

**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 LABRADOR IRON MINES HOLDINGS LIMITED, LABRADOR IRON MINES
LIMITED and SCHEFFERVILLE MINES INC. (the "Applicants")**

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Returnable September 1, 2015**

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**FACTUM OF THE APPLICANTS, LABRADOR IRON MINES LIMITED,
LABRADOR IRON MINES HOLDINGS LIMITED and SCHEFFERVILLE MINES INC.**

PART I. OVERVIEW

1. On this motion, the Applicants seek approval of their sale of surplus equipment, an order vesting title in the buyer and a sealing order to protect certain confidential information relating to the sale, if necessary.

PART II. FACTS

A. The Companies and This Proceeding

2. The Applicants were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended ("CCAA") pursuant to an Initial Order of the Ontario Superior Court of Justice dated April 2, 2015. The Initial Order also appointed Duff & Phelps Restructuring Canada Inc. (now KSV Kofman Inc.) as Monitor.

3. The Applicants' protection from their creditors was extended from May 1, 2015 to July 31, 2015 by an extension order of the Ontario Superior Court of Justice dated April 30, 2015 and again to December 18, 2015 by an order of the same Court dated July 27, 2015.

B. The Sale Process

4. As part of their efforts to successfully restructure their operations during these CCAA proceedings, the Applicants have pursued a variety of efforts to generate revenue from existing operational assets. For example, the Applicants have rented their camp facilities at their Schefferville-area mine site and have provided rail maintenance services and rail car rental arrangements.¹

5. Another important manner in which the Applicants have attempted to maximize cash resources is through the sale of surplus, non-core assets. To this end, the Applicant Labrador Iron Mines Limited ("LIM") undertook a process for the sale of three 1.8 megawatt diesel generators (the "Equipment").²

6. The Equipment is surplus to the Applicant's current and potential future operations and its value is expected to decline over time.³ The Applicant has not granted any security interest in the Equipment.⁴

¹ Affidavit of John Kearney sworn August 24, 2015 (the "Kearney Affidavit") at para. 7, Applicants' Motion Record ("M.R."), Tab 2, p. 25.

² Kearney Affidavit at para. 8, M.R., Tab 2, p. 25.

³ Kearney Affidavit at para. 11, M.R., Tab 2, p. 26.

⁴ Kearney Affidavit at para. 14, M.R., Tab 2, p. 27.

7. In early 2015, LIM delivered requests for proposals to equipment dealers, mining companies and other end users within its region, with respect to the Equipment. LIM selected potential bidders based on its knowledge of likely purchasers and end users of this type of equipment.⁵

C. The Offers

8. The sale process resulted in two “clean” offers. Both offers were on substantially the same terms except for price, and both offered prices were in excess of the net liquidation value of the Equipment as determined by an independent appraisal obtained by the Applicant and the Monitor (the “Appraisal”).⁶

9. Toromont CAT (the “Buyer”) is the bidder with the higher-priced offer (the “Offer”). The Offer provides for a sale on an “as is, where is” basis and for costs of dismantling and moving the Equipment to be borne by the Buyer.⁷

10. The Monitor has expressed its support for a sale of the Equipment on the terms reflected in the Offer (the “Sale”).

PART III. ISSUES

11. The issues to be determined on this motion are:

(a) Should this Court approve the Sale of the Equipment?

(b) Should this Court make an order vesting the Equipment in the Buyer?

⁵ Kearney Affidavit at para. 9, M.R., Tab 2, p. 25.

⁶ Kearney Affidavit at para. 10, M.R., Tab 2, p. 25.

⁷ Exhibit A to the Kearney Affidavit, M.R., Tab 2A, p. 30.

(c) Should this Court make an order sealing the Offer?

12. The Applicants submit that all heads of relief sought should be awarded.

PART IV. LAW & ARGUMENT

A. *The Sale Approval*

1. The Test for Approval of a Sale

13. Subsection 36(1) of the CCAA authorizes a debtor company to sell its assets outside the ordinary course of business, provided it is authorized to do so by the Court:

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.⁸

14. The test for approval is not onerous. At common law, the factors to consider on a motion for approval are set out in the Ontario Court of Appeal decision of *Royal Bank v. Soundair Corp.*:

- (a) whether the [applicant] has made a 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.
- (d) whether there has been unfairness in the working out of the process.⁹

15. Since the Court of Appeal's judgment in *Soundair*, Parliament has amended the CCAA in 2009 to codify the factors to be considered. Subsection 36(3) reads:

- (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

⁸ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 36(1).

⁹ (1991), 4 O.R. (3d) 1 at para. 16; *Re PSINET Ltd.* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 6; *Re Canadian Red Cross Society* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 47.

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.¹⁰

16. These factors are not exhaustive, and this Court has continued to apply the principles set out in *Soundair* in combination with the statutory test in recognition of the substantial overlap between the common law and statutory factors.¹¹

17. A key consideration in applying these factors is the business judgment of the Monitor and the parties involved. It is well-established that absent a violation of the *Soundair* principles, courts should defer to the Monitor's business judgment in supporting a proposed sale.¹²

2. The Sale Should be Approved

18. The Sale is consistent with the letter and spirit of section 36 of the CCAA:

- (a) it is the result of a reasonable, transparent and thorough sale process;
- (b) the Monitor has approved both the process and the result;

¹⁰ CCAA, *supra* note 8, s. 36(3).

¹¹ See e.g. *Re Target Canada Co.*, 2015 ONSC 2066 at para. 15 [Commercial List]; *Re Crate Marine Sales Ltd.*, 2015 ONSC 1062 at para. 25 [Commercial List].

¹² See e.g. *Soundair*, *supra* note 9 at para. 21; *Re Eddie Bauer of Canada Inc.* (2009), 57 C.B.R. (5th) 241 ("the Court should to the extent possible uphold the business judgment of the Court officer and the parties supporting it. Absent a violation of the *Soundair* principles, the result of that process should as well be upheld" at para. 22) (Ont. S.C.J. [Commercial List]).

- (c) no creditors or other stakeholders will be prejudiced by the approval of the Sale. Indeed, they stand to benefit from the liquidity the Sale will generate for the Applicants; and
- (d) the consideration to be received for the assets has been independently confirmed as fair in the Appraisal.

19. The sale process was transparent, fair and reasonable, so there is no basis to second-guess the Monitor's business judgment in deciding to recommend approval. Each of the factors listed in paragraph 18 above are independently corroborated in the Monitor's report.

3. The Equipment should vest in the Buyer

20. Subsection 36(6) of the CCAA gives this Court authority to "authorize a sale or disposition free and clear of any security, charge or other restriction."¹³

21. The Offer contemplates that the Buyer will be provided with clear title to the Equipment. In these circumstances, a vesting order would further the progress of the Applicants' restructuring efforts in accordance with the scheme of the CCAA.

B. The Sealing Order

1. The Test for a Sealing Order

22. Subsection 137(2) of the Ontario *Courts of Justice Act* gives courts a discretion to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.¹⁴

¹³ CCAA, *supra* note 8, s. 36(6).

23. The test for the exercise of this discretion comes from the Supreme Court of Canada's judgment in *Sierra Club of Canada v. Canada (Minister of Finance)*.¹⁵

Sealing orders should be granted where:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.¹⁶

24. This test applies in the insolvency context.¹⁷ Courts in insolvency proceedings have made sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders.¹⁸

2. This Court should grant a Sealing Order

25. The Offer contains confidential and commercially sensitive information. If it is made public prior to the Sale closing, it will materially prejudice LIM and the price at which the Equipment could be sold should the Sale not close. This is an important interest that goes to the very purpose of CCAA protection, namely to facilitate financial rehabilitation of distressed companies, while maximizing recovery for creditors.

¹⁴ R.S.O. 1990, c. C.43, s. 137(2).

¹⁵ 2002 SCC 41.

¹⁶ *Ibid.* at para. 53.

¹⁷ *Re Stelco Inc.* (2006), 17 C.B.R. (5th) 76 at para. 4 (Ont. S.C.J. [Commercial List]).

¹⁸ See e.g. *Re Nortel Networks Inc.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]); *Re Hollinger Inc.*, 2011 ONCA 579.

26. If granted, a Sealing Order will protect the commercial interests of LIM and its stakeholders. This salutary effect greatly outweighs the deleterious effects of inhibiting immediate public access to the details of the offers and appraisal filed in this motion.

PART V. RELIEF SOUGHT

27. The Applicants respectfully request that this Court order the relief sought in the form at Tab 1A of the Applicants' motion record, namely an approval of the Sale of the Equipment, a vesting order and a sealing order over the Offer and appraisal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 25th day of August, 2015.



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TAB A

SCHEDULE "A" – LIST OF AUTHORITIES

1. *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)
2. *Re Target Canada Co.*, 2015 ONSC 2066 [Commercial List]
3. *Re Crate Marine Sales Ltd.*, 2015 ONSC 1062 [Commercial List]
4. *Re Eddie Bauer of Canada Inc.* (2009), 57 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List])
5. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
6. *Re Stelco Inc.* (2006), 17 C.B.R. (5th) 76 (Ont. S.C.J. [Commercial List])
7. *Re Nortel Networks Inc.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List])
8. *Re Hollinger Inc.*, 2011 ONCA 579

TAB B

SCHEDULE "B" – RELEVANT LEGISLATION

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

Restriction on disposition of business assets

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

Notice to creditors

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

Factors to be considered

(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.

Additional factors — related persons

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

- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
- (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

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

- (a) a director or officer of the company;
- (b) a person who has or has had, directly or indirectly, control in fact of the company; and
- (c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

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

Restriction — employers

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

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

Sealing documents

137. (2) A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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PROCEEDING COMMENCED AT
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