

**Superior Court of Ontario**  
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## FAX COVER SHEET

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**From:** Justice Colin Campbell

**Date:** July 30, 2009

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**COMMENTS:**

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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  
EDDIE BAUER OF CANADA, INC. AND  
EDDIE BAUER CUSTOMER SERVICES  
INC.

Applicants

)  
) Fred Myers, L. Joseph Latham,  
) Christopher G. Armstrong for the  
) Applicants  
)  
) Jay Swartz for RSM Richter  
) Linda Galessiere for the Landlords  
) Maria Konyukhova for Everest  
) Holdings  
)  
) Alexander Cobb for Bank of America

Heard: July 22, 2009

C. CAMPBELL J.:

REASONS FOR DECISION

[1] A joint hearing between this Court and the United States Bankruptcy Court for the District of Delaware was held on July 22, 2009 for Sale Approval and a Vesting Order in respect of an Asset Purchase Agreement dated as of July 17, 2009 among Everest Holdings LLC as buyer and Eddie Bauer Holdings Inc. ("EB Holdings") and each of its subsidiaries.

[2] These are the reasons for approval of the Order granted.

[3] On June 17, 2009, Eddie Bauer Canada Inc. and Eddie Bauer Customer Services Inc. (together, "EB Canada"), two of the EB Holdings subsidiaries, were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended ("CCAA") in an Initial Order of this Court, with RSM Richter Inc. appointed as Monitor.

[4] On the same day, EB Holdings commenced reorganization under Chapter 11 of the United States Code in bankruptcy. A cross-border protocol was approved by this Court and the U.S. Court on June 25, 2009.

[5] The purpose of what is described in the Orders as "Restructuring Proceedings" was a process to enable the Eddie Bauer Group to have an opportunity to maximize the value of its business and assets in a unified, Court-approved sale process.

[6] EB Holdings is a publicly traded company with shares trade on the NASDAQ Global Market. Eddie Bauer branded products are sold at over 300 retail outlets in the United States and

36 retail stores and one warehouse store throughout Canada, together with online and catalogue sales employing 933 individuals in Canada.

[7] The joint hearing conducted on June 29, 2009 before the U.S. Court and this Court approved a Stalking Horse process and certain prescribed bidding procedures. Rainer Holdings LLC, an affiliate of CCMP Capital Advisors and indirectly of the buyer, became the Stalking Horse bidder.

[8] The Stalking Horse offer of US\$202.3 million was for substantially all of the assets, property and undertaking of the Eddie Bauer Group.

[9] The Bidding Procedure Order provided that the Stalking Horse offeror would be entitled to a break fee and to have its expenses of approximately \$250,000 reimbursed and would offer employment to substantially all of the Company's employees, assume at least 250 U.S. retail locations and all Canadian locations and pay all of the Group's post-filing supplier claims.

[10] The bidding was completed in the early hours of July 17, 2009. The three stage basis of the auction process included (1) the best inventory offer from Inventory Bidders; (2) the best intellectual property offer of the IP bidders; and (3) the best going-concern offer from Going-Concern Bidders. The best inventory and intellectual offers were to be compared against the best going-concern offer.

[11] The US\$286 million bid by Everest (a related company to Rainer) was deemed the best offer, yielding the highest net recovery for creditors (including creditors in consultation.) A US\$250 million back-up bid was also identified.

[12] The Canadian real property leases are to be assigned, assuming consent of landlords, and offers of employment to all Canadian employees to be made and ordinary course liabilities assumed.

[13] The value allocated to the Canadian Purchased Assets of US\$11 million exceeds in the analysis and opinion of the Monitor the net value on a liquidation basis, particularly as the only two material assets are inventory and equity (if any) in realty leases.

[14] All parties represented at the joint hearing, including counsel for the landlords, either supported or did not oppose the Order sought.

[15] The process that has been undertaken in a very short time is an example of a concerted and dedicated effort of a variety of stakeholders to achieve a restructuring without impairing the going-concern nature of the Eddie Bauer business.

[16] The sale and purchase of assets assures a compromise of debt accepted by those debtholders (with a process of certain leases not taken up in the US), which to the extent possible preserves the value of the name and reputation of the business as a going concern.

[17] Had it not been for the cooperative effort of counsel for the parties on both sides of the border and a joint hearing process to approve on an efficient and timely basis, the restructuring regime would undoubtedly have been more time-consuming and more costly.

[18] I am satisfied that the statement of law that set out the duties of a Court in reviewing the propriety of the actions of a Court officer (Monitor) are applicable and have been met here.

[19] The duties were set out by Anderson J. in *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 at pp 92-94 and are as follows:

1. It should consider the interests of all parties.
2. It should consider the efficacy and integrity of the process by which offers are obtained.
3. It should consider whether there has been unfairness in the working out of the process.

[20] Galligan J.A. for the majority in the Court of Appeal in Ontario in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at p. 8 further accepted and adopted the further statement of Anderson J. in *Crown Trust* at p. 551 that "its decision was made as a matter of business judgement on the elements then available to it. It is the very essence of a receiver's function to make such judgments and in the making of them, to act seriously and responsibly, so as to be prepared to stand behind them."


[21] What have come to be known as the *Soundair* principles have been accepted in a number of Ontario cases, including *Bakemates International Inc. v. Mormac Holdings* 2004 CanLII 59994 (ON. C.A.) The same principles have been accepted to approval of Asset Purchase Agreements and Vesting Orders. See *Ivaco Inc. (Re)* 2004 CanLII 21547 (ON. S.C.) In *Tiger Brand Knitting Co. (Re)* 2005 CanLII 9680 (ON. SC), I declined to extend the time for a bid and directed the Monitor not to accept a bid it had received and to negotiate with another party.

[22] The concern in *Tiger Brand*, as in this case, is that once a sales process is put forward, 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.

[23] A Stalking Horse bid has become an important feature of the CCAA process. In this case, the fact that the Stalking Horse bidder promoted other bids and put in the highest bid satisfies me that the process was fair and reasonable and produced a fair and reasonable result.

[24] One can readily understand that the goodwill attached to a recognized name such as Eddie Bauer will likely only retain its value if there is a seamless and orderly transfer.

[25] For the foregoing reasons the draft Orders of Approval and Vesting will issue as approved and signed.

  
C. CAMPBELL J.

Released: July 30, 2009

Court File No. CV-09-8240-00CL  
**Date:** 20090730

**SUPERIOR COURT OF JUSTICE**

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**C. CAMPBELL J.**

**RELEASED: July 30, 2009**