

COURT OF APPEAL FOR ONTARIO

**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"**

NOTICE OF MOTION

GE Canada Equipment Financing GP, GE Canada Leasing Services Company, GE Capital Canada Leasing Trust and General Electric Capital Canada Inc., d.b.a. GE Capital Fleet Services (all of which are individually and collectively referred to as "**GE Canada**"), will make a motion for leave to appeal to the Court of Appeal for Ontario pursuant to sections 13 and 14 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended ("**CCAA**"). Subject to any motion for directions, the Court will hear the motion in writing, 36 days after service of GE Canada's motion record, factum and transcripts, if any, or on the filing of GE Canada's reply factum, if any, whichever is earlier, on such date and in such manner as may be directed by the Court, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing unless the Court orders an oral hearing.

THE MOTION IS FOR:

- (a) Leave to appeal from the Order of Mr. Justice Wilton-Siegel made July 9, 2008;
- (b) Leave to appeal from the Order of Mr. Justice Wilton-Siegel made July 21, 2008;

- (c) Costs of this motion; and
- (d) Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF THE MOTION ARE:

Indebtedness of Hard Rock to GE Canada

- (a) Hard-Rock Paving Company Limited (referred to herein as “**Hard-Rock**” or the “**Company**”) is a party to various leasing and loan agreements with GE Canada. This motion relates specifically to Leasing Agreements, a Conditional Sale Agreement and a Master Lease Agreement between GE Canada and Hard-Rock (collectively, the “**GE Contracts**”), all in relation to construction equipment and light trucks and other motor vehicles used by Hard-Rock (the “**GE Equipment**”).
- (b) GE Canada is owed approximately \$8.6 million by Hard-Rock under the GE Contracts, excluding accrued interest, late payment charges, applicable taxes and legal fees.
- (c) Under each of the Leasing Agreements, “title to, ownership of, and property in [the leased] Equipment shall at all times be and remain exclusively in” GE Canada. The Company’s only rights therein are to quiet enjoyment and use of the equipment on the terms and conditions of the Leasing Agreements while not in default, and to purchase the leased equipment under any option granted therein.

- (d) Under the Conditional Sale Agreement, title to and ownership of the equipment remains with GE Canada until all amounts owed under the contract are paid in full.
- (e) Under the Master Lease Agreement, the Company agreed that it has no right, title or interest in and to any leased vehicle except as lessee, and has no option to purchase any such vehicle.

Initial CCAA Order and Sale Process

- (f) On May 2, 2008, Hard-Rock sought and obtained protection under the CCAA pursuant the Order of Justice Spence dated May 2, 2008 (the “**Initial CCAA Order**”). The order included terms of a marketing and sales process on terms agreed to among the Applicants, GE Canada, Caterpillar Financial Services Limited (“**CFSL**”) and the CCAA Monitor. Those terms included the following provisions:

SALE PROCESS

37. 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.

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

39. 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)

- (g) In essence, GE Canada and CFSL insisted on a right to approve any sale of their collateral. This right was agreed to by the Applicants, GE Canada, CFSL, and the CCAA Monitor and was approved by the Court.
- (h) The Initial CCAA Order was amended on May 12, 2008 (the “**Restated Initial CCAA Order**”). The provisions entitling GE Canada and CFSL to a right to approve any sale of their collateral remained unchanged, except their paragraph numbers became 43 and 44.

Sale Approval Order

- (i) On July 9, 2008, the Applicants brought a motion for approval of a transaction for the sale of their assets (including the GE Equipment) to Miller Paving Limited and Waterford Sand and Gravel Limited (collectively, the “**Purchasers**”).
- (j) GE Canada opposed the sale of the GE Equipment to the Purchasers and took the position that the Court had no authority to authorize the sale of the GE Equipment without its consent as provided for in paragraph 39 of the Initial CCAA Order [paragraph 44 of the Restated Initial CCAA Order].

- (k) In support of its position, GE Canada filed an affidavit of Carlo Fagnoli sworn July 9, 2008 who described the purpose of paragraph 44 as follows:

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.

- (l) No party submitted any contradictory or other evidence on this point.
- (m) On July 9, 2008, Justice Wilton-Siegel ruled that the GE Equipment could be sold under the sale process despite GE Canada's objection to the proposed sale and granted an order approving the sale of the Applicants' assets to the Purchasers (the "**Sale Approval Order**").
- (n) Justice Wilton-Siegel determined that the proper interpretation of paragraph 44 of the Restated Initial CCAA Order granted by Justice Spence is that "the right of consent of GE applies only to sale of individual pieces of collateral subject to the security of GE, rather than to the entirety of the assets of the applicants".
- (o) Justice Wilton-Siegel erred in law (i) by misinterpreting the Initial CCAA Order and failing to give effect to the plain meaning of paragraph 39 of the Initial CCAA Order [paragraph 44 of the Restated Initial CCAA Order] agreed to by the parties, and (ii) by interpreting the intention of the parties in a manner contrary to

the only evidence before the Court with respect to the intention and purpose of this provision of the Initial CCAA Order.

Vesting Orders

- (p) The Applicants subsequently brought a motion for a vesting orders in connection with the proposed sale transaction with the Purchasers. The proposed vesting orders sought to vest in the Purchasers the “Applicants’ right, title, and interest” in the purchased assets and to expunge GE Canada’s title to the GE Equipment [emphasis added].
- (q) GE Canada opposed the Applicants’ motion on the grounds that the Applicants did not have title to the GE Equipment and the Court did not have authority to transfer to the Purchasers GE Canada’s title to the GE Equipment without payment of all amounts payable under the GE Contracts.
- (r) On July 22, 2008, Justice Wilton-Siegel rejected GE Canada’s objections and granted orders vesting title to, *inter alia*, the GE Equipment in the Purchasers (the “**Vesting Orders**”) on the basis that:
 - i. he had authority under the CCAA to order the transfer of title to the GE Equipment; and
 - ii. GE Canada was estopped from objecting to the Vesting Orders by its prior actions in connection with the sales process.

- (s) Justice Wilton-Siegel erred in law and exceeded his jurisdiction in granting the Vesting Orders by, *inter alia*,
- i. holding that GE Canada's title to the GE Equipment was capable of being transferred to the Purchasers without GE Canada's consent or payment of all amounts payable under the GE Contracts;
 - ii. interpreting the legal effect of the ownership and title retention clauses in the GE Contracts, in the context of the CCAA, as being no more than that of a secured party under the *Personal Property Security Act* (Ontario) ("**PPSA**");
 - iii. not giving effect to the contractual rights of GE Canada contrary to s. 9 of the PPSA;
 - iv. determining GE Canada's rights on the motion as a secured creditor under the PPSA, when in fact it is not a secured creditor within the meaning of such term under s. 2 of the CCAA, being the applicable legislation governing this proceeding;
 - v. holding that GE Canada was only entitled to receive the value of the GE Equipment from the proceeds of sale of the Applicants' assets to the Purchasers, rather than all amounts payable under the GE Contracts;
 - vi. finding that GE Canada's actions in connection with the sales process

constituted an “on-going implied representation to the Court as well as to the applicants and the creditors of the applicants” that the GE Equipment would be included in the assets transferred to the Purchasers, when in fact the Initial CCAA Order expressly provided, as agreed by the parties, that the GE Equipment could not be sold without the consent of GE Canada; and

- vii. holding that GE Canada was “estopped” from objecting to the Vesting Orders.
- (t) The proposed appeals involve serious and arguable grounds that are of real and significant interest to the parties and to the practice, and in particular,
- i. the jurisdiction or authority of a CCAA judge to transfer a third party’s title to and ownership of its assets without its consent or payment of all amounts payable under the applicable contract; and
 - ii. the jurisdiction of a judge to interpret a previous consent order made by another judge in a manner contrary to its plain and ordinary meaning in the absence of a motion to vary, set aside or appeal the order.
- (u) The question regarding the jurisdiction of a CCAA judge to transfer a third party’s title to and ownership of its assets has not been considered by the Ontario Court of Appeal or a Court of Appeal of any other province or territory in Canada and the only two known decisions that have addressed this point are conflicting

decisions.

- (v) By interpreting the Initial CCAA Order contrary to its plain meaning, Justice Wilton-Spiegel contravened the well-established and fundamental rule that an order of a Court which has not been set aside or varied on appeal may not be collaterally attacked and must receive full effect according to its terms.
- (w) The appeals are *prima facie* meritorious.
- (x) The appeals will not unduly hinder the progress of this proceeding.
- (y) Sections 13 and 14 of the CCAA; and
- (z) Rule 61.03.1 of the *Rules of Civil Procedure*.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The affidavits and exhibits filed on the motions for the Sale Approval Order and the Vesting Orders;
- (b) The Order of Justice Wilton-Siegel dated July 9, 2008;
- (c) The endorsement of Justice Wilton-Siegel dated July 11, 2008;
- (d) The endorsement of Justice Wilton-Siegel dated July 21, 2008;
- (e) The endorsement of Justice Wilton-Siegel dated July 22, 2008;

- (f) The Order of Justice Wilton-Siegel dated July 22, 2008;
- (g) The written reasons of Justice Wilton-Siegel dated July 22, 2008; and
- (h) Such further and other material as this counsel may submit and this Honourable Court may permit.

Date: July 29, 2008

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