

**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 PROPOSED PLAN OF
COMPROMISE OR ARRANGEMENT WITH RESPECT TO
HARD ROCK PAVING COMPANY LIMITED AND THE OTHER
APPLICANTS LISTED IN SCHEDULE "A"**

Applicants

AFFIDAVIT OF CARLO FARGNOLI

I, **CARLO FARGNOLI**, of the City of Montreal, in the Province of Québec, **MAKE
OATH AND SAY:**

1. I am Vice-President, Credit Control & Processes, of GE Canada Equipment Financing GP. As such, I have knowledge of the matters to which I hereinafter depose. To the extent that I have relied on the information of others, I verily believe that information to be true.
2. This Affidavit is filed in opposition to the Applicants motion to approve the proposed sale of their assets to Miller Paving Limited and Waterford Sand and Gravel Limited.

Indebtedness of Hard-Rock to GE Canada

3. Hard-Rock Paving Company Limited (referred to in this affidavit as "**Hard-Rock**" or the "**Company**") is a party to various contracts with GE Canada Equipment Financing GP, GE Canada Leasing Services Company and GE Capital Canada Leasing Trust (all of which are collectively referred to in this affidavit as "**GE Canada**"), including Leasing Agreements, an

Equipment Loan and Security Agreements and a Conditional Sale Agreement (collectively, the “**GE Contracts**”), all in relation to construction equipment used by Hard-Rock (the “**GE Equipment**”).

4. All of the GE Equipment is either owned by GE Canada or secured in its favour in priority to all other creditors.

5. As of the end of April 2008, GE Canada was owed approximately \$10 million by Hard-Rock under the GE Contracts. Since that time, GE Canada has not received any payments from Hard-Rock under those contracts.

6. In addition to the amounts owed under the GE Contracts, Hard-Rock and other Applicants are indebted to GE Canada pursuant to various credit facilities include an operating line facility originally advanced by The Toronto-Dominion Bank (“**TD**”). After Hard-Rock filed for protection under the Companies’ Creditors Arrangement Act (“**CCAA**”), GE Canada acquired the debt and security of TD primarily in order to assist Hard-Rock in its restructuring efforts. That security includes a first-ranking charge over Hard-Rock’s accounts receivable. Although it was not obligated to do so, GE Canada has permitted Hard-Rock to use monies collected from its outstanding receivables in order to fund its operations during the CCAA process.

Sale Process

7. After Hard-Rock obtained the Initial CCAA Order on May 2, 2008, discussions took place among the Applicants, GE Canada, Caterpillar Financial Services Limited (“**CFSL**”) and the CCAA Monitor with respect to a sale process for the Applicants’ assets.

8. It was - and remains - the position of GE Canada that the GE Equipment was not to be sold without its consent as part of any such sale process. GE Canada has consistently maintained this position because, among other things:

- (a) the GE Contracts prohibit Hard-Rock from selling the GE Equipment without GE Canada's consent, which consent may be withheld by GE Canada in its discretion;
- (b) GE Canada is owed a significant sum of money by Hard-Rock;
- (c) according to Hard-Rock, as stated by its Chairman and principal shareholder, David Semley, in his affidavit sworn April 28 in support of the Company's CCAA application, the GE Equipment has "value which is greater than the amounts actually owing" to GE Canada under the GE Contracts; and
- (d) GE Canada has the internal ability and expertise to re-market the GE Equipment through its own customer base and other contacts. Among other things, GE Canada is able to maximize realization on the GE Equipment by providing a variety of financing alternatives to potential purchasers.

9. As a result of these factors and following extensive discussions with the Applicants, CFSL and the CCAA Monitor, an agreement was arrived at with respect to a sale process which was ultimately incorporated into the Amended and Restated Initial CCAA Order dated May 12, 2008 and which included the following provisions:

"42. THIS COURT ORDERS that the Monitor and the Applicants are hereby authorized and directed to conduct a process for the solicitation of offers for and sale of, the Property (the "Sale Process"), which Sale Process shall be completed by June 10th, 2008, in accordance with such steps as the Monitor and the

Applicants may reasonably determine is necessary to obtain the best realization for the Property, in consultation with and as approved by CFSL, and GE.

44. THIS COURT ORDERS that the Applicants may not sell any part of the Property that is the subject matter of the GE Security without the consent of GE.

(Emphasis added.)

10. In essence, GE Canada insisted on the right to approve any sale of the GE Equipment, and this right was agreed upon by the parties who consented to the Amended and Restated Initial CCAA Order and was approved by the Court. This right was and is consistent with the provisions in the GE Contracts between GE Canada and the Company to the effect that the Company cannot transfer or sell the GE Equipment without GE Canada's consent, which consent may be withheld by GE Canada in its discretion.

The Miller/Waterford Offer

11. The Applicants have brought a motion for approval of a transaction for the sale of their assets (including the GE Equipment) which they describe as the "Miller/Waterford Offer".

12. The Miller/Waterford Offer contemplates the purchase of the GE Equipment but does not allocate a specific purchase price for it. Based on an analysis provided by the CCAA Monitor to GE Canada on a without prejudice basis, the amount of the purchase price payable under the Miller/Waterford Offer to be allocated to the GE Equipment is approximately \$6.275 million.

13. In recent discussions with representatives of CFSL, CFSL has taken the position that the 'without prejudice' allocation analysis performed by the CCAA Monitor is flawed and that the amount of the purchase price that should be allocated to the GE Equipment is far less than \$6.275 million.

SCHEDULE "A"

DIAMOND STONEBRIDGE CONTRACTING INC.

HARD-ROCK HIGHWAY MAINTENANCE INC.

HARD-ROCK CONSTRUCTION INC.

942355 ONTARIO LIMITED

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