a pension plan, means the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related, and "employed" and "employment" have a corresponding meaning.

7 Remuneration is not defined in the Act. The *Shorter Oxford English Dictionary on Historical Principles* (3rd ed. 1988; Claredon Press, Oxford) defines in this context "remunerate" and "remuneration" as follows:

> "remunerate" 2. To reward (a person); to pay (a person) for services rendered or work done, hence "remuneration", reward, recompense, repayment, payment, pay.

8 One has to appreciate that these plans in question have not been wound up; in fact the Trustee has made fresh contributions to these plans. Then too there is the recognition that these workers reengaged by the Trustee are members of the plans. It may not have intended that it come within the definition of "employer" as set out above but it seems that the Trustee fits that definition in relation to what it has done -- notwithstanding its disclaimer in its reengagement agreement with the workers. It has dealt with these workers who are members of the plan and it has paid these workers for their services now being rendered to the Trustee. In addition as part of the package the Trustee has made payments into the plan fund for the benefit of the members of these plans. It seems to me that the Trustee has become (albeit it appears inadvertently) an employer within the meaning of the legislation.

9 While there does not appear to be any prohibition against contracting out of the provisions of the Act in words of that specific import, I note two aspects. Firstly s. 3 of the Act provides:

> This Act applies to every pension plan that is provided for persons employed in Ontario.

Thus it would not appear that the legislation contemplated any contracting out. In this regard see also s. 19(1), (2) and (4) notwithstanding the awkward wording thereof. Secondly, it seems to me that a pension plan once implemented may be wound up and terminated or it may be amended in accordance with its terms. I note that did not happen in this instance. Rather the Trustee made contributions to the plan fund. However, it does not seem to me that the pension arrangement is a private contractual one between the employing entity and its workers once a plan has been instituted. Clearly according to s. 19 of the Act, the administrator of a plan is charged with the responsibility of ensuring that that plan is administered in accordance with the Act and Regulations. S. 115(1)(x) of the Act provides:

> s. 115(1) The Lieutenant Governor Council may make regulations...
>
> (x) exempting pension plans, pension funds, employees, administrators or other persons from the application of this Act or the regulations or from any section of this Act or the regulations.

I was not advised that there was any such regulation in place which would pertain to this situation. I also note that there is no indication that an employer could be exempted from its obligations under the Act or Regulations. It would therefore seem to me that an employing entity could not contract out of its responsibilities otherwise imposed by the Act and Regulations by having a (side) agreement with the workers if it were otherwise caught within the definition of "employer" under the Act.

10 Those obligations of an employer are generally set forth (with other provisions of the Act and Regulations specifying the exact obligations on a wind-up or special payments amortizing funding deficiencies in the plan) in s. 55 of the Act:

> s. 55(1) A pension is not eligible for registration unless it provides for sufficient funding to provide the pension benefits, ancillary benefits and other benefits under the pension plan in accordance with this Act and the regulations.
>
> (2) An employer required to make contributions under a pension plan, or a pension required to make contributions under a pension plan on behalf of an employer, shall make the contributions in the prescribed manner and in accordance with the prescribed agreement for funding,
>
> (a) to the pension plan...

11 I note that it would have been entirely possible for the Trustee in this case to re-engage the workers without making a contribution to the plan funds. There was no legal requirement that it do so; however, it chose to do so since that appears to be part of the price extracted by these workers to continue the undertaking as a going concern. The concern for their pension benefits, I have no doubt, was a legitimate one. It would be very unfortunate, however, if this request to have contributions to the funds resulted in a problem in effecting a sale as a going concern (since it appears to me that the Trustee is technically caught as an "employer" with the resultant pension obligations). This situation may have been alleviated or dealt with if, say, the money which would otherwise be contributed to the funds had been paid as extra remuneration, if a group RRSP had been set up or if a new pension plan had been established, etc. That, of course, is the counsel of perfection and hindsight. I could observe that such arrangements may be difficult to introduce into a bankruptcy situation where emotions and concerns will be of a fever pitch. I would think that the more practical expedient may be an amendment to the legislation since it would seem to be in everyone's best interests to allow a trustee in bankruptcy the flexibility of seeing if an undertaking could be sold on a going concern basis while maintaining current payments but not exposing the Trustee to liability for past unfunded liabilities.

Applicability of the White Motor case

12 While I have reached the conclusion that the Trustee is caught by statutory interpretation, I would not think that it would have had the additional pension obligations imposed on it by virtue of the *White Motor* case principles. That case involved the debtor company making a proposal in bankruptcy. The court there appointed an interim receiver. During the interim receivership, and with the acquiescence of the receiver, the company itself continued to transact business under a pre-existing contract in exactly the same manner as it had before the date of the proposal. The other party to the contract had every reason to believe that the contract was continuing according to the previous terms and it continued to provide additional financing to the

company under receivership. The court there held that the receiver was bound by the liabilities incurred under the receivership while the company continued the contract and incurred new liabilities under it.

13 At p. 244 of *White Motor* Steele J. stated:

> I am of the opinion that the continued use of the money provided by Traders to the operations of White Motor was a type of service rendered or other consideration given with the approval of the receiver-manager. The principle set out in *Re Morris; Ex parte Whyte Packing Co.*, 53 O.L.R. 36, 3 C.B.R. 446, [1923] 3 D.L.R. 848 (H.C.), which was a case relating to goods supplied, applies with equal force to services rendered or other consideration given where the trustee carries on the business for and on behalf of the creditors, as authorized by the creditors at a meeting duly called. The creditors knew that the trustee must incur liabilities during the period of the extension. It was an experiment entered into and agreed upon by the creditors. The trustee and receiver-manager and White Motor knew that Traders was supplying the necessary financing for White Motor to carry on business and took advantage of it. Even though Clarkson did not expressly approve such financing, it stood by and did not object. At the lowest, Clarkson stood by and allowed the debtor to carry on the business and incur the debts and proceed with the transaction of its business. In equity, it is estopped from denying liability, and therefore Clarkson, White Motor and the general creditors are bound by the actions of the trustee. For this reason, the interest accruing on all transactions that took place after 10th September, 1980 is found owing to Traders and should be paid forthwith. If Traders had not permitted the continuation of its financing and had called upon its security or terminated the agreement, then there could have been no orderly realization upon the sale of the equipment by Clarkson.

It appears to me that Steele J. was rightly concerned with the receiver in that situation "laying doggo" to the detriment of the other party (and to its own benefit). Such is certainly not the situation in the case of this, an actual in place bankruptcy, where the Trustee went clearly on record as not, offering nor agreeing to be responsible for any unfunded pension liabilities.

Costs

14 It seems to me that the point involved is a novel one as unfortunately many of the matters are that involve this legislation. I would think that each side should bear its own costs. I would trust that the interested parties may be able to reach an arrangement whereby this will not be an impediment to a sale as a going concern which would, it seems on surface, to be in the best interests of those concerned.

APPENDIX

Graphic 1

• Ernst & Young Inc.

Ernst & Young Tower

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Ernst & Young Inc., Trustee In The Bankruptcy of St. Marys Paper Inc. Third Report of The Trustee to The Ontario Court (General Division) September 22, 1993

Introduction

1. This Report, dated September 22, 1993, is the Third Report of Ernst & Young Inc. (the "Trustee"), in its capacity as Trustee in the bankruptcy of St. Marys Paper Inc. ("St. Marys"). A copy of the Receiving Order in Bankruptcy appointing the Trustee and two further Orders dated April 26, 1993, and April 27, 1993, amending the Receiving Order are attached as Exhibit "A."

2. St. Marys operated a papermill located in Sault Ste. Marie, Ontario (the "Business"). The First Report of the Trustee to the Ontario Court (General Division), dated July 15, 1993 (the "First Report"), reported on the activities of the Trustee from the date of its appointment on April 26, 1993, to July 12, 1993. A copy of the First Report is attached as Exhibit "B".

3. Contemporaneous with the Receiving Order, an Order was also made on April 26, 1993, appointing Ernst & Young Inc. as Receiver and Manager of the undertaking, property and assets of St. Marys (the "Receiver"). It was agreed between the Trustee and the Receiver that the Trustee would manage and operate the Business and the Receiver would collect pre-bankruptcy accounts receivable and proceeds of assets sold. Also, the Receiver agreed to make a revolving loan facility available to the Trustee for the purpose of managing and operating the Business. This agreement was documented on May 14, 1993, and is attached as Exhibit "C".

4. On April 28, 1993, the Trustee commenced to operate the Business pursuant to its powers under the *Bankruptcy and Insolvency Act* (the "BIA"). The Trustee has continued to operate the Business while efforts are pursued to sell the Business on a going concern basis.

5. The purpose of this Report is to provide the Court the facts required to give directions concerning pension obligations which Price Waterhouse Limited, in its capacity as administrator of the Pension Plan for participating Unions of St. Marys Paper Inc. (the "Union Plan") and the Pension Plan for Non-Union Employees (the "Non-Union Plan", collectively the "Plans") alleges are owed by the Trustee.

Operation of the Business

6. Notwithstanding that the Receiving Order was made on April 26, 1993, the Trustee did not go into possession of the assets of St. Marys until April 28, 1993, when negotiations with the Ministry of Environment resulted in an agreement regarding environmental related concerns.

Termination of Employment Relationship by Bankruptcy

7. The employment relationship between St. Marys and its employees was terminated by operation of the bankruptcy of St. Marys on April 26, 1993.

New Employment Relationship

8. On April 28, 1993, the Trustee offered employment to most of the former employees of St. Marys. For those individuals represented by a union (the "Union Employees"), some of the conditions of their employment were the subject of negotiations between the Trustee and the respective unions (the "Unions"). For those persons not represented by a Union ("Non-Union Employees"), some of the conditions of their employment were the subject of negotiations with senior representatives of the Non-Union Employees.

9. On April 28, 1993, the Trustee met with a group of employees representing both Union and Non-Union Employees to inform them of the bankruptcy and the Trustee's intention to continue operations. The employees were informed that their employment with St. Marys had been terminated as a result of the bankruptcy. The employees were also informed that it was the Trustee's intention that rates of pay, dental, health, life insurance and long-term disability benefit programs and, in general, working conditions would be maintained by the Trustee as much as possible. The Union Employees were specifically informed that the Trustee was not bound by the existing collective bargaining agreements. At the meeting, a question was raised about the status of the Plans. The Trustee stated that it was unaware of the specific details of the Plans and that it would be reviewed and the

status reported back at a subsequent meeting. The employees requested that the Trustee continue to deduct the pension plan contributions and to pay the current service component as part of the general intent to maintain existing working arrangements.

10. At subsequent meetings with employee representatives, the Trustee reported that as requested by the employees, as long as it employed the employees and the Plans were not terminated, it would continue to withhold from employees an amount equal to the amount of the pension plan contribution that was formerly being withheld by St. Marys and to remit these amounts along with an amount equal to the current service amount formerly paid by St. Marys to the trustee of the Plans. The Trustee specifically informed the employees that no payments would be made for the unfunded liability or special contribution payments related thereto as these were liabilities of St. Marys.

11. The terms and conditions of the new employment of Union Employees were ultimately documented by letter dated May 21, 1993, delivered to each Union Employee. The letter specifically stated that the Trustee was not liable for any unfunded pension plan liabilities. A copy of the form of the letter to Union Employees is attached as Exhibit "D".

12. The terms and conditions of employment of Non-Union Employees were ultimately documented by letter dated May 21, 1993, delivered to each Non-Union Employee. The letter specifically stated that the Trustee was not liable for any unfunded pension plan liabilities. A copy of the form of the letter to Non-Union Employees is attached as Exhibit "E".

13. All persons who were in the employ of the Trustee on May 21, 1993, continued in the employ of the Trustee subsequent to receipt of the May 21, 1993, letters. A copy of a schedule listing the amounts paid by the Trustee to the trustee of the Plans is attached as Exhibit "F".

Termination of Employment

14. In late June, 1993, the Trustee became concerned with potentially significant liabilities to the employees of the Trustee, as employer (not successor employer) under the *Employment Standards Act* (the "ESA") which arguably would have entitled them to notice of termination or payment in lieu of notice after employment for more than three months.

15. As a result of this potential problem, the Trustee obtained an Order from Mr. Justice Houlden on July 16, 1993, (the "July 16 Order") declaring that section 57(2) of the ESA did not apply to impose any obligation on the Trustee to give any further notice or payment in lieu of notice to any employees whose employment was terminated prior to July 25, 1993, to the extent that any such employee was given temporary work for a period of up to 12 weeks thereafter. A copy of that Order is attached as Exhibit "G".

16. The July 16 Order also appointed R. Douglas S. Hunter, Q.C. as solicitor of record for the Employees and the Unions. Mr. Hunter consented to the July 16 Order and waived applicable appeal periods. The Ministry of Labour was also represented at the motion before Mr. Justice Houlden and made no objection to the terms of the July 16 Order and waived all applicable appeal periods.

17. On July 16, 1993, notices of termination were sent to all former employees of St. Marys who were in the employ of the Trustee, advising them that their employment with the Trustee was terminated effective as of July 23, 1993. A copy of a sample letter of termination is attached as Exhibit "H".

Temporary Work

18. By letter dated July 16, 1993, the Trustee offered temporary work to substantially all former employees of St. Marys pursuant to the July 16 Order, for the period from July 24, 1993, up to and including August 6, 1993. The letter offered employment on the terms and conditions outlined in the Trustee's earlier letter of May 21, 1993. A copy of the offer of temporary work is attached as Exhibit "I".

19. By letter dated August 5, 1993, the Trustee extended the temporary employment of certain employees until further notice. The letter offered employment on the terms and conditions outlined in the Trustee's letter of July 16, 1993. A copy of a sample

letter is attached as Exhibit "J". By letter dated August 5, 1993, the Trustee notified certain employees that their employment would not be extended beyond August 6, 1993.

Terms of The Union/Non-Union Plan

20. The most recent versions of the Union Plan and the Non-Union Plan in possession of the Trustee are dated July 1, 1988, and May 1, 1987, respectively. Copies of the Union Plan and the Non-Union Plan are attached as Exhibits "K" and "L".

21. The Plans imposed an obligation on the "Company" to make any payments necessary to amortize any unfunded liability. The definition of "Company" in the Plans was as follows:

> "Company" means St. Marys Paper Inc. or any successor thereof and any of its subsidiary, associated or affiliated companies which shall adopt this Plan, and prior to June 1, 1984, Abitibi-Price Inc., except that any reference in this Plan to any action to be taken, consent, approval or opinion to be given, or decision to be made or discretion to be exercised by the Company shall refer to St. Marys Paper Inc., acting through its Board or any other person or persons authorized to act on behalf of the Company for the purposes of the Plan, in accordance with the normal practices of the Company.

22. The Plans provided that, in the event of the Company's bankruptcy, the Plans were to be wound up, with the Plans' assets to be first used to satisfy Plan liabilities. Any remaining surplus would then revert to the Company.

Funded Status of The Union/Non-Union Plan

23. GBB Buck Consultants Limited, the actuary for the Plans, (the "Actuary") prepared an actuarial valuation for the Union Plan as of June 1, 1990. This valuation disclosed an unfunded liability as at June 1, 1987, of $2,087,243. It also disclosed that the Actuary had determined that an annual special contribution of $243,852 payable each year until May 31, 2002, was required to amortize that liability.

24. The valuation also revealed an additional unfunded liability of $2,528,144 as at June 1, 1990. The Actuary determined that an annual special contribution of $295,364 payable each year until May 31, 2005, was required to amortize that liability. A copy of the 1990 valuation report is attached as Exhibit "M".

25. The most recent actuarial valuation for the Union Plan was prepared as at December 31, 1992. The valuation revealed that the total unfunded liability had reduced from $4,465,836 as at June 1, 1990, to $3,753,528 as at December 31, 1992. A summary of the December 31, 1992, valuation results is contained in a letter from the Actuary dated March 16, 1993. A copy of that letter is attached as Exhibit "N".

26. The Actuary also prepared an actuarial valuation for the Non-Union Plan as at June 1, 1990. This valuation disclosed an unfunded liability of $828,226 as at June 1, 1987. The Actuary determined that an annual special contribution of $96,761 payable each year until May 31, 2002, was required to amortize that liability.

27. The valuation also revealed an additional unfunded liability of $114,577 as at June 1, 1990. The Actuary determined that an annual special contribution of $13,386 payable until May 31, 2005, was required to amortize that liability. A copy of the 1990 valuation report is attached as Exhibit "O".

28. The aggregate special contributions on a monthly basis would be approximately $54,000.

29. Each actuarial valuation is also required to consider whether the Plans have a "Solvency Deficiency". This assessment requires a comparison of the liabilities under the Plans on a wind-up basis and the market value of assets. The June 1, 1990, valuations of the Union Plan and the Non-Union Plan reported that the market value of the assets exceeded the liabilities with a result that there would be no deficiency in either Plan if the Plans were wound upon the valuation date.

30. The Trustee understands that Price Waterhouse Limited, in its capacity as administrator of the Plans, will be securing a new actuarial valuation for both Plans. This valuation must be prepared as at a date no later than June 1, 1993. This report has yet

been prepared. In addition, employee reductions since June 1, 1993, and the 20% salary and wage rollback effective August 31, 1993, will have an impact on the proposed June 1, 1993, actuarial valuation.

Appointment of Administrator by Superintendent of Pensions

31. Shortly after the date of bankruptcy, the Unions approached the Trustee requesting information related to the status of certain employees who had previously planned to retire in the months of June and July, 1993. They also enquired about the ability to keep the pension plan operating in order to give a prospective purchaser of the mill operations a chance to continue the Plan. On the first issue, the Trustee replied that the Plan administrator had been St. Marys and that following the bankruptcy, no individual was empowered to give instructions to Canada Trust on pension administration matters. On the second issue, the Trustee replied that the PCO would have to decide whether the pension plan would be wound up as a result of the bankruptcy or if an interim administrator could be appointed. The Trustee, acting in good faith, undertook to contact the PCO to discuss this matter and the status of the pension plan in general.

32. On April 30, 1993, St. Marys wrote to the Pension Commission of Ontario (the "PCO") advising the PCO that St. Marys was placed into bankruptcy on April 26, 1993, and that St. Marys was no longer able to act as administrator of the Plans. A copy of that letter is attached as Exhibit "P".

33. The Trustee wrote to the PCO on May 4, 1993, advising that it was their intention to continue making current service contributions so long as the operations of St. Marys continued under the Trustee's direction. A copy of the May 4, 1993, letter is attached as Exhibit "Q".

34. On June 4, 1993, Jaan Pringi, a Pension Officer at the PCO, wrote to the Trustee seeking information in relation to the Plans. That letter indicated that inquiries were being made to determine whether the Superintendent of Pensions should appoint an administrator for the pension plans. A copy of this letter is attached as Exhibit "R".

35. After receipt of the June 4, 1993, letter, Thane Woodside of Osler, Hoskin and Harcourt (counsel to the Trustee) met with representatives of the PCO on June 17, 1993. By letter dated June 29, 1993, Osler, Hoskin & Harcourt wrote to the PCO responding to the June 4, 1993, letter and requesting that the PCO appoint an administrator for the Plans. A copy of the June 29, 1993, letter is attached as Exhibit "S".

36. On July 15, 1993, the Superintendent of Pensions appointed Price Waterhouse Limited as the Administrator of the Plans (the "Administrator"). The Administrator has asserted the position that the Trustee is liable to make special payments for unfunded liabilities which were previously outstanding and accruing into the future.

Proposed Sale of St. Marys

37. Since its appointment, the Receiver has marketed the assets of St. Marys in an effort to sell the Business as a going concern. As a result of those efforts, the Receiver entered into a Court approved Exclusivity Agreement with a potential purchaser in order to grant the potential purchaser an opportunity to complete its due diligence including the negotiating of a new agreement with the Union and Non-Union Employees.

38. Those negotiations resulted in an August 30, 1993, agreement whereby the potential purchaser agreed to pension improvements in consideration of the employees not advancing any claims with respect to the Enhanced Retirement Incentive provisions of the existing Plans if the sale is completed. A copy of an excerpt from the August 30, 1993, agreement relating to the pension benefits is attached as Exhibit "T".

Position of Trustee

39. The position of the Trustee is that it is not liable to make any special payments or any other amounts owing under the Plans for unfunded liabilities by reason of the following:

(a) St. Marys' bankruptcy terminated the employment of its employees. The Trustee commenced new temporary employment of certain of St. Marys' former employees. Accordingly, the Trustee is not the "Company" under the Plans and it is not the "employer" for purposes of the *Pension Benefits Act* (the "PBA").

(b) The Trustee did not adopt the Plans. The Plans formed part of the employment contract between St. Marys and its employees. The Trustee did not assume that employment contract. In particular, it did not assume the benefits, rights, duties or obligations of St. Marys under the Plans.

(c) The fact that the Trustee made certain payments equal to St. Marys' previous current service costs did not obligate the Trustee to make any other payments under the Plans.

(d) The agreement between the Trustee and the employees was in writing and expressly denied any obligation on the part of the Trustee to pay unfunded liabilities.

40. In the event that the Trustee is found liable to make any special contributions for unfunded liabilities, given the financial situation and the current operations of the Business, the Trustee will be compelled to consider the viability of the Plans continuing or whether the Plans should be immediately terminated. In addition, the Trustee will have to consider whether the operations at the mill can be economically viably continued with such additional liability. The Trustee is of the view that the effect of terminating the Plans or ceasing operations would seriously negatively effect the sale of the Business as well as potentially jeopardizing future employment for approximately 457 current employees at the mill.

41. All of which is respectively submitted to the Court in support of the motion by the Trustee for directions in respect of its liability to make special or any other payments in relation to the Plans.

DATED at Toronto, this 22nd day of September, 1993

Ernst & Young Inc.

In its Capacity as Trustee in bankruptcy of St. Marys Paper Inc.

Ernst & Young Inc.

End of Document

TAB 3

Court File No: CV13-10069-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	TUESDAY, THE 30TH
	)	
JUSTICE MORAWETZ	)	DAY OF APRIL, 2013

BANK OF AMERICA, N.A.,
as Administrative Agent

Applicant

- and -

CPI CORP., CPI PORTRAIT STUDIOS OF CANADA CORP. and CPI CANADIAN IMAGES

Respondents

ORDER

THIS MOTION made by Duff & Phelps Canada Restructuring Inc. ("**D&P**") in its capacity as Court-appointed receiver and receiver manager (in such capacities, the "**Receiver**") without security, of all of the assets, undertakings and properties (the "**Property**") of CPI Corp.("**CPI Corp**"), an unlimited liability company organized under the laws of Nova Scotia, CPI Portrait Studios of Canada Corp., an unlimited liability company organized under the laws of Nova Scotia, and CPI Canadian Images, an Ontario partnership (collectively, the "**Debtor**"), for an order to, *inter alia,* (i) permit the Receiver to cause CPI Corp to make special payments on a monthly basis in respect of the going concern unfunded liability and the solvency deficiency in the Pension Plan for Canadian Employees of CPI Corp. pursuant to the pension plan dated January 1, 1992 (as such pension plan was thereafter amended, restated, modified and/or supplemented from time to time in accordance with its terms, the "**Pension Plan**"); (ii)

amend the Order dated April 15, 2013 granted by Justice Morawetz appointing D&P as Receiver (the "**Receivership Order**") to provide that the priority granted to the Receiver's Charge and the Receiver's Borrowings Charge (as such terms are defined in the Receivership Order) pursuant to the Receivership Order shall be elevated so that they are in priority to any security interests, trusts, liens, charges and encumbrances, statutory or otherwise of any Person, including without limitation, any beneficiary of a statutory deemed trust that is in existence now, or may in the future arise, under the P*ension Benefit Act* (Ontario) or similar pension benefits minimum standards legislation of other provinces (the "**PBA**"); (iii) permit the Receiver to cause CPI Corp to continue to administer the Pension Plan; (iv) seek the approval by the Court of the payment of certain pre-appointment obligations and to continue certain pre-appointment business practices; and (v) approve the appointment of the CRO (as defined herein) and the CRO's Charge (as defined herein) was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Receiver returnable April 30, 2013, the First Report of the Receiver dated April 24, 2013 ~~(the~~ "**First Report**"), the Motion Record of the Receiver for a Motion returnable April 30, 2013, all filed, and on hearing the submissions of counsel to the Receiver, Bank of America N.A. and the Financial Services ~~Commission~~ Superintendent of Wal-Mart Canada Corp. + Sears Canada Inc. Ontario, no other parties appearing although duly served as appears from the affidavit of service of Caitlin Fell dated April 24, 2013, filed.

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged so that this Motion is properly returnable today and that all persons requiring notice of this Motion have been duly served with notice thereof and that the service including the form, manner, and time thereof be and is hereby validated and any further service thereof be and is hereby dispensed with.

DEFINITIONS

2. **THIS COURT ORDERS** that all capitalized terms used but not defined in this Order shall have the meaning given in the Receivership Order.

RECEIVER'S POWERS

3. **THIS COURT ORDERS** that in addition to the powers provided to the Receiver in paragraph 3(c) of the Receivership Order, and without limiting the generality contained therein, the Receiver is empowered and authorized to receive and collect all monies and accounts receivable now owed or hereafter owing to the Debtor by Sears Canada, subject to Sears Canada's contractual rights of set off, offset, right to retain and/or netting as provided for by the Sears Portrait Agreement.

4. **THIS COURT ORDERS** that, without limiting the generality contained in paragraph 3(c) of the Receivership Order and provided that there is sufficient cash on hand to make such payments in accordance with the projected cash flows prepared by the Debtor (the "**Cashflows**"), the Receiver shall cause the Debtor to pay all outstanding and future wages (for greater certainty, excluding severance and termination pay), salaries, vacation pay and expenses of employees of the Debtor that are or become payable on or after the date of the Receivership Order, whether incurred prior to or after the date of the Receivership Order, in each case incurred in the ordinary course of business and consistent with the Debtor's existing compensation policies and arrangements.

5. **THIS COURT ORDERS** that, without limiting the generality contained in paragraph 3(c) of the Receivership Order and provided that there is sufficient cash on hand to

make such payments in accordance with the Cashflows, the Receiver shall cause the Debtor to remit or to pay, in accordance with the Debtor's legal requirements,

(a) any statutory deemed trust amounts in favour of the Crown in right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of (i) employment insurance, (ii) Canada Pension Plan, (iii) Quebec Pension Plan, and (iv) income taxes; and

(b) all goods and services, harmonized sales or other applicable taxes (collectively, "**Sales Taxes**") required to be remitted by the Debtor in connection with the sale of goods and services by the Debtor, but only where such Sales Taxes are accrued or collected after the date of the Receivership Order, or where such Sales Taxes were accrued or collected prior to the date of the Receivership Order but not required to be remitted until on or after the date of the Receivership Order.

6. **THIS COURT ORDERS** that, without limiting the generality of paragraph 11 of the Receivership Order and, provided that there is sufficient cash on hand to make such payments, the Receiver shall cause the Debtor to pay all outstanding amounts properly owing to (i) Wal-Mart Canada Corp. pursuant to the Amended and Restated License Agreement dated as of January 1, 2006, the License Agreement dated as of November 1, 2006 and the License Agreement dated as of October 24, 2008 and (ii) Sears Canada Inc. pursuant to the Sears Trademark License Agreement dated as of August 19, 2009, payable on or after the date of the Receivership Order, whether incurred prior to or after the date of the Receivership Order in each case incurred in the ordinary course of business and consistent with the Debtor's existing contractual arrangements.

CHIEF RESTRUCTURING OFFICER

7. **THIS COURT ORDERS** that (a) the Receiver be and is hereby authorized to engage Keystone Consulting Group, LLC ("**Keystone**") as chief restructuring officer pursuant to the terms set out in the Retention Agreement (the "**CRO Agreement**") attached as Appendix "F" to the First Report; (b) the CRO Agreement be and is hereby approved; and (c) Keystone be and is hereby appointed as an officer of this Court (in such capacity, the "**CRO**") with the powers and obligations set out in the CRO Agreement.

8. **THIS COURT ORDERS** that the CRO be subject to the supervision and direction of the Receiver and shall report to the Receiver regarding all material issues relating to the Debtor's business and affairs.

9. **THIS COURT ORDERS** that, in addition to the rights and protections afforded to the CRO as an officer of this Court, neither the CRO nor any employee of the CRO shall be deemed to be a director or trustee of the Debtor or its affiliates.

10. **THIS COURT ORDERS** that neither the CRO nor any employee of the CRO shall incur any liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its or their part.

11. **THIS COURT ORDERS** that no action or other proceeding shall be commenced against or in respect of the CRO or any employee of the CRO, except with the written consent of the CRO and the Receiver or with leave of this Court on notice to the CRO and the Receiver.

12. **THIS COURT ORDERS** that the CRO shall be entitled to and is hereby granted a charge (the "**CRO's Charge**") on the Property, as security for the payment of amounts owing to the CRO under the CRO Agreement.

PRIORITY OF CHARGES

13. **THIS COURT ORDERS** that the priorities set out in the Receivership Order shall be amended to provide that the Receiver's Charge, the CRO's Charge and the Receiver's Borrowings Charge (the "**Charges**") shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise in favour of any Person, including without limitation, any beneficiary of a statutory deemed trust that is in existence now, or may in the future arise, under the PBA or similar pension benefits minimum standards legislation of other provinces, subject to sections 14.06(7), 81.4(4), and 81.6(2) of the *Bankruptcy and Insolvency Act* (the "**BIA**"), and the Charges shall rank as amongst themselves as follows:

First- the Receiver's Charge and the CRO's Charge on a *pari passu* basis

Second- the Receiver's Borrowings Charge

APPROVAL OF PENSION PAYMENTS

14. **THIS COURT ORDERS** that the Receiver be and is hereby directed and authorized to cause CPI Corp to make when required by the PBA, the minimum required monthly special payments in respect of the going concern unfunded liability and the solvency deficiency in the Pension Plan as set out in the actuarial valuation for the Pension Plan filed with the Ontario pension regulator (the "**Special Payments**") and that the payment of the Special Payments by CPI Corp be and are hereby approved.

ADMINISTRATION OF THE PENSION PLAN

15. **THIS COURT ORDERS** and directs, subject to the power of the Superintendent of Financial Services to appoint a replacement administrator under the Pension Plan in accordance with the PBA, that CPI Corp continue to carry out and comply with its responsibilities as administrator of the Pension Plan in accordance with the PBA and consistent with CPI Corp's past practices, policies and procedures relating thereto and in furtherance of such, the Receiver may cause CPI Corp to complete and file with the Ontario pension regulator any documents required to be filed by CPI Corp as administrator of the Pension Plan, give instructions to third parties currently engaged in the administration of the Pension Plan or the administration and investment of the assets held in relation to the Pension Plan (collectively, the "**Plan Administration Activities**") or engage any Person to carry out any act required to be done in respect of the Plan Administration Activities.

16. **THIS COURT ORDERS** that the expenses relating to the Plan Administration Activities shall be paid out of the assets held in relation to the Pension Plan consistent with CPI Corp's past practices.

NO LIABILITY OF THE RECEIVER

17. **THIS COURT ORDERS** that in addition to the protections in favour of the Receiver as set out in the Receivership Order, the Receiver shall incur no liability or obligation, in its personal or corporate capacity, or in its capacity as Receiver, for any act or omission in connection with the carrying out of the terms of this Order including, without limitation, in causing the CPI Corp to take the steps in respect of the Pension Plan as contemplated in this Order; save and except for any claim or liability arising out of any gross negligence or wilful misconduct on the part of the Receiver, provided however that nothing in this Order shall

derogate from the protections afforded to the Receiver in the BIA, including without limitation section 14.06.

GENERAL

18. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body or US bankruptcy trustee having jurisdiction in Canada, the United States of America or elsewhere to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to the Order or to assist the Receiver and its agents in carrying out the terms of this Order.

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

APR 30 2013

Court File No. CV13-10069-00CL

BANK OF AMERICA, N.A., as Administrative Agent **v.** **CPI CORP. et al**
Applicant Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

ORDER

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Lawyers for the Receiver

RESOURCE CAPITAL FUND V L.P. v. **FIRST NICKEL INC.**
Applicant Respondents

Court File No. CV-15-11082-00CL

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

BOOK OF AUTHORITIES
RESOURCE CAPITAL FUND V L.P.
(Comeback Hearing)

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