This is the 1st Affidavit of
Pedram Gholipour-Shahraki in this case
and was made on October 28, 2024

VANCOUVER
OCT 28 2024 C
REGISTRY

No. S-244212
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*,
S.B.C. 2002, c.57, AS AMENDED

AND

IN THE MATTER OF GOOD NATURED PRODUCTS INC.,
& THOSE ENTITIES LISTED IN SCHEDULE "A"

PETITIONERS

AFFIDAVIT

I, **Pedram Gholipour-Shahraki**, articling student, of Suite 2400, 745 Thurlow Street, Vancouver, British Columbia, SWEAR THAT:

1. I am an articling student with the law firm of McCarthy Tétrault LLP, counsel to the Monitor in this proceeding, and as such have personal knowledge of the matters hereinafter deposed to, save and except where stated to be on information and belief, in which case I verily believe them to be true.

2. Attached hereto and marked as **Exhibit "A"** is a true copy of a letter from Miller Thomson to Alvarez & Marsal Canada and McCarthy Tetrault LLP dated October 27, 2024.

SWORN BEFORE ME at the City of Vancouver, in the Province of British Columbia, this 28th day of October, 2024.	)
A Commissioner for taking Affidavits for British Columbia	**Pedram Gholipour-Shahraki**

ASHLEY BOWRON
Barrister & Solicitor
McCarthy Tétrault LLP
SUITE 2400 - 745 THURLOW STREET
VANCOUVER, B.C. V6E 0C5
604-643-7973

This is **Exhibit "A"** referred to in **Affidavit #1** of **Pedram Gholipour-Shahraki**, sworn before me at Vancouver, British Columbia, this 28th day of October, 2024.

A Commissioner for taking Affidavits
for British Columbia

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McCarthy Tetrault LLP
745 Thurlow Street
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Vancouver BC V6E 0C5

Attn: Lance Williams & Ashley Bowron

Dear Sir/Madams:

Re: Transaction Approval and the Monitor's Concerns

We are counsel to HUK 149 Limited (the "**Proposed Purchaser**"), the proposed purchaser of Good Natured Products Inc., (the "**Company**"). The Proposed Purchaser and the Company are parties to a subscription agreement (the "**Subscription Agreement**"), wherein the terms and conditions of the Purchaser's acquisition of the Company are established (the "**Transaction**"). Defined terms used herein but not defined shall have the meaning provided for in the Subscription Agreement. Capital West Partners is referred to herein as "**CapWest**". References to the "**Transaction Success Fee**" shall have the definition provided for in the agreement between CapWest and the Company dated July 11, 2024 (the "**CapWest Engagement Agreement**").

We write to you in your capacity as the Court's appointed Monitor (the "**Monitor**") and the Monitor's counsel, respectively. We refer to the Monitor's Fifth Report, dated October 25, 2024 (the "**Fifth Report**"). The Monitor makes several references to the "purchaser's position" in the Fifth Report. We do not know the reference sources for the Monitor's quoting of the "purchaser's position". It could be that the Monitor received second-hand information resulting from confidential counsel to counsel communications or it could be that the Monitor relied upon privileged conversations between parties negotiating the Subscription Agreement. In any event, we write to the Monitor in an effort to ensure that our client's positions are corrected in a supplementary report to the Court. The purpose of this letter is to provide the Monitor with the clarified positions of the Proposed Purchaser. Our client does not take issue with the fact that its positions were shared, it simply wants to correct the Monitor's record to ensure that its position is shared accurately.

This letter is structured so as to highlight conclusions from the Fifth Report, clarify the Proposed Purchaser's position, and note follow up questions.

The following documents are attached to this letter for ease of reference:

1. The CapWest Engagement Agreement;
2. *Harte Gold* case;
3. *Soundair* case;
4. *Third Eye* case; and
5. The SISP.

Fifth Report – Conclusions, Clarifications and Questions

1. The Legal Test to Approve the Transaction has Been Established

The *Ontario Superior Court of Justice* established the leading authority for approving a reverse vesting transaction in a case called *Harte Gold Corp. (Re)*[1], *("**Harte Gold**")*. Further to the *Harte Gold* test, the long standing leading authority to approve the sale of a business is *Royal Bank of Canada v Soundair Corporation*[2] ("***Soundair***").

The Fifth Report sets out the relevant legal test to approve a reverse vesting transaction and establishes that first five prongs of the *Harte Gold* criteria are achieved. In assessing the sixth and final prong of the legal test the Monitor summarizes the criteria as "Is any stakeholder worse off under the RVO structure than they would have been under another viable structure?" The Monitor suggests that "it is unable to confirm that this would be the case under the Transaction, particularly due to the proposed treatment of the Success Fee Charge."

The analysis avoids the clear test as articulated in *Harte Gold*. The Court in *Harte Gold* required a comparative analysis so as to contrast the transaction proposed for approval as against alternative "viable structures". In this case there are no alternative viable structures. The Company will be forced to liquidate if the Transaction is not approved.

Question: Given that the sixth prong of the *Harte Gold* test is established in that there are no alternatives to the Transaction, it is reasonable to suggest that the clear legal thresholds to approve a sale, as have been clearly articulated in the *Harte Gold* and *Soundair* matters, have been satisfied. On what legal basis therefore is the Monitor concluding that the Transaction should not be approved? Does the Monitor have case law upon which it relies? It would be helpful to review the case law that varies from these clear legal precedents.

2. It is Well Established Law that Court Ordered Charges can be Vested Out Without Being Paid in Full

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[1] 2022 ONSC 653.

[2] 1991 CanLII 2727.

In *DGDP-BC Holdings Ltd. v Third Eye Capital Corporation*[3] ("***Third Eye***") the Alberta Court of Appeal (at paragraph 30) treated the following legal conclusions as "well established":

a. "The assets of the insolvent corporation can be sold free and clear of encumbrances, even if the sale does not generate sufficient funds to pay out all creditors, or any class of creditors:...

b. "When assets are sold free and clear of all encumbrances, that could include encumbrances related to debtor-in-possession financing, even if the sale does not generate sufficient funds to pay out those encumbrances. Security and priority given to debtor-in-possession lenders provide no assurance that the loans will actually be repaid.

The Alberta Court of Appeal continues:

- "...the debtor -in-possession lender is never assured that its loans will be paid back at all or in full. There is always a prospect that the insolvency will evolve unfavorably, meaning that there are insufficient funds to meet all legitimate claims. When exercising her jurisdiction the servicing judge must weigh the legitimate expectations of all stakeholders against the changed circumstances. (at paragraph 32)
- "The DIP Financing Term sheet certainly created legitimate expectations, but as none there was never an assurance that the DIP funding would be repaid." (at paragraph 33)
- "In summary, the supervising judge did have the discretion and jurisdiction to approve the sale of the Accel Energy assets, free and clear of the Interim Lenders' Charge, even though that charge was not paid in full." (at paragraph 36)

Question: The Alberta Court of Appeal makes clear that it is "well established" that court-ordered charges can be vested out even when not paid in full. The Fifth Report seems to arrive at the conclusion that it cannot support the Transaction on the basis that it would create an outcome where a court-ordered charge is vested but not paid out. May we please have the case law that the Monitor relies upon in reaching this conclusion. Furthermore, may we please understand how the Monitor distinguishes the facts of this matter from the *Third Eye* case.

3. Balance of Prejudice Favors the Transaction

It has been made clear to the Proposed Purchaser that the alternative to the Transaction is a liquidation of the Company. In *Third Eye*, the Alberta Court of Appeal stated "Third Eye Capital was merely able to persuade the supervising judge that the sale and vesting order it proposed represented the proper balancing of the interest of all of the stakeholders". Put another way, the Alberta Court of Appeal acknowledged that the legal test to approve an

[3] 2021 ABCA 226.

outcome from an insolvency proceeding is to reflect on the "proper balancing of the interest of all of the stakeholders". Set out is our analysis for the primary stakeholder groups, wherein we compare the Transaction against the only other viable path forward, being a liquidation. You will note that in every single case each meaningful stakeholder is dramatically better off, or, in a few instances, receives a neutral outcome.

Comparison of Outcomes for Good Natured Products Inc.'s (the "Company") Stakeholders in the Proposed Transaction versus in a Receivership

Stakeholder	Outcome in the Proposed Transaction	Outcome in a Receivership	Approximate Estimated Exposure
The Company	Receives a $7M working capital injection and continues to operate as a Canadian and American going-concern in the ordinary course.	The Company will be likely be liquidated, resulting in the value destruction set out below.	
Secured Creditors			
CapWest via the Transaction Success Fee Charge	$315,000	$0	$315,000
Professional via the Administration Charge	Obligation paid by Company pursuant to agreement with professionals.	Retained debt paid upon a liquidity event.	$250,000
CapWest Work Fee Charge	This charge has been satisfied and so no further amount is payable.	This charge has been satisfied and so no further amount is payable.	$0
DIP Charge (Wells Fargo)	Retained debt paid by company post-close.	Retained debt paid upon a liquidity event.	$14,000,000
Directors' via the Director's Charge	Resolved as agreed to between the Purchaser and the Directors.	Retained debt paid upon a liquidity event, if necessary.	$400,000
Key Employees via theRetention Payments Charge	Paid by the Company pre-close.	Paid upon the earlier of the conclusion of the CCAA proceedings or each beneficiaries' termination without cause by the Company.	$116,000
Royal Bank of Canada	Company continues to service obligations in the ordinary course as agreed to between RBC and the	Accrued debt continues to accrue until liquidity event. Risk of material shortfall to position in	$7,000,000

Stakeholder	Outcome in the Proposed Transaction	Outcome in a Receivership	Approximate Estimated Exposure
	Company, including the payment of accrued interest.	the event that collateral is insufficient to cover exposure.	
Toronto-Dominion Bank	Company continues to service obligations in the ordinary course as agreed to between TD and the Company, including the accrued interest.	Accrued debt continues to accrue until liquidity event. Risk of material shortfall to position in the event that collateral is insufficient to cover exposure.	$13,000,000
American Community Bank and Trust	Company continues to service obligations in the ordinary course as agreed to between ACBT and the Company, including the payment of accrued interest.	Accrued debt continues to accrue until liquidity event. Risk of material shortfall to position in the event that collateral is insufficient to cover exposure.	$3,000,000 USD
Export Development Canada	Company services obligations pursuant to an agreement between EDC and the Company.	Accrued debt continues to accrue until liquidity event. Risk of material shortfall to position in the event that collateral is insufficient to cover exposure.	$2,500,000 USD
Unsecured Creditors and Other Stakeholders			
Trade Creditors	The Company will retain ~$1,700,000 of trade debt.	Our analysis shows that trade creditors receive zero in a receivership.	$1,700,000
Employees	The Company will retain approximately 150 employees across Canada and the United States. Go-forward payroll is estimated as exceeding $12,000,000 per year.	The employees will likely be terminated through a staged liquidation of the business.	$12,000,000 per year.
Customers	The Company purchased ~$24,100,000 of goods from suppliers in 2023.	The Company will likely cease to purchase any goods from suppliers, causing ripple effects in the supply chain.	$24,100,000 per year.
Environmental and Related Issues	The Company remains in operation as a Canadian-headquartered employer and manufacturer of sustainably-produced packaging products.	The Purchaser has not been able to identify any other significant Canadian eco-packaging companies. The Company's customers will have to either purchase less-sustainable alternatives in Canada or else	

Stakeholder	Outcome in the Proposed Transaction	Outcome in a Receivership	Approximate Estimated Exposure
		sustainable alternatives outside of Canada.	

Questions:

Given that a critical component of the legal test to vest the Transaction Success Fee out is directly tied to balancing of stakeholder interests, we think it be helpful to the Court for the Monitor to provide a more thorough analysis than what is provided for in paragraph 6.13 of the Fifth Report. More specifically, we think it should be noted that CapWest, along with every other single stakeholder, is either materially better off or at worst, neutrally treated. We also think that it would be helpful to the Court to disclose that if the Transaction isn't approved the secured lenders will commence a receivership of the Company and liquidate its business.

4. Company's Enterprise Value is $315,000

A company's enterprise value is a reference to its total value and is intended to reflect the sum calculation of the market capitalization of a company along with short term and long term debt, as well as any cash or cash equivalents on the company's balance sheet. There was an extended sales process where the Company was exposed thoroughly and to more than 160 possible buyers. Aside from the Proposed Purchaser, none of the canvassed investors believed that the Company had a positive enterprise value. In fact, the only other Qualified Bidder advanced a bid that forced the secured lenders to "take significant losses on their secured positions". The sales process results clearly establish that despite being widely marketed not one other party believes in the Company as having positive enterprise value. The Proposed Purchaser's bid was the only bid that established enterprise value, which value is clearly set at the $315,000 the Proposed Purchaser is willing to pay to acquire the shares and take on the enormous task of turning the Company around.

Put another way, the Proposed Purchaser isn't purchasing the assets of the Company. The assets of the Company clearly remain the assets indirectly owned by the secured lenders and subject to the secured lenders' security. The Proposed Purchaser is acquiring equity and the opportunity to hopefully restore equity value (or enterprise value) to something beyond its current nominal value.

Questions: The definition of enterprise value is a well established business metric that clearly is intended to reflect going concern value, or, put another way, the net value of a going concern business. The Fifth Report seems to indicate that the value being paid by Hilco is not $315,000, but more like $53 million (paragraph 6.8 of the Fifth Report). Given that no other party was willing to bid even $1 for the Company and that the only other Qualified Bid for the business required a significant write off for secured lenders, why is it that the Monitor doesn't accept that the enterprise value being offered for the Company is $315,000?

If the Monitor believes that the Proposed Purchaser's offer is actually a $53 million enterprise value offer, why isn't the Monitor taking the position that CapWest is entitled to 3% of that value, which would materially increase the Transaction Success Fee?

It appears that the Monitor is equating the Proposed Purchaser's offer as equal to the amount of the secured lenders' debt. Is this reasonable given that if the Company fails in the near future, the secured lenders will be paid from the proceeds derived from the liquidation of their collateral and not by the Proposed Purchaser? Has the Monitor considered that references to "assumed debt" are erroneous in that the Proposed Purchaser takes no responsibility for these debts and that these debts will simply be satisfied from the liquidation of the secured lenders' collateral or by the Company in the ordinary course of business?

All of this to say, is it possible that the Monitor is confusing the Court by asking it to consider the purchase price at $53 million, instead of the $315,000 that is actually being paid to acquire the Company.

Finally, if the Monitor is treating the Proposed Purchaser's bid as being $53 million, why did the Monitor only ask for and accept a $200,000 deposit? The SISP requires a 10% deposit of the consideration to be paid and held in accordance with the SISP. 10% of $53 million is $5.3 million, which is substantially more than the deposit paid of $200,000.

5. Cash Purchased at Face Value

In paragraph 6.10 of the Fifth Report the Monitor makes a reference to the requirement that the Company have at least $650,000 in cash at closing. The Proposed Purchaser has previously expressed its issue with the idea that it is acquiring cash in the truest sense. The Company has no cash. Every single dollar on hand is a product of borrowing from the Company's operating lender. The Proposed Purchaser was led to believe that the operating lender's revolving facility would have a balance of $13.2 million at the time of Transaction close. Over the course of additional diligence by the Proposed Purchaser it discovered that the actual operating facility at close would be drawn to $14.4 million. Additionally, the Proposed Purchaser learned that the accrued and unpaid debt service payments to the secured lenders was in excess of $700,000. Finally, the Proposed Purchaser is currently aware of more than $1.7 million that will have to be paid immediately on close or shorty thereafter, just to keep the Company operating. Given the moving targets on the material post close payables, the operating line of credit and the fact that the Company relies entirely on an operating line for its liquidity it is entirely misleading to refer to the Proposed Purchaser as acquiring cash.

Question: Is the Monitor comfortable confirming this understanding to the Court?

6. Reasonable Precedent for all SISPs

In paragraph 6.14 the Monitor reaches the conclusion that a success fee should not be subject to liquidity on the basis that the SISP model would become "unsustainable".

Questions: Has the Monitor considered that a sales agent has many opportunities to negotiate protections to ensure it gets paid. In this case CapWest could easily have negotiated any of the following protections:

- CapWest could have required that the secured lenders backstop the Transaction Success Fee
- CapWest could have required a veto in the SISP
- CapWest could have required that their charge continued if the SISP failed and a liquidation ensued
- CapWest could have required a retainer from the secured creditors equal to the success fee

These are a handful of available solutions to any sales agent in any sales process and clearly they were available to CapWest. Has the Monitor considered why none of these protections were provided? Is it possible that CapWest tried to negotiate protections from the secured lenders and the secured lenders said no. Did CapWest get exactly what they bargained for? If CapWest received the protections they bargained for, why is the Monitor imputing a catastrophic veto in favour of CapWest when that isn't a term to the CapWest Engagement or the SISP?

Has the Monitor considered that CapWest receives $0 as the success fee where there isn't a transaction? Has the Monitor considered why this is the case? The secured lenders clearly intended this outcome and intended that CapWests' charge would evaporate if it couldn't generate liquidity in a going concern sale.

If sales agents have numerous contractual protections available to them in negotiations why is the Monitor worried about the sustainability of sales agent mandates?

Finally, has the Monitor considered that this case is unique in that only one of the 168 possible investors submitted a viable going concern offer to purchase the Company and liquidation is the alternative. These facts are unusual and perhaps shouldn't be relied upon to suggest that sales processes are unsustainable if the Transaction is approved and the precedent set.

7. No Restrictions in SISP

The SISP as approved set out numerous fundamental thresholds necessary for a bid to be a qualified bid. The SISP does not include any reference to CapWest or the Transaction Success Fee or an obligation to ensure the Transaction Success Fee is paid. The SISP goes to lengths to require that bidders comment on the treatment of employees, material contracts, leases and the Lender (as defined therein). Given that the SISP sets out the thresholds to be qualified and given that the SISP enumerates treatment of the parties that the framers of the SISP deemed to be key stakeholders, it is surprising that the Monitor expects that CapWest's getting paid is a deal-killing threshold.

Questions: If CapWest being paid is a deal-killing threshold why wasn't that articulated to the lenders, the Court and bidders to the SISP process? Would it have been fair to the market to let potential bidders know that CapWest's fee was the most important priority to the sales process and that the Monitor would reject any and all bids that didn't pay the Transaction Success Fee in full? If CapWests getting paid was the primary intended result from the SISP, why didn't CapWest have an explicit veto on a transaction?

8. Staggering Effort to Negotiate Forbearance and Stability with Key Stakeholders

The Proposed Purchaser, the secured lenders, key executives, suppliers and customers have invested a staggering amount of time to ensure that the Company has stability post Transaction close. In each case a unique agreement has been thoughtfully negotiated and memorialized through legal counsel. These negotiations and documentation are necessary to providing the Company with a reasonable chance to succeed into the future.

Question: Given the material benefits arising from the Transaction and the staggering effort deployed to ensure stability with numerous stakeholders, could it be the case that the Monitor is preferring the interest of one party disproportionally to the interests of the many?

9. Sales Process information Deficiencies

Throughout this SISP, the information made available to the Proposed Purchaser has not been of the standard expected for this nature of process. When our client was first engaged there was only a consolidated quarterly high-level P&L forecast without detailed entity by entity monthly forecasting to support the consolidated high-level statement. As the Company is made up of four key trading locations across two countries that all operate relatively standalone, a monthly entity by entity forecast would be of been a vital information required by any proposed purchase to understand and value the business.

As this was unavailable, our client had to be very hands on with the Company to develop its offer. Our client worked extensively with the Company to develop a financial model and has had to take on a lead role in giving the secured creditors comfort that they were involved in the forecasting process. The forecasting process has involved multiple iterations due to the management information available, delays, and time constraints and so this model has been continuously developed. Our client is currently on version 20 of a model that might have been prepared by CapWest and available from the beginning of the SISP. The cash price offered for the Company is a result of having been through this iterative process of developing an entity-by-entity model which has highlighted cashflow and trading issues which were not identified at the outset.

Below is a summary of the working capital movement that were identified between the first high-level statement provided on September 28 and the detailed receipts and payments cash flow model that was only received on October 12.

	Balance per model shared with Lenders (September 28)	Balance per closing cash flow (October 12)	Variance
Wells Facility	$13.2m	$14.4m	$(1.2)m
Wells headroom	$0.9m	Nil	$(0.9)m
Closing cash	$2.9m	$2.5m	$(0.4)m
Eligible debtors	$5.5m	$4.9m	$(0.6)m
TOTAL:			**$(3.1)m**

As is apparent, the variance between the forecast provided on September 28 and the information provided on October 12th shows a total negative variance of over $3,000,000. the Company's true asset position was materially lower and the liability position materially higher than was readily apparent at the outset. This variance necessitated revisions to our client's financial model and thus to the maximum cash closing payment that would be feasible in the circumstances.

Alongside the forecasting work, our client has been working extensively to understand the Company's capital structure and debts. Again, in this nature of process we would have imagined this information would have been forthcoming and clear. However, the Company's letter of credit liabilities, including the potential for these liabilities to be secured, was not fully understood or disclosed. This totals over $4,000,000 of additional liability.

Questions: In reviewing numerous other CCAA sales processes, the fee paid to CapWest is on the high end, with a total minimum fee of $1.5 million expected to be paid. Would it have been reasonable for bidders to expect a complete data room and representative, detailed and company by company forecasting? The Proposed Purchaser worked around the clock with the Company to develop this forecasting, which took as many as 20 drafts before it was reasonably accurate. Additionally, CapWest has already been paid approximately $300,000 and will receiver another $300,000, to complete a sales process. $600,000 is unusually high for a CCAA sales process, on its own. The cost of this sales process is more than many other CCAA Monitor engagements in total. Has the Monitor considered this fact?

Conclusion

In light of the foregoing, we are surprised that the Monitor is preferring the interests of one stakeholder – who under the proposed Transaction is getting treated in accordance with the rights it bargained for – over the interests of all others.

If the Transaction is not approved, more than 160 employees will lose their jobs, the Company's secured lenders will be forced to attempt to recover on their security in a liquidation, and the Company's customers across North America – which include retailers, food producers, food packers, consumer product companies, restaurants, and industrial processors – will lose access to a sustainable packaging supplier. As of December 31, 2023, the Company's over 90 plant-based packaging designs, which do not include any "forever chemicals", had displaced over 34,700,000 pounds of petroleum-based plastics. It is therefore not hyperbolic to say that it would be a shame if the Company was liquidated, which we are concerned is the outcome we are headed for.

Yours truly,

Per: on behalf of

Larry Ellis
Providing services on behalf of a Professional Corporation
LE/ks

July 11, 2024

Private and Confidential

Good Natured Products Inc.
Suite #814 - 470 Granville Street, Vancouver, BC, V6C 1V5

Dear Mr. Paul Antoniadis

This agreement sets out the basis of the engagement of Capital West Partners ("**Capital West**") to act as exclusive financial advisor to Good Natured Products Inc., its shareholders and/or any related, associated or affiliated entities (collectively, the "**Company**") in connection with the sale and investment solicitation process (the "**SISP**") to solicit one or more or any combination of (1) a *restructuring, recapitalization or other form of reorganization of the business and affairs of one or more* of the Company as a going concern or otherwise, or (2) a sale of all, substantially all or one or more components of the Company's assets (the "**Property**") and/or business operations of the Company (the "**Business**") as a going concern or otherwise (collectively, a "**Transaction**").

1. Engagement

1.1 Subject to and in accordance with the terms and conditions set forth herein, the Company hereby engages Capital West and Capital West hereby agrees to act as the Company's exclusive financial advisor in connection with the SISP and the Transaction (the "**Engagement**").

1.2 The Engagement is for an initial term of four months ("**Initial Term**") and will automatically renew for each 30 day period thereafter until the date of the successful completion of the Transaction. Subject to section 6 hereof, the Engagement may be terminated at any time by either party hereto giving 30 days written notice to the other ("**Termination**").

2. Scope of Engagement

2.1 Under the terms of the Engagement, Capital West shall provide the Company with such advice and services as would be customary for a North American financial advisor to provide in relation to the SISP and the Transaction, including:

(a) preparing a list of potential bidders who may have an interest in the Transaction;

(b) preparing an initial offering summary notifying potential known bidders of the SISP and inviting potential known bidders to express interest in a Transaction;

(c) preparing and distributing a teaser letter and a form of confidently agreement to potential known bidders with respect to the SISP and a Transaction;

(d) reviewing and determining the financial capabilities and technical expertise of all known potential bidders;

(e) preparing a confidential information memorandum ("**CIM**"), describing the opportunity to make a bid in the SISP and delivering the CIM to each known potential bidder;

(f) providing information to potential bidders, including access to a data room established by Capital West, providing information for potential bidders to prepare a bid to submit in the SISP;

(g) reviewing, in connection with the Company and the "**Monitor**", (Alverez & Marsal Canada Inc.), any bids received during the SISP;

(h) providing advice on the Transaction process;

(i) preparing marketing materials for the Transaction;

(j) soliciting prospective purchasers;

(k) advising on the appropriate form and structure of the Transaction;

(l) assisting in organizing due diligence information and coordinating the due diligence process;

(m) assisting and advising on negotiating the terms and conditions of the Transaction (including with respect to any legal documentation to be entered into);

(n) assisting in coordinating other advisors (e.g. legal and tax) in respect of the Transaction; and

(o) managing the transaction process to closing of the Transaction.

2.2 If Capital West is requested to provide any other services in addition to those described above, the terms and conditions relating to such services will be outlined in a separate letter agreement and the fees for such services will be negotiated separately and in good faith and will be consistent with fees paid to financial advisors in North America for similar services.

2.3 The Company shall provide or otherwise make available on a timely basis to Capital West and its professional advisors such corporate, financial and other records and information of the Company, as well as access to its officers, directors, employees and professional advisors, as may be necessary or reasonably required by Capital West to assist Capital West in carrying out the Engagement. The Company agrees that, during the term of the Engagement, Capital West will be kept fully informed of all material business and financial developments affecting the Company.

2.4 Capital West shall be entitled to rely upon the information, documents, and data provided by the Company and shall be under no obligation to verify independently the accuracy or completeness of any such information, documents, or data. The Company will provide Capital West with complete and accurate information, documents and data.

3. Remuneration

3.1 The Company hereby agrees to pay Capital West the following amounts in consideration of Capital West accepting the Engagement:

(a) *Work Fee.* The Company will pay Capital West a work fee ("**Work Fee**") consisting of: (i) $75,000, to be paid on the date of the signing of this agreement in respect of the first 30 day period; and (ii) $75,000, to be paid on the commencement of each 30 day period thereafter during the term of this agreement (including, for greater certainty, any renewal thereof). 50% of the 4th monthly Work Fee and 50% of each subsequent monthly Work Fee will be credited against the Transaction Success Fee.

(b) *Success Fee.* Capital West will be paid a success fee ("**Transaction Success Fee**") based on the Enterprise Value (as defined below) implied under the Transaction on the following basis:

- 3.0% of Enterprise Value (as defined below).

Not withstanding the above, the Transaction Success Fee will be a minimum of $1,250,000, regardless of the Enterprise Value and any Work Fee credit referred to in Section 3.1(a).

The Transaction Success Fee will be paid in full at the closing of the Transaction, and the Company hereby assigns to Capital West an amount equal to the Transaction Success Fee from the proceeds to which the Company is otherwise entitled from the counterparty under the Transaction. The Company covenants to cause the Transaction Success Fee to be presented as a "closing document" on the closing agenda relating to the Transaction, and acknowledges that receipt by Capital West of payment of the Transaction Success Fee will be a condition precedent to the closing of the Transaction. The Company and Capital West will provide letters of direction with respect to the payment of the Transaction Success Fee in connection with the closing of the Transaction.

For purposes of this agreement, "**Enterprise Value**" is defined as the sum of the fair market value of the cash, securities, and other amounts paid or payable to the Company or its shareholders including, for avoidance of doubt, any amounts held in escrow.

(c) *Expenses.* Capital West will be reimbursed in respect of any out-of-pocket expenses incurred in carrying out the Engagement, which reimbursement shall be payable on a monthly basis upon receipt of an invoice from Capital West. Although not currently anticipated, the parties acknowledge and agree that Capital West may need to retain legal counsel in respect of the engagement for the Company's account, provided that such legal counsel shall not be retained without the Company's prior consent.

3.2 All amounts described in subsection 3.1 will be subject to all applicable taxes, including excise taxes.

3.3 Invoices not paid when due will be charged interest of 1% per month.

3.4 The Company will seek a court ordered priority charge from the Supreme Court of British Columbia (the "**Court**") in the amounts and priorities as follows:

a. a charge in the amount of $75,000 with respect to the Work Fee, secured against the current and future assts, undertakings and properties of the Company ranking *pari passu* with the Administration Charge (as defined in the Amended and Restated Initial Order of the Court made July 8, 2024); and

b. a super priority charge in the amount of $1,250,000 with respect to the Transaction Success Fee, secured against any and all proceeds from a sale Transaction, ranking in priority to all other claims.

4. Use of Advice

4.1 The Company acknowledges and agrees that all written and oral opinions, advice, analysis and materials provided by Capital West in connection with the Engagement are intended solely for the Company's benefit and its internal use only in considering the Transaction and the Company agrees that no such opinion, advice or material will be used for any other purpose whatsoever or be reproduced, disseminated, quoted from or referred to in whole or in part at any time, in any manner or for any purpose, without Capital West's prior written consent in each specific instance.

4.2 Any advice or opinions given by Capital West hereunder will be made subject to, and will be based upon, such assumptions, limitations, qualifications and reservations as Capital West, in its sole judgment, deems necessary or prudent in the circumstances.

4.3 Capital West expressly disclaims any liability or responsibility by reason of any unauthorized use, publication, or distribution of or reference to any oral or written opinions or advice or materials provided by Capital West or any unauthorized reference to Capital West, or this Engagement.

5. Termination

5.1 It is understood that any Termination of the Engagement by the Company will not affect Capital West's right to receive the fees earned, or to be reimbursed for expenses incurred under this agreement. The Company agrees and acknowledges that if this agreement is terminated:

(a) Capital West shall be entitled to a minimum fee equal to the greater of (i) $300,000; or (ii) the Work Fee (as defined above) earned by Capital West up to the date of Termination; plus, in either case, reimbursement in respect of the expenses incurred by Capital West up to the date of Termination; and

(b) Capital West will be entitled to receive the Transaction Success Fee if a Transaction is completed by the Company within 12 months of Termination.

5.2 The Company and Capital West agree that the following provisions shall survive any Termination of the Engagement or of this agreement: Sections 3.1, 3.2, 4.1, 5.1, 5.3, 7.3, 7.4 and 7.7.

6. General

6.1 The Company shall obtain all reasonable outside services for its own account to complete the Transaction. Capital West may, with the Company's prior consent, retain such outside services, in addition to those contemplated in paragraph 3.1(c), that it deems necessary to fulfill Capital West's duties hereunder for the Company's account.

6.2 It is hereby agreed that the Company and Capital West will perform all functions required hereunder in compliance with all applicable laws including, but not limited to, securities and regulatory laws.

6.3 Capital West agrees that all information, documents, and data relating to the Company and its business(es) and operations disclosed to, obtained by, or made available to Capital West (the "**Confidential Information**") shall be held confidential and shall not be disclosed by Capital West, except to its professional advisors in connection with the Engagement, unless authorized by the Company or required by any law or regulation and, in the latter case, only after timely notice to the Company to enable the Company to take such action as is available to it, in compliance with all applicable laws, to protect the confidentiality of the Confidential Information.

6.4 Each of the Company and Capital West agrees that the terms of this Engagement shall be confidential and shall not be disclosed without the prior written consent of each of the parties hereto. The Company agrees that it shall not make any public announcement concerning the appointment of Capital West or the Transaction without the written consent of Capital West, acting reasonably, and any public announcements shall be made in compliance with applicable securities laws. After completion of the Transaction, Capital West shall be entitled to place advertisements in electronic and print format at its own expense describing its services in connection with the Transaction. Notwithstanding the foregoing, the Company is expressly authorized to: (a) inform the Supreme Court of British Columbia (the "**Court**") that Capital West is acting as "Sales Agent" for the SISP and answer any questions the Court may have about Capital West's appointment and this agreement in connection with obtaining the Court's approval of the SISP; and (b) provide the Court with this agreement in a confidential affidavit of a representative of the Company under a sealing order of the Court.

6.5 If any provision of this agreement is determined to be illegal, invalid or unenforceable, that provision will be severed from this agreement and the remaining provisions will remain in full force and effect.

6.6 This agreement will enure to the benefit of and be binding upon the parties hereto and their respective successors and assigns, provided that no party may assign this agreement or any rights or obligations hereunder without the prior written consent of the other.

6.7 This agreement shall be governed by the laws of the Province of British Columbia and the laws of Canada applicable thereto and the parties hereto hereby irrevocably attorn to the exclusive jurisdiction of the Courts of the Province of British Columbia (and, if necessary, the Supreme Court of Canada).

6.8 This agreement constitutes the entire agreement between the Company and Capital West respecting the matters dealt with herein and the parties hereto are not bound by any representation, warranty, promise, agreement or inducement respecting such matters not embodied or contained in this agreement.

Execution Page Follows

If you are in agreement with the terms and conditions of this letter, please indicate your acceptance thereof by signing one copy and returning it to Capital West.

Yours truly,

CAPITAL WEST PARTNERS

By: ______________________________

Authorized Signatory

The foregoing is accepted and agreed to this 11th day of July, 2024.

GOOD NATURED PRODUCTS INC.

By: ______________________________
Mr. Paul Antoniadis
Chief Executive Officer

CITATION: *Harte Gold Corp. (Re)*, 2022 ONSC 653
COURT FILE NO.: CV-21-00673304-00CL
DATE: 2022-02-04

SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

RE: THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED, Applicant

AND:

A PLAN OF COMPROMISE OR ARRANGEMENT OF HARTE GOLD CORP., Applicant

BEFORE: Penny J.

COUNSEL: *Guy P. Martel, Danny Duy Vu, Lee Nicholson, William Rodler Dumais* for the Applicant

Joseph Pasquariello, Chris Armstrong, Andrew Harmes for the Court appointed Monitor

Leanne M. Williams for the Board of Directors of the Applicant

Marc Wasserman, Kathryn Esaw, Dave Rosenblat, Justin Kanji for 1000025833 Ontario Inc.

Stuart Brotman and Daniel Richer for BNP Paribas

Sean Collins, Walker W. MacLeod and Natasha Rambaran for Appian Capital Advisory LLP, 2729992 Ontario Corp., ANR Investments B.V. and AHG (Jersey) Limited

David Bish for OMF Fund II SO Ltd., Orion Resource Partners (USA) LP and their affiliates

Orlando M. Rosa and Gordon P. Acton for Netmizaaggamig Nishnaabeg First Nation (Pic Mobert First Nation)

Timothy Jones for the Attorney General of Ontario

HEARD: January 28, 2022

ENDORSEMENT

[1] This is a motion by Harte Gold for an approval and reverse vesting order involving the sale of Harte Gold's mining enterprise to a strategic purchaser (that is, an entity in the gold

mining business) and for an order extending the stay and expanding the Monitor's powers to include new entities to be created for the purposes of implementing Harte Gold's proposed restructuring. There was no opposition to the relief sought. All those who appeared at the hearing supported approval of the transaction.

[2] Following the conclusion of oral submissions on Friday, January 28, 2022, I issued the orders sought with written reasons to follow. These are the reasons.

Background

[3] Harte Gold is a public company incorporated under the *Business Corporations Act* (Ontario). Prior to January 17, 2022, its shares publicly traded on the Toronto Stock Exchange, Frankfurt Stock Exchange and over-the-counter. Harte Gold operates a gold mine located in northern Ontario within the Sault Ste. Marie Mining Division and approximately 30 km north of the town of White River. This mine, referred to as the Sugar Loaf Mine, produces gold bullion. Harte Gold has a total of 260 employees on payroll, as well as 19 employees retained through various agencies. Harte Gold's payroll obligations are current.

[4] Of some importance to the form of transaction proposed in this case, involving an approval and reverse vesting order (RVO), is the fact that Harte Gold has 12 material permits and licenses that are required to maintain its mining operations, 24 active work permits and licenses that allow the performance of exploration work on various parts of the Sugar Loaf property and many other forest resource licenses, fire permits and the like, all necessary in one way or another to Harte Gold's continued operations. Harte Gold also has 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The transfer of these permits and licenses etc. would involve a complex transfer or new application process of indeterminate risk, delay and cost.

[5] It is also important to note that Harte Gold is party to an Impact Benefits Agreement dated April 2018 between Harte Gold and Netmizaaggamig Nishnaabeg First Nation.

[6] Harte Gold has two primary secured creditors. They are: a numbered company (833) owned by Silver Lake Resources Limited (an Australian gold mine company). 833 is a very recent assignee of significant secured debt from BNPP; and, AHG Jersey Limited (AHG is part of the Appian group). Appian entities are also counterparties to a number of offtake agreements under which Harte Gold sells gold in exchange for prices determined by a pricing formula tied to the London bullion market. Orion is, similarly, a counterparty to additional offtake agreements. BNPP, following the assignment of its secured debt, has retained additional obligations in respect of certain hedging arrangements provided to Harte Gold. Harte Gold also has a number of trade and other unsecured creditors who are owed an estimated $7.5 million for pre-filing obligations and further amounts for services rendered post-filing.

[7] At the time of its initial application to the court, Harte Gold's assets were valued at $163.8 million. Its liabilities were valued at $166.1 million. On a balance sheet basis, therefore, Heart Gold was insolvent.

[8] Since about 2019, Harte Gold has been pursuing a number of measures to address a growing liquidity problem, a problem only exacerbated by the Covid-19 pandemic. Despite these efforts, in 2020 Harte Gold was obliged to seek agreement from its prime lender, BNPP, to defer debt payments and to seek a forbearance from enforcement of BNPP's security. In May 2021, Harte Gold initiated a strategic review of options to achieve the desired liquidity and to fund the acquisition of new capital. Harte Gold appointed a strategic committee of its board and, shortly thereafter, a special committee of independent directors. The special committee retained FTI as financial advisor (FTI was subsequently appointed Monitor by this Court) and developed a plan to attract new capital through a potential sale.

[9] This prefiling strategic process involved approaching over 250 potential buyers. 31 of these entities executed confidentiality agreements; 28 of those conducted due diligence through Harte Gold's virtual data room. Harte Gold received four nonbinding expressions of interest but, by the bid deadline in September 2021, no binding offers had been received.

[10] In the aftermath of this unsuccessful process, Silver Lake through 833 acquired BNPP's debt and advanced a proposal to acquire Harte Gold's operations by way of a credit bid and to provide interim financing in connection with any proceedings under the CCAA. An initial order under the CCAA issued from this Court on December 7, 2021.

[11] In the midst of this process, Harte Gold received a competing proposal to make a credit bid from Harte Gold's second secured creditor, Appian. As a result of these developments, Harte Gold resolved to conduct a further (albeit brief, given the extensive process that had just been completed) sale and investment solicitation process, this time with a stalking horse bid. Further competing proposals took place between Silver Lake and Appian over who would be the stalking horse bidder. As a result of this process, the stalking horse bid of Silver Lake was significantly improved. Appian was then content to let Silver Lake's credit bid form the basis of the SISP. I approved this process in an order dated December 20, 2021.

[12] The Monitor provided a new solicitation notice to a total of 48 known and previously unknown potential bidders (other than Silver Lake and Appian). None of the potentially interested parties signed a confidentiality agreement or requested access to the data room.

[13] Only one competing bid was received – a further credit bid from Appian with improved conditions over those proposed by Silver Lake. Ultimately, all parties agreed that the responding commitment from Silver Lake which was at least as favourable to stakeholders as the Appian bid would be, in effect, the prevailing and winning bid.

[14] This took the form of a Second Amended and Restated Subscription Agreement (SARSA) with 833, the actual purchaser. The improved terms were: (a) the assumption by the purchaser of Harte Gold's office lease at 161 Bay Street in Toronto; (b)(i) the proviso that

the $10 million cap on payment of cure costs and pre-filing trade creditors does not apply to the assumption of post-filing trade creditor obligations; and (ii) all amounts owing by Harte Gold to any of the Appian parties are subject to a settlement agreement between 833 Ontario, Silver Lake and Appian and excluded from the prefiling cure costs; and, (c) the undertaking to pay an additional cash deposit of US$1,693,658.72, equivalent to approximately 5% of the Appian indebtedness.

[15] In broad brush terms, the Silver Lake/833 purchase is structured as a reverse vesting order. The transaction will involve:

- the cancellation of all Harte Gold shares and the issue of new shares to the purchaser
- payment by the purchaser of all secured debt
- payment by the purchaser of virtually all prefiling trade amounts (estimated at $7.5 million but with a $10 million cap) and postfiling trade amounts
- certain excluded contracts and liabilities being assigned to newly formed companies which will, ultimately, be put into bankruptcy. The excluded contacts and liabilities include a number of agreements involving ongoing or future services in respect of which there is little if any money currently owed. They also include a number of contracts with Appian entities and Orion, both of which support approval of the transaction The emplyment contracts of four terminated executives will, however, be excluded liabilities, which will nullify the value of any termination claims. Notably, excluded liabilities does not include regulatory or environmental liabilities to any government authority
- retaining on the payroll all but four employees (the four members of the executive team whose employment contracts will be terminated), and
- releases, including of Harte Gold and its directors and officers, the Monitor and its legal counsel and Silver Lake and its directors and officers.

There is no provision for any break fee. Nor is there a request for any form of sealing order.

[16] I should add that the value of what the purchaser is paying for Harte Gold's business, including the secured debt, the pre and postfiling trade amounts, interim financing and the like, totals well over $160 million.

Issues

[17] There are three principal issues:

(1) Whether the proposed transaction should be approved, including the reverse vesting order transaction structure and the form of the proposed release;

(2) Whether the stay should be extended; and,

(3) Whether the Monitor's mandate should be extended to included additional companies (newcos) being incorporated for the purposes of executing the proposed transaction.

Analysis

[18] Section 11 of the CCAA confers jurisdiction on the Court in the broadest of terms: "the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances".

[19] Section 36(1) of the CCAA provides:

> 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.

[20] Section 36(3) of the CCAA provides a non-exhaustive list of factors to be considered on a motion to approve a sale. These include:

> (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.

[21] The s. 36(3) criteria largely correspond to the principles articulated in *Royal Bank v. Soundair Corp,* 1991 CanLII 2727 (ONCA) for the approval of the sale of assets in an insolvency scenario:

> (a) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers have been obtained; and
>
> (d) whether there has been unfairness in the working out of the process:

see *Target Canada Co. (Re),* 2015 ONSC 1487, at paras. 14-17.

[22] The purchase transaction for which approval is being sought in this case does not provide for a sale of assets but, rather, provides for a "reverse vesting order" under which the purchaser will become the sole shareholder of Harte Gold and certain excluded assets, excluded contracts and excluded liabilities will be vested out to new companies incorporated for that purpose.

[23] In determining whether the transaction should be approved and the RVO granted, it is appropriate to consider:

(a) the statutory basis for a reverse vesting order and whether a reverse vesting order is appropriate in the circumstances; and,

(b) the factors outlined in s. 36(3) of the CCAA, making provision or adjustment, as appropriate, for the unique aspects of a reverse vesting transaction.

The Statutory Basis (Jurisdiction) for a Reverse Vesting Order

[24] The first reverse vesting sale transaction appears to have been approved by this Court in *Plasco Energy (Re),* (July 17, 2015), CV-15-10869-00CL in the handwritten endorsement of Justice Wilton-Siegel. The use of the reverse vesting order structure was not in dispute (indeed, in most of the cases, reported and otherwise, there has been no dispute). Wilton-Siegel J. found "the Court has authority under section 11 of the CCAA to authorize such transactions notwithstanding that the applicants are not proceeding under s. 6(2) of the CCAA insofar as it is not contemplated that the applicants will propose a plan of arrangement or compromise."

[25] A few dozen of these orders have been made since that time, mostly in a context where there was no opposition and no obvious or identified unfairness arising from the use of the RVO structure. The frequency of applications based on court approval of an RVO structure has increased significantly in the past few years.

[26] More recently, two reverse vesting orders have been approved in contested cases and been considered by appellate courts in Canada. I cite these two cases in particular because, being opposed and appealed, there tends to be a more in-depth analysis of the issues than is usually the case in the context of unopposed orders.

[27] In *Arrangement relatif à Nemaska Lithium Inc, 2020 QCCS 3218* at paras. 52 and 71 (leave to appeal to QCCA refused, *Arrangement relatif à Nemaska Lithium Inc,* 2020 QCCA 1488; leave to appeal to SCC refused, *Arrangement relatif à Nemaska Lithium Inc,* 2021 CarswellQue 4589), Justice Gouin of the Quebec Superior Court approved a reverse vesting transaction in the face of opposition by a creditor. Following a nine day hearing, Gouin J. reviewed the context of the transaction in detail and carefully analyzed the purpose and efficiency of the RVO in maintaining the going concern operations of the debtor companies. He also found that the approval of the RVO should be considered under s. 36 CCAA, subject to determining, for example:

- Whether sufficient efforts to get the best price have been made and whether the parties acted providently

- The efficacy and integrity of the process followed

- The interests of the parties, and

- Whether any unfairness resulted from the process.

Gouin J. considered that these criteria had been met and found the issuance of the RVO to be a valid exercise of his discretion, concluding that it would serve to maximize creditor recoveries while maintaining the debtor companies as a going concern and allowing an efficient transfer of the necessary permits, licences and authorizations to the purchaser.

[28] In denying leave to appeal, the Quebec Court of Appeal noted that the CCAA judge found that "the terms 'sell or otherwise dispose of assets outside the ordinary course of business' under subsection 36(1) of the CCAA should be broadly interpreted to allow a CCAA judge to grant innovative solutions such as RVOs on a case by case basis, in accordance with the wide discretionary powers afforded the supervising judge pursuant to section 11 CCAA, as recognized by the Supreme Court in *Callidus*": *Nemaska* QCCA at para 19.

[29] Similarly, in *Quest University Canada (Re),* 2020 BCSC 1883, Justice Fitzpatrick of the British Columbia Supreme Court extensively reviewed the caselaw related to a CCAA court's authority to grant a reverse vesting order. Fitzpatrick J. found that the CCAA provided sufficient authority to grant the reverse vesting order being sought, which was consistent "with the remedial purposes of the CCAA" and consistent with the Supreme Court of Canada's ruling on CCAA jurisdiction in *9354-9186 Québec Inc. v. Callidus Capital Corp.,* 2020 SCC 10. She found, therefore, that the issue in each case is not whether the court has sufficient jurisdiction but whether the relief is "appropriate" in the circumstances and stakeholders are treated as fairly and reasonably as the circumstances permit.

[30] In *Quest*, the debtor was in the process of putting forward a plan of compromise under the CCAA. It encountered resistance from an unsecured creditor whose vote could potentially have prevented the necessary creditor approval of the plan. The debtor revised its approach, deleting all conditions precedent requiring creditor and court approval and proceeded with a motion for the approval of an RVO to achieve what it was really after; that is, a sale of certain assets to a new owner with Quest continuing as a going concern academic institution.

[31] Fitzpatrick J. relied on *Callidus* to the effect that:

- Courts have long recognized that s. 11 of the CCAA signals legislative endorsement of the "broad reading of CCAA authority developed by the jurisprudence". On the plain wording of the provision, the jurisdiction granted by s. 11 is constrained only by restrictions set out in the CCAA itself, and the requirement that the order made be "appropriate in the circumstances"

- the CCAA generally prioritizes "avoiding the social and economic losses resulting from liquidation of an insolvent company"

- Where a party seeks an order relating to a matter that falls within the supervising judge's purview, and for which there is no CCAA provision conferring more specific jurisdiction, s. 11 necessarily is the provision of first resort in anchoring jurisdiction. As Blair J.A. put it in *Stelco*, s. 11 "for the most part supplants the need to resort to inherent jurisdiction" in the CCAA context

- The exercise of the discretion under s. 11 must further the remedial objectives of the CCAA and be guided by the baseline considerations of appropriateness, good faith, and due diligence

- Whether this discretion ought to be exercised in a particular case is a circumstance-specific inquiry that must balance the various objectives of the CCAA. The supervising judge is best positioned to undertake this inquiry.

[32] The SCC in *Callidus* made an important point in the context of the limits of broad discretion; all discretion has limits and its exercise under s. 11 must accord with the objectives of the CCAA and other insolvency legislation in Canada. These objectives include: providing for timely, efficient and impartial resolution of a debtor's insolvency; preserving and maximizing the value of a debtor's assets; ensuring fair and equitable treatment of the claims against a debtor; protecting the public interest; and, in the context of a commercial insolvency, balancing the costs and benefits of restructuring or liquidating the company. Further, the discretion under s. 11 must also be exercised in furtherance of three baseline considerations: (a) that the order sought is appropriate in the circumstances, and (b) that the applicant has been acting in good faith and (c) with due diligence.

[33] Ultimately, Fitzpatrick J. held that, in the complex and unique circumstances of that case, it was appropriate to exercise her discretion to allow the RVO structure. Quest sought this relief in good faith and while acting with due diligence to promote the best outcome for all stakeholders. She considered the balance between the competing interests at play and concluded that the proposed transaction was unquestionably the fairest and most reasonable means by which the greatest benefit can be achieved for the overall stakeholder group.

[34] The British Columbia Court of Appeal refused leave to appeal, concluding that the appeal was not "meritorious", also noting that reverse vesting orders had been granted in other contested proceedings, namely *Nemaska*. The BCCA also stated that the reverse vesting order granted by Fitzpatrick J. "reflect[ed] precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising CCAA proceedings": *Southern Star Developments Ltd. v. Quest University Canada*, 2020 BCCA 364.

[35] It is worthy of note that, in both *Nemaska* and *Quest*, the *bona fides* of the objectors were front and centre in the judicial analysis and, in both cases, the motivations and objectives of the objectors were found suspect and inadequate.

[36] The jurisdiction of the court to issue an RVO is frequently said to arise from s. 11 and s. 36(1) of the CCAA. However, the structure of the transaction employing an RVO typically does not involve the debtor 'selling or otherwise disposing of assets outside the ordinary course of business', as provided in s. 36(1). This is because the RVO structure is really a purchase of shares of the debtor and "vesting out" from the debtor to a new company, of unwanted assets, obligations and liabilities.

[37] I am, therefore, not sure I agree with the analysis which founds jurisdiction to issue an RVO in s. 36(1). But that can be left for another day because I am wholeheartedly in agreement that s. 11, as broadly interpreted in the jurisprudence including, most recently, *Callidus*, clearly provides the court with jurisdiction to issue such an order, provided the discretion available under s. 11 is exercised in accordance with the objects and purposes of the CCAA. And it is for this reason that I also wholeheartedly agree that the analytical framework of s. 36(3) for considering an asset sale transaction, even though s. 36 may not support a standalone basis for jurisdiction in an RVO situation, should be applied, with necessary modifications, to an RVO transaction.

[38] Given this context, however, I think it would be wrong to regard employment of the RVO structure in an insolvency situation as the "norm" or something that is routine or ordinary course. Neither the BIA nor the CCAA deal specifically with the use or application of an RVO structure. The judicial authorities approving this approach, while there are now quite a few, do not generally provide much guidance on the positive and negative implications of this restructuring technique or what to look out for. Broader-based commentary and discussion is only now just now starting to emerge. This suggests to me that the RVO should continue to be regarded as an unusual or extraordinary measure; not an approach appropriate in any case merely because it may be more convenient or beneficial for the purchaser. Approval of the use of an RVO structure should, therefore, involve close scrutiny. The Monitor and the court must be diligent in ensuring that the restructuring is fair and reasonable to all parties having regard to the objectives and statutory constraints of the CCAA. This is particularly the case where there is no party with a significant stake in the outcome opposing the use of an RVO structure. The debtor, the purchaser and especially the Monitor, as the court appointed officer overseeing the process and answerable to the court (and in addition to all the usual enquiries and reporting obligations), must be prepared to answer questions such as:

(a) Why is the RVO necessary in this case?

(b) Does the RVO structure produce an economic result at least as favourable as any other viable alternative?

(c) Is any stakeholder worse off under the RVO structure than they would have been under any other viable alternative? and

(d) Does the consideration being paid for the debtor's business reflect the importance and value of the licences and permits (or other intangible assets) being preserved under the RVO structure?

[39] With this in mind, I will turn to the enumerated s. 36(3) factors. To the extent there are RVO specific issues of concern apart from those enumerated in s. 36(3), I will also address those in the following section of my analysis.

The Section 36 Factors in the RVO Context

Reasonableness of the Process Leading to the Proposed Sale

[40] Between the pre-filing strategic review process and the court approved SISP, the business and assets of Harte Gold have been extensively marketed on a global basis. While the SISP was subject to variation from the format contemplated in my earlier order, the ability of the applicant, in conjunction with the Monitor, to vary the process was already established in that order. I find, in any event, that the adjustments made were appropriate in the circumstances, given there were no new bidders and the only offers came from the two competing secured creditors who had already been extensively involved in the process and whose status, interests and objectives were well known to the applicant and the Monitor.

[41] Prior to its appointment as Monitor, FTI was intimately involved at all stages of the strategic review process, including the implementation of the pre-filing marketing process and the negotiation of the original proposed subscription agreement that was executed prior to the commencement of the CCAA proceedings and subsequently replaced by the stalking horse bid and the SARSA.

[42] Following the commencement of the CCAA proceedings, the Monitor was involved in the negotiations that resulted in the execution of the stalking horse bid and the SARSA. In addition, the Monitor has overseen the implementation of the SISP and is satisfied that it was carried out in accordance with the SISP procedures, including the Monitor's consent to the amendment of the SISP procedures to cancel the auction as unnecessary and accept the SARSA as the best option available.

[43] The Monitor's opinion is that the process was reasonable, leading to the best outcome reasonably available in the circumstances.

[44] I am satisfied that the sales process was reasonable. The transaction now before the Court was the culmination of approximately seven months of extensive solicitation efforts on the part of both Harte Gold and FTI as part of the prefiling strategic process and the SISP.

[45] Harte Gold and FTI broadly canvassed the market by contacting 241 parties regarding their potential interest in acquiring Harte Gold's business and assets. This process ultimately culminated in initial competing bids from Silver Lake and Appian and, subsequently, additional competing bids from both entities as part of the SISP. The competitive tension in this process resulted in material improvements for stakeholders on both occasions.

Comparison with Sale in Bankruptcy

[46] The Monitor has considered whether the completion of the transaction contemplated by the SARSA would be more beneficial to creditors of the applicant and stakeholders generally than a sale or disposition of the business and assets of Harte Gold under a bankruptcy. The Monitor is unambiguously of the view that the SARSA transaction is the vastly more beneficial option.

[47] The SISP has shown that the SARSA represents the highest and best offer available for Harte Gold's business and assets. The Monitor is satisfied that the approval and completion of the transactions contemplated by the SARSA are in the best interests of the creditors of Harte Gold and its stakeholders generally.

[48] In addition to anything else, a bankruptcy would jeopardize ongoing operations and the permits and licences necessary to maintain such operations. A sale in bankruptcy would delay and, again, jeopardize the approval and closing of the proposed transaction as it would be necessary to first assign Harte Gold into bankruptcy or obtain a bankruptcy order, convene a meeting of creditors, appoint inspectors and obtain the approval of the inspectors for the transaction prior to seeking a more traditional AVO or an RVO. Additional costs would also be incurred in undertaking those steps. Silver Lake would have to continue to advance additional funds to finance ongoing operations during this extended period. There is no indication it would be willing to do so. In any event, requiring such a process would fundamentally change the value proposition the purchaser has relied upon and is willing to accept.

[49] Taking all this into account, a sale or disposition of the business and assets of the applicant in a bankruptcy would almost certainly result in a lower recovery for stakeholders and would not be more beneficial than closing the RVO transaction in the CCAA proceedings.

Consultation with Creditors

[50] Harte Gold's major creditors are Silver Lake, the Appian parties and BNPP. BNPP still has potential claims of approximately $28 million in respect of its hedge agreements. Silver Lake has claims of approximately $95 million in respect of the DIP facility and the first lien credit facilities it acquired from BNPP. The Appian parties have claims of approximately US$34 million in respect of amounts owing under the Appian facility and additional potential claims in respect of obligations under royalty and offtake agreements.

[51] BNPP was consulted throughout the strategic review process and has executed a support agreement with the purchaser. In addition, as previously described, the purchaser and the Appian Parties have been extensively involved in the SISP.

[52] While there is no evidence of consultations with unsecured creditors, I do not regard that as a material deficiency given that virtually all creditors, secured and unsecured alike, are going to be paid in full under the terms of the SARSA.

[53] The Monitor is of the view that the degree of creditor consultation has been appropriate in the circumstances. The Monitor does not consider that any material change in the outcome of efforts to sell the business and assets of the Applicant would have resulted from additional creditor consultation.

[54] I find, on the evidence, that the Monitor's assessment of this factor is well supported and correct.

The Effect of the Proposed Sale on Creditors and Other Interested Parties

[55] The proposed transaction affords the following benefits to the creditors and to stakeholders generally:

(a) the retention and payment in full of the claims of almost all creditors of Harte Gold;

(b) continued employment for all except four of the Harte Gold's employees;

(c) ongoing business opportunities for suppliers of goods and services to the Sugar Loaf Mine; and

(d) the continuation of the benefits of the existing Impact Benefits Agreement with Netmizaaggamig Nishnaabeg First Nation.

[56] The Monitor's opinion is that the effect of the proposed transaction is overwhelming positive for the vast majority of Harte Gold's creditors and other stakeholders apart (as discussed below) from the shareholders who have no reasonable economic interest at this point.

[57] Unlike *Quest*, this is not a case in which the RVO is being used to thwart creditor opposition. Indeed, the evidence is that almost all creditors, secured and unsecured, will be paid in full. To the extent there might be concerns that an RVO structure could be used to thwart creditor democracy and voting rights, those concerns are not present here. This is not a traditional "compromise" situation. It is hard to see how anything would change under a creditor class vote scenario because almost all of the creditors are being paid in full.

[58] The evidence is that there is no creditor being placed in a worse position, because of the use of an RVO transaction structure, than they would have been in under a more traditional asset sale and AVO structure (or, for that matter, under any plausible plan of compromise).

[59] Because the transaction contemplates the cancellation of all existing shares and related rights in Harte Gold and the issue of new shares to the purchaser, the existing shareholders of Harte Gold will receive no recovery on their investment. Being a public company, Harte Gold has issued material change notices as the events described above were unfolding. By the time of the commencement of the CCAA proceedings, the shareholders had been advised in no uncertain terms that there was no prospect of shareholders realizing any value for their equity investment.

[60] The evidence of Harte's financial problems and balance sheet insolvency, the unsuccessful prefiling strategic review process, and the hard reality that the only parties willing to bid anything for Harte Gold were the holders of secured debt (and only for, effectively, the value of the secured debt plus carrying and process costs) only serves to emphasize that equity holders will not see, and on any other realistic scenario would not see, any recovery of their equity investment in Harte Gold.

[61] Under s. 186(1) of the OBCA, "reorganization" includes a court order made under the *Bankruptcy and Insolvency Act* or an order made under the *Companies Creditors Arrangement Act* approving a proposal. While the term "proposal" is unfortunate (because there are no formal "proposals" under the CCAA), I view the use of this term in the non-technical sense of the word; that is, as encompassing any proposal such as the proposed transaction brought forward for the approval of the Court under the provisions of the CCAA in this case.

[62] Section 186(2) of the OBCA provides that if a corporation is subject to a reorganization, its articles may be amended by the court order to effect any change that might lawfully be made by an amendment under s. 168. Section 168(1)(g) provides that a corporation may from time to time amend its articles to add, change or remove any provision that is set out in its articles, including to change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares. This provides the jurisdiction of the court to approve the cancellation of all outstanding shares and the issuance of new shares to the purchaser.

[63] Section 36(1) of the CCAA contemplates that despite any requirement for shareholder approval, the court may authorize a sale or disposition out of the ordinary course even if shareholder approval is not obtained. While, again, s. 36(1) is concerned with asset sales, the underlying logic of this provision applies to an assessment of cancellation of shares as well. In this case, there is no prospect of shareholder recovery on any realistic scenario.

[64] Equity claims are subject to special treatment under the CCAA. Section 6(8) prohibits court approval of a plan of compromise if any equity is to be paid before payment in full of all claims that are not equity claims. Section 22(1) provides that equity claimants are prohibited from voting on a plan unless the court orders otherwise. In short, shareholders have no economic interest in an insolvent enterprise: *Sino-Forest Corporation (Re)*, 2012 ONSC 4377, paras. 23-29. In circumstances like Harte Gold's, where the shareholders have no economic interest, present or future, it would be unnecessary and, indeed, inappropriate to require a vote of the shareholders: *Stelco Inc. (Re),* 2006 CanLII 4500 at para. 11. The order requested for the cancellation of existing shares is, for these reasons, justified in the circumstances.

[65] Taking all this into account, I find that the effect of the transaction on creditors and stakeholders is overwhelmingly positive and the best outcome reasonably available in the circumstances.

Fairness of Consideration

[66] Harte Gold's business and assets have been extensively marketed both prior to and during the CCAA proceedings. At the conclusion of the SISP, two bids were available, which were equivalent in all material respects and represented the highest and best offers received. As described earlier, all parties concurred that the Silver Lake-sponsored SARSA should be determined to be the successful bid. As also described above, the closing of the SARSA transaction will provide a vastly superior recovery for creditors than would a liquidation of Harte Gold's assets in bankruptcy. Based on the market, therefore, the consideration must be considered fair and reasonable.[1]

[67] A further concern with an RVO transaction structure such as this one could be whether, in effect, a purchaser making a credit bid might be getting something (i.e., the licences and permits) for nothing (i.e., the licences and permits were not subject to the creditor's security). It is possible that in a bankruptcy, for example, the licences and permits might have no value. The evidence here is that the purchaser is paying more than Harte Gold would be worth in a bankruptcy. The evidence is also that the purchaser is paying considerably more than just the value of the secured debt. This includes cure costs for third party trade creditors and DIP financing to keep the Mine operational – both payments being made to bring about the acquisition of the Mine as a going concern.

[68] It is true that no attempt has been made to put an independent value on the transfer of the licences and permits. However, any strategic buyer (Silver Lake is a strategic buyer and acquired the BNPP debt for this purpose) would need the licences and permits. The results of the prefiling strategic process and the SISP constitutes evidence that no one else among the universe of potential purchasers of an operating gold mine in Northern Ontario was willing to pay more than Silver Lake was willing to pay. In the circumstances, I do not think it could be seriously suggested that Silver Lake is getting "something" for "nothing".

[69] The Monitor is satisfied that the consideration is fair in the circumstances. I agree with the Monitor's assessment for the reasons outlined above.

Other Considerations Re Appropriateness of RVO vs. AVO

[70] As noted, Harte Gold has twelve material permits and licenses that are required to maintain its mining operations, as well as twenty-four active work permits and licenses that allow the performance of exploration work and many other forest resource licences and fire permits.

[71] The principal objective and benefit of employing the RVO approach in this case is the preservation of Harte Gold's many permits and licences necessary to conduct operations at the Sugar Loaf Mine. Under a traditional asset sale and AVO structure, the purchaser would

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[1] The total value of the consideration is, perhaps coincidentally, also roughly equivalent to the value of Harte Gold's assets as shown in its audited financial statements in the last full year prior to the commencement of these proceedings.

have to apply to the various agencies and regulatory authorities for transfers of existing licences and permits or, if transfers are not possible, for new licences and permits. This is a process that would necessarily involve risk, delay, and cost. The RVO sought in this case achieves the timely and efficient preservation of the necessary licences and permits necessary for the operations of the Mine.

[72] It is no secret that time is not on the side of a debtor company faced with Harte Gold's financial challenges. It is also relevant that the purchaser has agreed to provide DIP financing up to $10.8 million and substantial cure costs of pre and post filing trade obligations. This is all financing required to be able to continue operations as a going concern at the Mine post closing and to fund the CCAA process.

[73] The position of the purchaser is, not unreasonably, that it will not <u>both</u> continue to fund ongoing operations and the CCAA process <u>and</u> undertake a process of application to relevant government agencies for transfers of the Harte Gold licenses and permits (or, if necessary, for new ones) with all of the risks and uncertainties of possible adverse outcomes and indeterminant delays and costs associated with such a process. The RVO structure will enable the transaction to be completed efficiently and expeditiously, without exposure to these material risks, delays and costs.

[74] The Monitor supports the use of the RVO transaction structure. The Monitor has also pointed out that the applicant holds some 513 mineral tenures, consisting of three freehold properties, seven leasehold properties, 468 mineral claims and 35 additional tenures. The reverse vesting structure avoids the need to amend the various registrations to reflect a new owner, which would add more cost and delay if the proposed purchase transaction was to proceed through a traditional asset purchase and vesting order.

[75] In addition, Harte Gold has a significant number of contracts that will be retained under the SARSA. Again, the RVO transaction structure will avoid potentially significant delays and costs associated with having to seek consent to assignment from contract counter-parties or, if consents could not be obtained, orders assigning such contracts under s. 11.3 of the CCAA. The Monitor has also pointed out that under the SARSA and the RVO, the purchaser will be required to pay applicable cure costs in respect of the retained contracts which has been structured in substantially the same manner as contemplated by s. 11.3(4) of the CCAA if a contract was assigned by court order.

[76] For all these reasons, I accept that the proposed RVO transaction structure is necessary to achieve the clear benefits of the Silver Lake purchase and that it is appropriate to approve this transaction in the circumstances.

<u>Conclusion on RVO/Section 36 Issues</u>

[77] In all the circumstances, I find that the RVO sought in the circumstances of this case is in the interests of the creditors and stakeholders in general. I consider the RVO to be appropriate in the circumstances. The RVO will: provide for timely, efficient and impartial resolution of Harte Gold's insolvency; preserve and maximize the value of Harte Gold's

assets; ensure a fair and equitable treatment of the claims against Harte Gold; protect the public interest (in the sense of preserving employment for well over 250 employees as well as numerous third party suppliers and service providers and maintaining Harte Gold's commitments to the First Nations peoples of the area); and, balances the costs and benefits of Harte Gold's restructuring or liquidation.

Release

[78] Harte Gold seeks a Release which includes the present and former directors and officers of Harte Gold and the newcos, the Monitor and its legal counsel, and the purchaser and its directors, and officers. The proposed Release covers all present and future claims against the released parties based upon any fact, matter of occurrence in respect of the SARSA transactions or Harte Gold and its assets, business or affairs, except any claim for fraud or willful misconduct or any claim that is not permitted to be released under s. 5.1(2) of the CCAA.

[79] CCAA courts have frequently approved releases, both in the context of a plan and in the absence of a CCAA plan, both on consent and in contested matters. These releases have been in favour of the parties, directors, officers, monitors, counsel, employees, shareholders and advisors.

[80] I find that the requested Release is reasonable and appropriate in the circumstances. I base my decision on an assessment of following factors taken from *Lydian International Limited (Re)*, 2020 ONSC 4006 at para. 54. As is often the case in the exercise of discretionary powers, it is not necessary for each of the factors to apply for the release to be approved.

[81] <u>Whether the claims to be released are rationally connected to the purpose of the restructuring</u>: The claims released are rationally connected to Harte Gold's restructuring. The Release will have the effect of diminishing claims against the released parties, which in turn will diminish indemnification claims by the released parties against the Administration Charge and the Directors' Charge. The result is a larger pool of cash available to satisfy creditor claims. Given that a purpose of a CCAA proceeding is to maximize creditor recovery, a release that helps achieve this goal is rationally connected to the purpose of the Company's restructuring.

[82] <u>Whether the releasees contributed to the restructuring</u>: The released parties made significant contributions to Harte Gold's restructuring, both prior to and throughout these CCAA Proceedings. Among other things, the extensive efforts of the directors and management of Harte Gold were instrumental in the conduct of the prefiling strategic process, the SISP and the continued operations of Harte Gold during the CCAA proceedings. With a proposed sale that will maintain Harte Gold as a going concern and permit most creditors to receive recovery in full, these CCAA proceedings have had what must be considered a "successful" outcome for the benefit of Harte Gold's stakeholders. The released parties have clearly contributed time, energy and resources to achieve this outcome and accordingly, are deserving of a release.

[83] Whether the Release is fair, reasonable and not overly broad: The Release is fair and reasonable. Harte Gold is unaware of any outstanding director claims or liabilities against its directors and officers. Similarly, Harte Gold is unaware of any claims against the advisors related to their provision of services to Harte Gold or to the purchaser relating to Harte Gold or these CCAA proceedings. As such, the Release is not expected to materially prejudice any stakeholders. Further, the Release is sufficiently narrow. Regulatory or environmental liabilities owed to any government authority have not been disclaimed and the language of the Release was specifically negotiated with the Ministry of Northern Development and Mines to preserve those identified obligations. Further, the Release carves out and preserves claims that are not permitted to be released pursuant to s. 5.1(2) of the CCAA and claims arising from fraud or wilful misconduct. The scope of the Release is sufficiently balanced and will allow Harte Gold and the released parties to move forward with the transaction and to conclude these CCAA proceedings.

[84] Whether the restructuring could succeed without the Release: The Release is being sought, with the support of Silver Lake and the Appian parties (the most significant stakeholders in these CCAA proceedings) as it will enhance the certainty and finality of the transaction. Additionally, Harte Gold and the purchaser both take the position that the Release is an essential component to the transaction.

[85] Whether the Release benefits Harte Gold as well as the creditors generally: The Release benefits Harte Gold and its creditors and other stakeholders by reducing the potential for the released parties to seek indemnification, thus minimizing further claims against the Administration Charge and the Directors' Charge.

[86] Creditors' knowledge of the nature and effect of the Release: All creditors on the service list were served with materials relating to this motion. Harte Gold also made additional efforts to serve all parties with excluded claims under the transaction. Additionally, the form of the Release was included in the draft approval and reverse vesting order that was included in the original Application Record in these CCAA proceedings. All of this provided stakeholders with ample notice and time to raise concerns with Harte Gold or the Monitor. No creditor (or any other stakeholder) has objected to the Release. A specific claims process for claims against the released parties in these circumstances would only result in additional costs and delay without any apparent corresponding benefit.

Extension of the Stay

[87] The current stay period expires on January 31, 2022. Under s. 11.02 of the CCAA, the court may grant an extension of a stay of proceedings where: (a) circumstances exist that make the order appropriate; and (b) the debtor company satisfies the court that it has acted, and is acting, in good faith and with due diligence.

[88] Harte Gold is seeking to extend the stay period to and including March 29, 2022 to allow it to proceed with the closing of the Silver Lake transaction, while at the same time preserving the status quo and preventing creditors and others from taking any steps to try and better their positions in comparison to other creditors.

[89] No creditors are expected to suffer material prejudice as a result of the extension of the stay of proceedings. Harte Gold is acting in good faith and will continue to pay its post-filing obligations in the ordinary course. As detailed in Harte Gold's cash flow forecast, it is expected to have sufficient liquidity to continue its operations during the contemplated extension of the stay.

[90] For these reasons the stay is extended to March 29, 2022.

Expansion of Monitor's Powers

[91] The CCAA provides the Court with broad discretion in respect of the Monitor's functions. Section 23(1)(k) of the CCAA provides that the Monitor can "carry out any other functions in relation to the [debtor] company that the court may direct". In addition, of course, s. 11 of the CCAA authorizes this Court to make any order that is necessary and appropriate in the circumstances.

[92] The order for the Monitor's expanded powers is intended to provide the Monitor with the power, effective upon the issuance of the approval and reverse vesting order, to administer the affairs of the newcos (which is necessary to complete the transaction), along with powers necessary to wind down these CCAA proceedings and to put the newcos into bankruptcy following the close of the transaction. No creditor is prejudiced by the expansion of the Monitor's powers to facilitate the transaction and the wind-down of the CCAA proceedings. On the contrary, the granting of such powers is necessary to achieve the benefits of the transaction to stakeholders which have been described above.

[93] I approve the grant of the requested powers to the Monitor.

Conclusion

[94] For all these reasons, the motion for an order approving the Silver Lake transaction, including the RVO structure, is granted. The additional requests for orders extending the stay and expanding the Monitor's powers are also granted.

Penny J.

Date: 2022-02-04

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer, and should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): The fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

John T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). By that order, he approved the sale of Air Toronto to Ontario Express Limited and Frontier Air Limited and he dismissed a motion to approve an offer to purchase Air Toronto by 922246 Ontario Limited.

It is necessary at the outset to give some background to the dispute. Soundair Corporation (Soundair) is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the Royal Bank) is owed at least $65,000,000. The appellants Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively called CCFL) are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50,000,000 on the winding-up of Soundair.

On April 26, 1990, upon the motion of the Royal Bank, O'Brien J. appointed Ernst & Young Inc. (the receiver) as receiver of all of the assets, property and undertakings of Soundair. The order required the receiver to operate Air Toronto and sell it as a going concern. Because of the close relationship between Air Toronto and Air Canada, it was contemplated that the receiver would obtain the assistance of Air Canada to operate Air Toronto. The order authorized the receiver:

> (b) to enter into contractual arrangements with Air Canada to retain a manager or operator, including Air Canada, to manage and operate Air Toronto under the supervision of Ernst & Young Inc. until the completion of the sale of Air Toronto to Air Canada or other person ...

Also because of the close relationship, it was expected that Air Canada would purchase Air Toronto. To that end, the order of O'Brien J. authorized the receiver:

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale

to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

The receiver then looked elsewhere. Air Toronto's feeder business is very attractive, but it only has value to a national airline. The receiver concluded reasonably, therefore, that it was commercially necessary for one of Canada's two national airlines to be involved in any sale of Air Toronto. Realistically, there were only two possible purchasers whether direct or indirect. They were Air Canada and Canadian Airlines International.

It was well known in the air transport industry that Air Toronto was for sale. During the months following the collapse of the negotiations with Air Canada, the receiver tried unsuccessfully to find viable purchasers. In late 1990, the receiver turned to Canadian Airlines International, the only realistic alternative. Negotiations began between them. Those negotiations led to a letter of intent dated February 11, 1991. On March 6, 1991, the receiver received an offer from Ontario

Express Limited and Frontier Airlines Limited, who are subsidiaries of Canadian Airlines International. This offer is called the OEL offer.

In the meantime, Air Canada and CCFL were having discussions about making an offer for the purchase of Air Toronto. They formed 922246 Ontario Limited (922) for the purpose of purchasing Air Toronto. On March 1, 1991, CCFL wrote to the receiver saying that it proposed to make an offer. On March 7, 1991, Air Canada and CCFL presented an offer to the receiver in the name of 922. For convenience, its offers are called the 922 offers.

The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

Before dealing with that issue there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person". The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.R., of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

4. It should consider whether there has been unfairness in the working out of the process.

I intend to discuss the performance of those duties separately.

1. Did the receiver make a sufficient effort to get the best price and did it act providently?

Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

When the receiver got the OEL offer on March 6, 1991, it was over ten months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

On March 8, 1991, the date when the receiver accepted the OEL offer, it had only two offers, the OEL offer which was acceptable, and the 922 offer which contained an unacceptable condition. I cannot see how the receiver, assuming for the moment that the price was reasonable, could have done anything but accept the OEL offer.

When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.R.:

> Its decision was made as a matter of business judgment on the elements then available to it. It is of 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.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

(Emphasis added)

I also agree with and adopt what was said by Macdonald J.A.

in Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), at p. 11 C.B.R., p. 314 N.S.R.:

> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement.

(Emphasis added)

On March 8, 1991, the receiver had two offers. One was the OEL offer which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL. Air Canada had the benefit of an "exclusive" in negotiations for Air Toronto and had clearly indicated its intention to take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it

> contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

(Emphasis added)

I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

I mentioned earlier that, pursuant to an order, 922 was permitted to present a second offer. During the hearing of the appeal, counsel compared at great length the price contained in the second 922 offer with the price contained in the OEL offer. Counsel put forth various hypotheses supporting their contentions that one offer was better than the other.

It is my opinion that the price contained in the 922 offer is relevant only if it shows that the price obtained by the Receiver in the OEL offer was not a reasonable one. In Crown Trust v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.R., discussed the comparison of offers in the following way:

> No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.), at p. 247:

> If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

The second is Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), at p. 243:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate.

In Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), at p. 142, McRae J. expressed a similar view:

> The court will not lightly withhold approval of a sale by the receiver, particularly in a case such as this where the receiver is given rather wide discretionary authority as per the order of Mr. Justice Trainor and, of course, where the receiver is an officer of this court. Only in a case where there seems to be some unfairness in the process of the sale or where there are substantially higher offers which would tend to show that the sale was improvident will the court withhold approval. It is important that the court recognize the commercial exigencies that would flow if prospective purchasers are allowed to wait until the sale is in court for approval before submitting their final offer. This is something that must be discouraged.

(Emphasis added)

What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

It is necessary to consider the two offers. Rosenberg J. held that the 922 offer was slightly better or marginally better than the OEL offer. He concluded that the difference in the two offers did not show that the sale process adopted by the receiver was inadequate or improvident.

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

The receiver studied the two offers. It compared them and took into account the risks, the advantages and the disadvantages of each. It considered the appropriate contingencies. It is not necessary to outline the factors which were taken into account by the receiver because the manager of its insolvency practice filed an affidavit outlining the considerations which were weighed in its evaluation of the two offers. They seem to me to be reasonable ones. That affidavit concluded with the following paragraph:

> 24. On the basis of these considerations the Receiver has approved the OEL offer and has concluded that it represents the achievement of the highest possible value at this time for the Air Toronto division of SoundAir.

The court appointed the receiver to conduct the sale of Air Toronto and entrusted it with the responsibility of deciding what is the best offer. I put great weight upon the opinion of the receiver. It swore to the court which appointed it that the OEL offer represents the achievement of the highest possible value at this time for Air Toronto. I have not been convinced that the receiver was wrong when he made that assessment. I am, therefore, of the opinion that the 922 offer does not demonstrate any failure upon the part of the receiver to act properly and providently.

It follows that if Rosenberg J. was correct when he found that the 922 offer was in fact better, I agree with him that it could only have been slightly or marginally better. The 922 offer does not lead to an inference that the disposition strategy of the receiver was inadequate, unsuccessful or improvident, nor that the price was unreasonable.

I am, therefore, of the opinion that the receiver made a sufficient effort to get the best price and has not acted improvidently.

2. Consideration of the interests of all parties

It is well established that the primary interest is that of the creditors of the debtor: see Crown Trust Co. v. Rosenberg, supra, and Re Selkirk (1986, Saunders J.), supra. However, as Saunders J. pointed out in Re Beauty Counsellors, supra, at p. 244 C.B.R., "it is not the only or overriding consideration".

In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as Crown Trust Co. v. Rosenberg, supra, Re Selkirk (1986, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), supra, and Cameron, supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

In this case, the interests of all parties who would have an interest in the process were considered by the receiver and by Rosenberg J.

3. Consideration of the efficacy and integrity of the process by which the offer was obtained

While it is accepted that the primary concern of a receiver is the protecting of the interests of the creditors, there is a secondary but very important consideration and that is the integrity of the process by which the sale is effected. This is particularly so in the case of a sale of such a unique asset as an airline as a going concern.

The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to Re Selkirk (1986), supra, where Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a finding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., p. 476 D.L.R., the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.R.:

> While every proper effort must always be made to assure maximum recovery consistent with the limitations inherent in the process, no method has yet been devised to entirely eliminate those limitations or to avoid their consequences. Certainly it is not to be found in loosening the entire foundation of the system. Thus to compare the results of the process in this case with what might have been recovered in some other set of circumstances is neither logical nor practical.

(Emphasis added)

It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 109 O.R., p. 548 D.L.R.:

> The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the circumstances leading up to the acceptance of the OEL offer. Having considered the process adopted by the receiver, it is my opinion that the process adopted was a reasonable and prudent one.

4. Was there unfairness in the process?

As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

I will outline the circumstances which relate to the allegation that the receiver was unfair in failing to provide an offering memorandum. In the latter part of 1990, as part of its selling strategy, the receiver was in the process of preparing an offering memorandum to give to persons who expressed an interest in the purchase of Air Toronto. The offering memorandum got as far as draft form, but was never released to anyone, although a copy of the draft eventually got into the hands of CCFL before it submitted the first 922 offer on March 7, 1991. A copy of the offering memorandum forms part of the record and it seems to me to be little more than puffery, without any hard information which a sophisticated purchaser would require in order to make a serious bid.

The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

The receiver did not proceed with the offering memorandum because to do so would violate the spirit, if not the letter, of its letter of intent with OEL.

I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

Moreover, I am not prepared top find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested, as a possible resolution of this appeal, that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within seven days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, it would have told the court that it needed more information before it would be able to make a bid.

I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

There are two statements by Anderson J. contained in Crown Trust Co. v. Rosenberg, supra, which I adopt as my own. The first is at p. 109 O.R., p. 548 D.L.R.:

> The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

The second is at p. 111 O.R., p. 550 D.L.R.:

> It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

In this case the receiver acted reasonably, prudently, fairly and not arbitrarily. I am of the opinion, therefore, that the process adopted by the receiver in reaching an agreement was a just one.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

I agree.

The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

II. THE EFFECT OF THE SUPPORT OF THE 922 OFFER BY THE TWO SECURED CREDITORS

As I noted earlier, the 922 offer was supported before Rosenberg J., and in this court, by CCFL and by the Royal Bank, the two secured creditors. It was argued that, because the interests of the creditors are primary, the court ought to give effect to their wish that the 922 offer be accepted. I would not accede to that suggestion for two reasons.

The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have attempted to explain in these reasons, when a receiver's sale is before the court for confirmation the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But, if the court decides that the receiver has acted properly and providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

The second reason is that, in the particular circumstances of this case, I do not think the support of CCFL and the Royal Bank of the 922 offer is entitled to any weight. The support given by CCFL can be dealt with summarily. It is a co-owner of 922. It is hardly surprising and not very impressive to hear that it supports the offer which it is making for the debtors' assets.

The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6,000,000 cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline, if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the Employment Standards Act, R.S.O. 1980, c. 137, and the Environmental Protection Act, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that

Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

GOODMAN J.A. (dissenting):-- I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto two competing offers were placed before Rosenberg J. Those two offers were that of Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively CCFL) and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada (the Bank). Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to nor am I aware of any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., p. 30 C.B.R.:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not having a roving commission to decide what

is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [pp. 17-18]:

I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3,000,000 to $4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority of the court, said at p. 10 C.B.R., p. 312 N.S.R.:

> Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that the contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.) Saunders J. said at p. 243:

> This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interests of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with the commercial efficacy and integrity.

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his reasons. In Cameron, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The receiver at that time had no other

offer before it that was in final form or could possibly be accepted. The receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1. The receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

In my opinion there was no evidence before him or before this court to indicate that Air Canada with CCFL had not bargained in good faith and that the receiver had knowledge of such lack of good faith. Indeed, on this appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase which was eventually refused by the receiver that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing Air Canada may have been playing "hard ball" as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position as it was entitled to do.

Furthermore there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event although it is clear that 922 and through it CCFL and Air Canada were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

To the extent that approval of the OEL agreement by Rosenberg

J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

I would also point out that, rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was no unconditional offer before it.

In considering the material and evidence placed before the court I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned and improvident insofar as the two secured creditors are concerned.

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18,000,000. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada", it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the receiver's option.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

29, 1990.

By amending agreement dated June 19, 1990 the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement the receiver had put itself in the position of having a firm offer in hand with the right to negotiate and accept offers from other persons. Air Canada in these circumstances was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto Division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990 in part as follows:

> Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto to Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the receiver was of the opinion that the fair value of Air Toronto was between $10,000,000 and $12,000,000.

In August 1990 the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3,000,000 for the good will relating to certain Air Toronto routes but did not include the purchase of any tangible assets or leasehold interests.

In December 1990 the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991 culminating in the OEL agreement dated March 8, 1991.

On or before December, 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

By late January CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

By letter dated February 25, 1991, the solicitors for CCFL made a written request to the Receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers and specifically with 922.

It was not until March 1, 1991 that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at any time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL) it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid and, indeed, suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime by entering into the letter of intent with OEL it put itself in a position where it could not negotiate with CCFL or provide the information requested.

On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

By letter dated March 1, 1991 CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an interlender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining:

> ... a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period.

The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45-day option to purchase excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

In my opinion the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991 to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result no offer was sought from CCFL by the receiver prior to February 11, 1991 and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver, then, on March 8, 1991 chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of three months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of three months notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

In his reasons Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said [p. 31]:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was in acceptable form and one of which could not possibly be accepted in its present form. The receiver acted appropriately in accepting the OEL offer.

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard as it contained a condition with respect to financing terms and conditions "acceptable to them".

It should be noted that on March 13, 1991 the representatives of 922 first met with the receiver to review its offer of March 7, 1991 and at the request of the receiver withdrew the inter-lender condition from its offer. On March 14, 1991 OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991 to submit a bid and on April 5, 1991, 922 submitted its offer with the interlender condition removed.

In my opinion the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3,000,000 to $4,000,000.

In Re Beauty Counsellors of Canada Ltd., supra, Saunders J. said at p. 243 C.B.R.:

> If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J. the stated preference of the two interested creditors was made quite clear. He found as a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer and the court should so order.

Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique having regard to the circumstances of this case. In my opinion the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991 and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that at the time it became aware of the letter of intent, it knew that CCFL was interested in purchasing Air Toronto.

I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

In conclusion I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991 and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

For the above reasons I would allow the appeal with one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

In the Court of Appeal of Alberta

Citation: DGDP-BC Holdings Ltd v Third Eye Capital Corporation, 2021 ABCA 226

Date: 20210617
Docket: 2001-0241-AC;
2001-0125-AC
Registry: Calgary

2001-0241-AC

Between:

DGDP-BC Holdings Ltd.

Appellant

- and -

Third Eye Capital Corporation

Respondent

- and -

PricewaterhouseCoopers Inc.

Respondent

2001-0125-AC

And Between:

DGDP-BC Holdings Ltd.

Appellant

- and -

Third Eye Capital Corporation

Respondent

- and -

Accel Canada Holdings Limited and Accel Energy Canada Limited

Respondents

- and -

PricewaterhouseCoopers Inc. in its capacity as the court-appointed receiver of Accel Canada Holdings Limited and Accel Energy Canada Limited

Respondent

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Ritu Khullar

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice K.M. Horner
Dated the 4th day of December, 2020
Filed on the 4th day of December, 2020
(Docket: 2001 06776)

Appeal from the Order by
The Honourable Madam Justice K.M. Horner
Dated the 12th day of June, 2020
Filed on the 15th day of June, 2020
(Docket: 2001 06776)

Memorandum of Judgment

The Court:

[1] Two appeals were argued together. They both arise out of the insolvency of Accel Canada Holdings Limited and Accel Energy Canada Limited.

[2] The first appeal #2001-0125AC relates to the priority between a) an Interim Lenders' Charge given over the assets of the Accel Entities while they were in proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985 c. C-36, and b) a later Receiver's Borrowings Charge given when a receiver was appointed to facilitate the sale of the assets of the Accel Entities. The leave reasons reported as ***DGDP-BC Holdings Ltd v Third Eye Capital Corp***, 2020 ABCA 442 at para. 39 described the issue as follows:

> Can an order made in proceedings under the *BIA* or pursuant to section 13(2) of the *Judicature Act*, legally override the validity and priority of the charges contained in an earlier order granted pursuant to the *CCAA* in the same insolvency proceedings, without the consent of the person in whose favour the provision relating to validity and priority was given?

The crux of the dispute is that the supervising judge gave the later Receiver's Borrowings Charge priority over the earlier Interim Lenders' Charge.

[3] The second appeal #2001-0241AC arises out of a subsequent order which approved the sale of the assets of Accel Energy. It was originally contemplated that the assets of Accel Energy and Accel Holdings would be sold *en bloc*, but when complications arose, it was decided to sell the assets of Accel Energy separately. When that transaction was approved by the supervising judge, she granted an order vesting the sold Accel Energy assets in the purchaser free and clear of all encumbrances, including the Interim Lenders' Charge. However, the Interim Lenders' Charge was not completely satisfied during the transaction. The amounts advanced under the Interim Lenders' Charge had been allocated between Accel Energy and Accel Holdings. Only the portion allocated to Accel Energy was paid off.

[4] The appellant argues that it was not open to the supervising judge to bifurcate the Interim Lenders' Charge in this manner and that the transaction could not or should not have been approved unless the Interim Lenders' Charge was paid in full. In ***DGDP-BC Holdings Ltd v Third Eye Capital Corp***, 2021 ABCA 33 leave to appeal was given. The appellant states the issues as being whether the supervising judge had the statutory or inherent jurisdiction or discretion to partially vest out the Interim Lenders' Charge without its consent, and if so, did she err in law in the way she exercised her discretion.

Facts

[5] The facts are complex, but the essential narrative is as follows. In October 2019, the Accel Entities filed Notices of Intention to make a proposal under the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3. By November, the proceeding evolved into one under the *CCAA*, and PricewaterhouseCoopers was appointed as the Monitor.

[6] In November, the Court approved an interim financing loan, secured by the Interim Lenders' Charge, which was described in the Second Amended and Restated DIP Financing Term Sheet as a "super priority (debtor-in-possession), interim, revolving credit facility". The appellant DGDP-BC Holdings Ltd (through its predecessor 228139 Alberta Ltd) and Third Eye Capital Corporation were the two interim lenders. Through the Interim Lenders' Charge, the Court granted the debtor in possession loans priority over the other creditors of the Accel Entities. About $38 million was authorized.

[7] The Interim Lenders' Charge provided that Accel Energy and Accel Holdings would be acting jointly and severally as "Borrowers", and each (and certain affiliated entities) guaranteed the obligations of the other. Nevertheless, when the Monitor drew down funds, they were allocated either to Accel Energy or Accel Holdings, depending on which corporation was actually going to use the funds at the time.

[8] The Court approved a process for the sale of the assets of the Accel Entities. Details about the sale process can be found in 2020 ABCA 442 at paras. 11-14. The Monitor was able to negotiate a sale of the assets to Third Eye Capital. As noted, the originally contemplated combined sale of the assets of Accel Energy and Accel Holdings was found to be unworkable, and a sale of the Accel Energy assets proceeded, with an anticipated sale of the Accel Holdings assets to follow.

[9] As part of the sale process, Third Eye Capital applied under the *BIA* and s. 13(2) of the *Judicature Act*, RSA 2000, c. J-2 for the appointment of a receiver to replace the senior management of the Accel Entities and facilitate the sale. The insolvency had therefore evolved from the *BIA*, into the *CCAA*, and then back to the *BIA*.

[10] At this point, Third Eye Capital was wearing many hats. It was the primary secured creditor of the insolvent Accel Holdings, having advanced about $326 million. It was one of the interim lenders protected by the Interim Lenders' Charge and agent for the interim lenders. It was the successful bidder for the purchase of the assets of the Accel Entities. It was the applicant for the appointment of the receiver, to facilitate the sale of the Accel Energy assets to its nominee.

[11] The supervising judge appointed PricewaterhouseCoopers as receiver pursuant to s. 243(1) of the *BIA* and s. 13(2) of the *Judicature Act*, RSA 2000, c. J-2. The critical fact is that Third Eye Capital did not just want a receiver, it wished to have a receiver appointed with the power to borrow and to have the Receiver's Borrowings Charge take priority over all of the other charges against the assets of the Accel Entities, including the prior Interim Lenders' Charge. The Receiver

ultimately borrowed over $10 million. Over the objections of the appellant DGDP-BC Holdings, the Receivership order provided:

> 28. The priority of the charges created in the CCAA Proceedings (and continued by this Order) in relation to the Receiver's Charge and the Receiver's Borrowing Charge created hereunder, shall be as follows:
> First - the Receiver's Charge;
> Second - the Receiver's Borrowings Charge;
> Third - the Administration Charge as defined in the CCAA Proceedings;
> Fourth - the Interim Lenders' Charge as defined in the CCAA Proceedings;
> Fifth - the Intercompany Advance Charge as defined in the CCAA Proceedings;
> Sixth - the Directors' Charge as defined in the CCAA Proceedings.

The priority given to the Receiver's Borrowings Charge over the Interim Lenders' Charge is the central issue in the first appeal.

[12] As noted, the second appeal is from one provision of the Sale Approval and Vesting Order respecting the sale of the Accel Energy assets. The original DIP Financing Term Sheet had provided that both Accel Entities (Accel Holdings and Accel Energy) would be joint and several borrowers and that the Interim Lenders' Charge would attach to the assets of both Accel Entities. However, at the time of the sale of the Accel Energy assets, the debt secured by the Interim Lenders' Charge had been allocated by the Monitor to the two Accel Entities. Only that portion allocated to Accel Energy was to be paid off as part of the Accel Energy transaction. The portion allocated to Accel Holdings was deferred, and it was suggested that the appellant might not be paid in cash; rather its remaining debt might be converted to equity in the purchaser of the Accel Holdings assets or satisfied by some other non-cash consideration.

[13] Subsequent to the filing of these appeals, the sale of the Accel Energy assets closed, and the appellant DGDP-BC Holdings was paid the sums owing to it under the Interim Lenders' Charge that had been allocated to Accel Energy. The Receiver's Borrowings Charge allocated to Accel Energy was also paid out from the sale proceeds. Other payments were made, for example, on account of arrears of lease payments, arrears of municipal taxes, and amounts required to put contracts with third parties into good standing. Sufficient cash was inserted into the sale of the Accel Energy assets to satisfy these claims, but there was no "surplus" consideration available to pay creditors.

<u>The Priority Dispute</u>

[14] The supervising judge decided that the appointment of a receiver was called for. Third Eye Capital argued that the supervising judge had a discretion to set the priorities between the various charges in any reasonable fashion and that changes in the "risk profile" justified giving priority to

the Receiver's Borrowings Charge. The appellant argued that the Receiver's Borrowings Charge should at best rank *pari passu* with the Interim Lenders' Charge. The supervising judge held:

> THE COURT: Thank you, Mr. Simard [counsel for Third Eye Capital]. With respect to the issue of the priority of the charges of the receiver's borrowings and the receiver's fees, I am prepared in this instance to make the direction that those be as per the paragraph of the draft order set out at paragraph 28. In other words, Mr. Czechowskyj [counsel for DGDP-BC Holdings], I am going to allow Third Eye Capital in these specific contextual circumstances to prime the current outstanding 38 million in DIP financing.
>
> My reasons for doing so are essentially that for the very things that you point out, Mr. Czechowskyj, COVID, the Russian/Saudi Arabia pricing war, the continued deterioration of the Alberta energy sector at the moment and the months-long and court-application-intense arrangement proceedings to date, there is -- a lot of the stakeholders have a lot invested, not just Third Eye Capital in this matter, seen being brought to a conclusion. It's difficult for me to assess the increased closing risk referred to by both the monitor and Mr. Simard based on the Veracity reports, but I support the application by Third Eye Capital for the receiver at this point, and I think it's appropriate at this time, given that I will control the come-back application for approval of the sale -- the purchase and sale agreement in whatever, you know, form it takes and that the mon -- excuse me, the monitor and soon-to-be receiver -- because I will -- obviously inherent in my decision is that I will be granting a receivership order -- is on the first line and has an obligation at law as well as under the order to have all of the interests of all of the stakeholders as it moves forward, so I'm satisfied on these circumstances that the priorities as outlined at paragraph -- draft paragraph 28 of the receivership order are appropriate, and I would make that direction.

The supervising judge's reasons did not directly engage the issue of whether she had jurisdiction to restructure the priorities as set out in para. 28 of the order.

[15] The need for financing during restructuring proceedings is recognized in the *CCAA*:

> Interim financing
>
> 11.2 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow

> statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) <u>only with the consent</u> of the person in whose favour the previous order was made.
>
> (4) In deciding whether to make an order, the court is to consider, among other things, . . .

The appellant particularly relies on the requirement in s. 11.2(3) that in some circumstances the priority of the Interim Lenders' Charge could only be varied with its consent. It is clear that if what became the Receiver's Borrowings Charge had been created under s. 11.2(1), those charges could not have been given priority without the consent of the appellant.

[16] The respondents argue, however, that the Receiver's Borrowings Charge was not a charge granted under the *CCAA* and therefore does not fit within the provisions of s. 11.2(3). That section, they argue, only applies when two or more interim financing charges are made under the *CCAA*. Since the Receiver's Borrowings Charge was made under the *BIA*, it is not subject to the requirement for consent, and the wide jurisdiction given to supervising judges under the *BIA* allowed this supervising judge to set priorities.

[17] The respondents rely on s. 243(1)(c) of the *BIA*, which authorizes the supervising judge to "take any other action that the court considers advisable". There is a similar wide-ranging discretion under s. 13(2) of the *Judicature Act,* but it does not enhance the analysis here. These provisions create a plenary and open-ended jurisdiction in the court. Technically they are not a part of the "inherent" jurisdiction of the court; they are a residual statutory jurisdiction, not part of the "inherent jurisdiction of superior courts of record": ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60 at para. 64, [2010] 3 SCR 379. However, the appellant is correct that in either case, the residual or inherent discretion would yield to any specific statutory provision that expressly or impliedly narrowed it.

[18] How these various sections interact is a pure question of statutory interpretation. The provisions of the *CCAA* and *BIA* should be interpreted in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statutes, the object of the statutes, and the intention of Parliament. Since the two statutes deal with the same topic, they should be interpreted and applied in a complementary way, with due regard to their different focuses: ***Century Services*** at paras. 24, 76, 78; ***Reference re Broadcasting Regulatory Policy CRTC 2010-168***, 2012 SCC 68 at paras. 37, 41, [2012] 3 SCR 489.

[19] The proper interpretation of s. 11.2(3) of the *CCAA* is clear. The reference to "the security or charge" in that subsection can only be a reference to a security or charge under subsection 11.2(1). While the priority of a section 11.2 charge cannot be subordinated to another charge under that section without the consent of a prior holder of such a charge, that requirement of consent does not extend to charges created through other sources of jurisdiction, such as the *BIA*. The appellant did not enjoy a veto over the priority of the Receiver's Borrowings Charge as it argues.

[20] The other side of the equation is that the supervising judge clearly has authority to authorize a receiver to borrow and to grant the receiver security. The very wide wording of s. 243(1)(c) of the *BIA* ("take any other action that the court considers advisable") has been interpreted to give supervising judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise: ***Third Eye Capital Corporation v Dianor Resources Inc.***, 2019 ONCA 508 at paras. 57-58, 435 DLR (4th) 416. Further, s. 31(1) of the *BIA* provides:

> 31 (1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and <u>give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court</u> and those advances, obligations and money borrowed must be repaid out of the debtor's property <u>in priority to the creditors' claims</u>.

This provision clearly authorizes the order that was made. While the phrase "in priority to the creditors' claims" applies most directly to the pre-insolvency creditors of the insolvent corporation, there is no reason to limit the supervising judge's mandate to order the priority of borrowings made to facilitate the insolvency proceedings themselves. In addition, s. 243(1)(c) is wide enough to allow a supervising judge to set the order of priority.

[21] In summary, the answer to the question on which leave to appeal was granted is that the supervising judge did have the jurisdiction or discretion to make the order granting priority to the Receiver's Borrowings Charge.

[22] The parties did not contest whether leave to appeal was granted on the consequential issue, namely whether the supervising judge exercised her discretion to reorder the priorities between the Interim Lenders' Charge and the Receiver's Borrowings Charge in a reasonable way. As noted, a supervising judge's discretion is very wide, and it follows that the exercise of that discretion will not be disturbed on appeal in the absence of an error in principle, an error of law, or a wholly unreasonable decision.

[23] Finding that a supervising judge has a discretion to subordinate a super priority (debtor-in-possession) credit facility obviously does not mean that it should routinely be done. The importance and necessity of providing funding in *CCAA* proceedings, and the need to give that funding super priority, are well recognized: ***Re Timminco Ltd.***, 2012 ONSC 948 at para. 49, 86 CBR (5th) 171; ***Re Canada North Group Inc.***, 2017 ABQB 550 at paras. 100-102, 60 Alta LR

(6th) 103. Uncertainty in the priority given to those advances undermines the system and would "not represent a positive development": ***Sun Indalex Finance, LLC v United Steelworkers***, 2013 SCC 6 at para. 59, [2013] 1 SCR 271. There is no indication, however, that the supervising judge disregarded these important considerations. She was entitled to decide that, in the context of this particular insolvency, it was necessary to give priority to the Receiver's Borrowings Charge to protect the overall interests of all of the stakeholders.

[24] Some argument was directed to whether, at the time the Receiver's Borrowings Charge was granted, the *CCAA* proceeding was "successful", "unsuccessful", "continuing", or "terminated". The Receiver argues that once the insolvency transitioned from the *CCAA* to the *BIA* ". . . the CCAA Proceedings were no more". However, merely because the insolvency transitioned from one statute to the other did not mean that the Interim Lenders' Charge somehow disappeared or lost its priority or could just be disregarded. The Interim Lenders' Charge exists whether or not the *CCAA* proceedings are terminated and whether or not they are successful. The status of the *CCAA* proceedings was obviously relevant, as it was the apparent lack of success of the restructuring that led to the appointment of the receiver. However, the inability of the *CCAA* proceeding to achieve its desired objectives did not invalidate the prior Interim Lenders' Charge. The appellant still held that valid charge and was entitled to put forward the legitimate expectations that it had with regard to its priority. Circumstances had changed, but the background need to respect the position of debtor-in-possession financing remained.

[25] The supervising judge concluded that giving priority to the Receiver's Borrowings Charge was justified by a change in the "risk profile". As the appellant points out, the change in the risk profile affected all the stakeholders, but this was still a relevant consideration. It is true that when the funds secured by the Interim Lenders' Charge were advanced, the interim lenders faced a certain risk profile. One component of that risk profile, however, was that the risk profile could change. An interim lender advancing debtor-in-possession financing is entitled to insist on security and insist on a level of priority. There is, however, no assurance that the interim lender will actually be repaid. One component of the risk profile is always that the anticipated restructuring will be unsuccessful, or for any other reason, there will simply not be enough funds to pay all the legitimate claimants.

[26] At the time of the application for the receivership order, the respondents argued that the insolvent corporations were in dire financial straits and required additional funding in order to keep operating. If they had ceased operating, it was argued, a liquidation may have followed, resulting in losses to many. In that context, it was reasonable for the supervising judge to appoint a receiver, to give the receiver the power to borrow, and to establish the priority of the Receiver's Borrowings Charge. Certainly, one relevant consideration was which stakeholder should be subordinated to the receiver's borrowings. The appellant suggests that Third Eye Capital, as the major secured creditor, should have been expected to fund the receivership. There is no indication that the supervising judge disregarded this consideration.

[27] In summary, the supervising judge did have the discretion and jurisdiction to establish the priority of the Receiver's Borrowings Charge. There is no indication of any error of principle in the way she exercised her discretion, nor can it be said that the ultimate decision was unreasonable. It follows that appeal #2001-0125AC must be dismissed.

The Bifurcation and Vesting Issue

[28] The second appeal arises from the bifurcation of the Interim Lenders' Charge, its allocation between the two Accel Entities, and the subsequent sale of the Accel Energy assets without paying out the Interim Lenders' Charge in full. When the Accel Energy assets were sold, they were transferred free and clear of all encumbrances, including the Interim Lenders' Charge. Sufficient cash was built into the sale transaction to pay out the portion of the Interim Lenders' Charge and the Receiver's Borrowings Charge related to Accel Energy but not the portion related to Accel Holdings.

[29] The appellant argues that the supervising judge had no discretion to bifurcate the Interim Lenders' Charge in this way, and even if there was such a discretion, it was not reasonably exercised.

[30] A number of aspects of sales transactions under receiverships are well established:

(a) The assets of the insolvent corporation can be sold free and clear of encumbrances, even if the sale does not generate sufficient funds to pay out all creditors, or any class of creditors: ***Dianor Resources***.

(b) If the insolvent corporation has more than one asset, individual assets can be sold free and clear of all encumbrances, again even if the sale does not generate sufficient funds to pay out all creditors, or any class of creditors. Any unpaid debts remain in place, and can be satisfied by subsequent sales of other assets.

(c) When assets are sold free and clear of all encumbrances, that could include encumbrances related to debtor-in-possession financing, even if the sale does not generate sufficient funds to pay out those encumbrances. Security and priority given to debtor-in-possession lenders provide no assurance that the loans will actually be repaid.

It is against this background that the appellant argues that there was no jurisdiction or discretion to vest the assets of Accel Energy in the purchaser free and clear of the Interim Lenders' Charge unless that charge was paid off in full. There is, however, no reason in principle to carve that exception out of the general propositions just stated.

[31] As previously discussed, the power given to supervising judges in s. 243(1)(c) of the *BIA* to "take any other action that the court considers advisable" has been read very widely. That power

would include the mandate to sell some of the assets of the insolvent corporation, while only paying out a portion of the debtor-in-possession financing.

[32] Alternatively, the appellant argues that the discretion should not have been exercised in this case. The original DIP Financing Term Sheet had provided that Accel Holdings and Accel Energy would be joint and several borrowers and that the Interim Lenders' Charge would attach to the assets of both Accel Entities. The appellant argues that it was unfair to allocate the interim Lenders' charge between the two entities, and then allow the sale to proceed without paying off the charge in full. However, as previously noted, the debtor-in-possession lender is never assured that its loans will be paid back at all or in full. There is always a prospect that the insolvency will evolve unfavourably, meaning that there are insufficient funds to meet all legitimate claims. When exercising her discretion the supervising judge must weigh the legitimate expectations of all stakeholders against the changed circumstances.

[33] The unique position of Third Eye Capital as a major secured creditor, as a DIP lender, as the agent of the DIP lenders, and as a supporter of the successful bidder for the assets was not lost on the supervising judge. Third Eye Capital might have been operating with an eye to its own best interests, but that is not necessarily and automatically an indicator that the order granted by the supervising judge was unreasonable. As Slatter JA observed in ***Wilks Brothers LLC v 12178711 Canada Inc***, 2020 ABCA 430 at para. 72, 85 CBR (6th) 9:

> During the approval process, all stakeholders are allowed to identify their own best interests, and pursue those best interests. Acting in one's own best interests is not bad faith: *Bhasin v Hrynew*, 2014 SCC 71 at para. 70, [2014] 3 SCR 494.

The DIP Financing Term Sheet certainly created legitimate expectations, but as noted there was never an assurance that the DIP funding would be repaid. There is no indication on this record that Third Eye Capital did anything that specifically breached a contract or was tortious or otherwise offended against a law. Third Eye Capital was merely able to persuade the supervising judge that the sale and vesting order it proposed represented the proper balancing of the interests of all of the stakeholders. The appellant's disappointment at the outcome is not a basis for upsetting the decision of the supervising judge.

[34] Notwithstanding that the original DIP Financing Term Sheet had provided that Accel Holdings and Accel Energy would be joint and several borrowers, it was always recognized that they were separate corporations, with separate primary secured creditors, and separate stakeholders. The Monitor from the beginning allocated the borrowings under the Interim Lenders' Charge between the two entities. The fact that the borrowings were joint and several was qualified early on in the initial *CCAA* order:

> 38 . . . The Amended Interim Financing Agreement contemplates that the Applicants are jointly and severally liable, and are cross-guaranteeing all DIP Advances (as defined therein) made by the Interim Lender. <u>The Interim Lender</u>

> shall be required to first recover repayment of all DIP Advances made to a particular Applicant (and proceeds of DIP Advances approved by the Monitor to have been allocated to such Applicant) from the property of such Applicant. Only in the event that the Interim Lender is unable to fully recover all such amounts from such Applicant's property, shall the Interim Lender be entitled to recover payment of such amounts, from the other Applicant's property.

As the appellant points out, this is a marshaling provision, which required the appellant to exhaust its remedies against one borrower before calling on the other. However, it does reflect the reality that there were two separate insolvent corporations, with separate businesses, and that bifurcated treatment of the Interim Lenders' Charge might at some point be necessary or appropriate.

[35] The remedy the appellant seeks is to have the Interim Lenders' Charge reattach to the Accel Energy assets, even though they have now been sold free and clear of encumbrances. As the respondents point out, after the asset transaction closes, many remedies are simply unavailable: ***Resurgence Asset Management LLC v. Canadian Airlines Corp.***, 2000 ABCA 238 at para. 32, 266 AR 131. Unless this option was preserved under the sale agreement, it would be unprecedented to add conditions to the sale after the closing.

[36] In summary, the supervising judge did have the discretion and jurisdiction to approve the sale of the Accel Energy assets, free and clear of the Interim Lenders' Charge, even though that charge was not paid in full. There is no indication of any error in principle in the way she exercised her discretion, nor can it be said that the ultimate decision was unreasonable. It follows that appeal #2001-0241AC must be dismissed.

Appeal heard on June 7, 2021

Memorandum filed at Calgary, Alberta
this 17th day of June, 2021

Watson J.A.

Slatter J.A.

Authorized to sign for: Khullar J.A.

Appearances:

T.L. Czechowskyj, Q.C./I. Aversa /S. Babe
for the Appellant

C.D. Simard/K.R. Cameron
for the Respondent Third Eye Capital Corporation

R. Gurofsky/J.L. Cameron
for the Respondent PricewaterhouseCoopers Inc.

Respondents Accel Canada Holdings Limited and Accel Energy Canada Limited (No Appearance)

SALES AND INVESTMENT SOLICITATION PROCESS GOOD NATURED PRODUCTS INC. AND AFFILIATES

1. On June 28, 2024, Good Natured Products Inc. ("**Good Natured**") and its subsidiaries (collectively, the "**Petitioners**") sought and were granted an initial order (the "**Initial Order**") under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**") from the Supreme Court of British Columbia (the "**CCAA Court**"). The Petitioners' proceedings under the CCAA are referred to herein as the "**CCAA Proceedings**".

2. Pursuant to the Initial Order, Alvarez & Marsal Canada Inc. was appointed as monitor of the Petitioners in the CCAA Proceedings (in such capacity, the "**Monitor**").

3. Pursuant to proceedings commenced in the United States Bankruptcy Court for the Northern District of Illinois (the "**US Bankruptcy Court**", and together with the CCAA Court, the "**Insolvency Courts**") under chapter 15, Title 11 of the United States Code (the "**Chapter 15 Proceedings**", and together with the CCAA Proceedings, the "**Insolvency Proceedings**"), Good Natured obtained, among other things, recognition of the CCAA Proceedings.

4. Wells Fargo Capital Finance Corporation Canada (the "**Lender**") has agreed to provide certain interim financing to the Petitioners during the Insolvency Proceedings, as approved or to be approved by the Insolvency Courts.

5. Pursuant to the Order of the CCAA Court dated July 11, 2024 (the "**SISP Order**"), the CCAA Court approved the sale and investment solicitation process set out herein (the "**SISP**"). Capitalized terms used herein are as defined in the SISP Order unless defined otherwise herein.

6. Pursuant to the SISP Order, Capital West Partners was appointed to act as Sales Agent in accordance with the SISP Order and the SISP.

SISP OVERVIEW

7. The purpose of the SISP is to solicit interest in one or more or any combination of (1) a restructuring, recapitalization or other form of reorganization of the business and affairs of one or more of the Petitioners as a going concern, or (2) a sale of all, substantially all or one or more components of the Petitioners' assets (the "**Property**") and/or business operations of the Petitioners (the "**Business**") as a going concern or otherwise.

8. The SISP describes the manner in which individuals, corporations, limited and unlimited liability companies, general and limited partnerships, associations, trusts, unincorporated organizations, joint ventures, governmental organizations or other entities (each, a "**Person**") may gain access to or continue to have access to due diligence materials concerning the Petitioners, the Property and the Business, how bids involving the Petitioners, the Property or the Business will be submitted to and dealt with by the Petitioners, the Monitor, the Sales Agent and the Lender and how Court approval will be obtained in respect of any Transaction (as defined below).

9. As described below, the various deadlines herein may be extended by and at the discretion of the Monitor and the Petitioners, subject to approval by the Lender, in its sole discretion. The Monitor will consider extending the various deadlines herein in the event that the Monitor determines that such an extension will generally benefit the Petitioners' creditors and other stakeholders.

"AS IS, WHERE IS" BASIS

10. Any transaction involving the Petitioners, the Property or the Business (in each case, a "**Transaction**") will be on an "as is, where is" basis and without surviving representations, warranties, covenants or indemnities of any kind, nature, or description by the Sales Agent, the Monitor, the Petitioners, or any of their respective agents, estates, advisors, professionals or otherwise, except to the extent expressly set forth in the relevant Final Agreement (as defined herein).

THE SISP PROCESS

A. Initial Solicitation of Interest

11. The Sales Agent may contact any Persons to solicit expressions of interest in a Transaction either before or after the granting of the SISP Order.

12. As soon as reasonably practicable after the granting of the SISP Order, the Monitor will cause a notice regarding this SISP, in a form satisfactory to and previously approved by the Petitioners and the Monitor, to be published in (a) the Globe and Mail (National Edition), (b) the Wall Street Journal or other national daily publication acceptable to the Petitioners and the Monitor, and (c) any other publication in which the Sales Agent determines notice of this SISP should be published.

13. As soon as reasonably practicable after the granting of the SISP Order, in consultation with the Petitioners and the Monitor, the Sales Agent will prepare a list of potential bidders (the "**Known Potential Bidders**") who may have an interest in a Transaction. Such list will include both strategic and/or financial parties who may be interested in acquiring an interest in the Petitioners and/or their assets pursuant to an asset purchase transaction (an "**Asset Bid**"), a restructuring of the debt, share or capital structure of the Petitioners (a "**Restructuring Bid**") or some combination of an Asset Bid and a Restructuring Bid (such combination bid, a "**Hybrid Bid**"). Concurrently, the Sales Agent will prepare an initial offering summary (the "**Teaser Letter**") notifying Known Potential Bidders of the SISP and inviting the Known Potential Bidders to express interest in making an Asset Bid, Restructuring Bid or Hybrid Bid (each, a "**SISP Bid**").

14. By no later than July 18, 2024, the Sales Agent shall distribute to the Known Potential Bidders, the Teaser Letter, as well as a draft form of confidentiality agreement (the "**Confidentiality Agreement**") that shall inure to the benefit of the Person or Persons who make the Winning Bid (as defined herein) pursuant to this SISP. Copies of the Teaser Letter and Confidentiality Agreement shall be provided to any appropriate Persons who become known to the Sales Agent after the initial distribution of such documents.

15. Any Person who (a) executes a Confidentiality Agreement in form and substance satisfactory to the Petitioners, the Sales Agent and the Monitor, and (b) whom the Sales Agent is satisfied has the financial capabilities and technical expertise to make a viable SISP Bid, shall be deemed to be a potential bidder (each, a "**Potential Bidder**").

B. Due Diligence

16. The Sales Agent will prepare a confidential information memorandum ("**CIM**") by no later than July 18, 2024, describing the opportunity to make a SISP Bid. The Sales Agent shall deliver the CIM to each Potential Bidder as soon as practicable after such Person is deemed to be a Potential Bidder in accordance with this SISP.

17. The Sales Agent shall provide each Potential Bidder with information, including access to an electronic data room established by the Sales Agent by no later than July 18, 2024 (the "**Data Room**"), that the Sales Agent determines to be necessary for the Potential Bidder to evaluate a transaction involving a SISP Bid.

C. LOI Process

18. Any Potential Bidder who wishes to submit a SISP Bid must deliver a written, non-binding letter of intent (each, a "**LOI**") to the Monitor at the address specified in and in accordance with Schedule "A" hereto so as to be received by the Monitor not later than 5:00 p.m. PST on August 22, 2024, or such other date or time as the Monitor and the Petitioners may determine with the consent of the Lender, acting reasonably (the "**LOI Deadline**").

19. Following the LOI Deadline, all LOIs shall be reviewed by the Petitioners, in consultation with the Monitor, the Sales Agent the Lender, the Royal Bank of Canada ("**RBC**"), and Toronto-Dominion Bank ("**TD Bank**") and Export Development Canada ("**EDC**").

20. An LOI shall be a qualified LOI (each, a "**Qualified LOI**") provided that it contains:

(a) a specific indication of the anticipated sources of capital for such Potential Bidder and preliminary evidence of the availability of such capital, or such other form of financial disclosure and credit support or enhancement that will allow the Monitor and its legal advisors to make, in their reasonable business or professional judgment, a reasonable determination as to the Potential Bidder's financial and other capabilities to consummate a SISP Bid;

(b) a letter setting forth the identity of the Potential Bidder, the contact information for such Potential Bidder and full disclosure of the direct and indirect owners of the Potential Bidder and their principals;

(c) an indication of whether the Potential Bidder wishes to tender (i) an Asset Bid; (ii) a Restructuring Bid; or (iii) a Hybrid Bid;

(d) in the case of an Asset Bid, it identifies:

(i) the purchase price range (including liabilities to be assumed by the Potential Bidder and any credit bid) including indicative value allocated to the Real Property;

(ii) whether the Asset Bid is *en bloc*, the Property included, any of the Property expected to be excluded, and/or any additional assets desired to be included in the transaction;

(iii) the structure and financing of the transaction (including, but not limited to, the sources of financing for the purchase price, preliminary evidence of the availability of such financing and the steps necessary and associated timing to obtain the financing and consummate the proposed transaction and any related contingencies, as applicable);

(iv) the proposed treatment of employees of the Petitioners;

(v) the proposed treatment of any leases and other material contracts;

(vi) any anticipated corporate, shareholder, internal or regulatory approvals required to close the transaction and the anticipated time frame and any anticipated impediments for obtaining such approvals;

(vii) any additional due diligence required or desired to be conducted by the Potential Bidder;

(viii) any conditions to closing that the Potential Bidder may wish to impose; and

(ix) any other terms or conditions of the Asset Bid which the Potential Bidder believes are material to the transaction;

(e) in the case of a Restructuring Bid, it identifies:

(i) the aggregate amount of the equity and debt investment, including liabilities to be assumed by the Potential Bidder and any credit bid component (including the sources of capital, preliminary evidence of the availability of such capital and the steps necessary and associated timing to obtain the capital and consummate the proposed transaction and any related contingencies, as applicable) to be made in the Petitioners;

(ii) the underlying assumptions regarding the *pro forma* capital structure (including the anticipated debt levels, debt service fees, interest and amortization);

(iii) the consideration to be allocated to the stakeholders including claims of any secured or unsecured creditors of the Petitioners and the proposed treatment of employees;

(iv) the structure and financing of the transaction including all requisite financial assurance;

(v) any anticipated corporate, shareholder, internal or regulatory approvals required to close the transaction, the anticipated time frame and any anticipated impediments for obtaining such approvals;

(vi) any additional due diligence required or desired to be conducted by the Potential Bidder, if any;

(vii) any conditions to closing that the Potential Bidder may wish to impose; and

(viii) any other terms or conditions of the Restructuring Bid which the Potential Bidder believes are material to the transaction;

(f) in the case of a Hybrid Bid, all of the information contained in subparagraphs (d) through (e) above, as applicable;

(g) such other information as may be requested by the Monitor or the Sales Agent; and

provided however, that any Qualified LOI must be in form and substance satisfactory to the Monitor.

21. Any Potential Bidder who submits a Qualified LOI on or before the LOI Deadline shall be designated a "**Qualified Bidder**".

22. The Petitioners, with the approval of the Monitor and in consultation with the Lender, may waive the strict compliance of one or more of the requirements specified above and deem any LOI to be a Qualified LOI, notwithstanding any noncompliance with the terms and conditions of this SISP.

23. In the event that no Person submits an LOI, or that no LOI qualifies as or is deemed to qualify as a Qualified LOI, or that no LOI is deemed commercially reasonable to the Petitioners and the Monitor, the Petitioners may, with the approval of the Monitor and the Sales Agent and with the consent of the Lender, terminate the SISP. If no Qualified LOIs are received by the LOI Deadline, the Petitioners may, in consultation with the Monitor and the Lender, consider other forms of bids for the Property and the Business. At any time during the SISP, the Petitioners may, with the approval of the Monitor and the Lender, determine that any bid is a Winning Bid and seek Approval Orders (as defined below) in respect of such Winning Bid(s) from the Insolvency Courts.

D. Final Bid Process

24. By no later than August 26, 2024, the Sales Agent may invite Qualified Bidders to conduct additional due diligence or otherwise make available to Qualified Bidders additional information not posted in the Data Room, arrange for inspections and site visits at the Petitioners' premises, as determined by the Sales Agent.

25. Any Qualified Bidder may submit an Asset Bid, a Restructuring Bid or a Hybrid Bid (each a "**Final Bid**") to the Monitor at the address specified in Schedule "A" hereto on or before 5:00 pm PST on September 12, 2024, or such later time and date that the Petitioners may determine, with the approval of the Monitor and the consent of the Lender, acting reasonably (the "**Final Bid Deadline**").

26. Final Bids shall be reviewed by the Monitor, the Sales Agent, the Petitioners and the Lender, RBC, and TD Bank, and EDC

27. A Final Bid submitted as an Asset Bid shall be a "**Qualified Asset Bid**" in the event that:

(a) it complies with the criteria required for a Qualified LOI;

(b) provides an allocation of value for the Real Property;

(c) it includes a letter stating that the Asset Bid is irrevocable until the earlier of (i) the approval by the Insolvency Courts, and (ii) forty-five (45) days following the Final Bid Deadline; provided, however, that if such Asset Bid is selected as the Winning Bid or the Backup Bid, it shall remain irrevocable until the closing of the Winning Bid or the Backup Bid, as the case may be;

(d) it includes a duly authorized and executed purchase and sale agreement specifying all consideration payable, together with all exhibits and schedules thereto, and such ancillary agreements as may be required by the Qualified Bidder with all exhibits and schedules thereto;

(e) it does not include any request or entitlement to any break fee, expense reimbursement or similar type of payment;

(f) it includes written evidence of a firm, irrevocable commitment for all required funding and/or financing from a creditworthy bank or financial institution to consummate the proposed transaction, or other evidence satisfactory to the Monitor to allow the Monitor to make a reasonable determination as to the Qualified Bidder's (and its direct and indirect owners and their principals) financial and other capabilities to consummate the transaction contemplated by the Asset Bid;

(g) it is not conditional on (i) the outcome of unperformed due diligence by the Qualified Bidder and/or (ii) obtaining any financing capital and includes an acknowledgement and representation that the bidder has had an opportunity to conduct any and all required due diligence prior to making its Asset Bid;

(h) it is not conditional upon any governmental or regulatory approval;

(i) it fully discloses the identify of each Person that is bidding or otherwise that will be sponsoring or participating in the Asset Bid, including the identification of the bidder's direct and indirect owners and their principals, and the complete terms of any such participation;

(j) it is accompanied by a refundable cash deposit (the "**Deposit**") in the form of a wire transfer (to a trust account specified by the Monitor), in an amount equal to ten percent (10%) of the consideration to be paid in respect of the Asset Bid, to be held and dealt with in accordance with this SISP;

(k) it contains other information requested by the Sales Agent, the Petitioners or the Monitor; and

(l) it is received by no later than the Final Bid Deadline.

28. A Final Bid submitted as a Restructuring Bid shall be a "**Qualified Restructuring Bid**" in the event that:

(a) It includes definitive documentation, duly authorized and executed by the Qualified Bidder, setting out the terms and conditions of the proposed transaction, including the aggregate amount of the proposed equity and debt investment, assumption of debt if any, and details regarding the proposed equity and debt structure of the Petitioners following completion of the proposed transaction;

(b) it includes a letter stating that the Restructuring Bid is irrevocable until the earlier of (i) the approval by the Insolvency Courts, and (ii) forty-five (45) days following the Final Bid Deadline; provided however, that if such Restructuring Bid is selected as the Winning Bid or the Backup Bid, it shall remain irrevocable until the closing of the Winning Bid or the Backup Bid, as the case may be;

(c) it does not include any request or entitlement to any break fee, expense reimbursement or similar type of payment;

(d) it includes written evidence of a firm, irrevocable commitment for all required funding and/or financing from a creditworthy bank or financial institution to consummate the proposed transaction, or other evidence satisfactory to the Monitor to allow the Monitor to make a reasonable determination as to the Qualified Bidder's (and its direct and indirect owners and their principals) financial and other capabilities to consummate the transaction contemplated by the Restructuring Bid;

(e) it is not conditional on (i) the outcome of unperformed due diligence by the Qualified Bidder and/or (ii) obtaining any financing capital and includes an acknowledgment and representation that the bidder has had an opportunity to conduct any and all required due diligence prior to making its Restructuring Bid;

(f) it is not conditional on any governmental or regulatory approval;

(g) it fully discloses the identity of each entity that is bidding or otherwise that will be sponsoring or participating in the Restructuring Bid, including the identification of the Qualified Bidder's direct and indirect owners and their principals, and the complete terms of such participation;

(h) it is accompanied by a refundable deposit in the form of a wire transfer (payable to a trust account specified by the Monitor) in an amount equal to ten percent (10%) of the consideration to be paid pursuant to the Restructuring Bid, to be held and dealt with in accordance with this SISP; and

(i) it is received by no later than the Final Bid Deadline.

29. A Hybrid Bid submitted by the Final Bid Deadline will be considered a "**Qualified Hybrid Bid**" if it is in substantial compliance with the portions of paragraphs 27 and 28 of this SISP, as determined by the Monitor.

30. All Qualified Asset Bids, Qualified Restructuring Bids and Qualified Hybrid Bids shall constitute "**Qualified Final Bids**". The Petitioners, with the approval of the Monitor, may waive the strict compliance of one or more of the requirements specified above and deem any Final Bid(s) to be a Qualified Final Bid, notwithstanding any non-compliance with the terms and conditions of this SISP.

E. Selection of Winning Bid

31. The Petitioners shall review all Qualified Final Bids in consultation with the Monitor, the Sales Agent and the Lender. Subject to the approval of the Monitor and the Lender, the Petitioners may, but shall have no obligation to, enter into a definitive agreement or agreements (each, a "**Final Agreement**") with the Person or Persons who submitted the highest, best or otherwise most favourable Qualified Final Bid(s).

32. In the event that the Petitioners enter into one or more Final Agreements on or before September 19, 2024, or such later time that the Monitor may determine (the "**Final Agreement Deadline**"), any Qualified Bid so selected shall be a "**Winning Bid**" and the next highest, best or otherwise most favourable Qualified Bid received, as determined by the Petitioners with the consent of the Monitor and the Lender, shall be the "**Backup Bid**". Any Qualified Bidder that makes a Winning Bid shall be a "**Successful Bidder**" and any Qualified Bidder that makes a Backup Bid shall be a "**Backup Bidder**".

33. Notwithstanding anything to the contrary in this SISP, the Petitioners and the Monitor shall not, without the prior consent of RBC and TD Bank (collectively, the "**Real Estate Lenders**"), identify one or more Qualified Final Bid that includes the sale or acquisition of the Real Estate Lenders' Canadian real property collateral (the "**Real Estate Collateral**") as the Winning Bid, if such Qualified Final Bid would not, if so identified, result in full payment of the amounts owing to the Real Estate Lenders on closing with respect to the Real Estate Collateral. For greater certainty, this provision does not override paragraph 12 of the Amended and Restated Initial Order of Justice Fitzpatrick made on July 8, 2024.

34. The Monitor or the Sales Agent will notify each Successful Bidder and Backup Bidder of the Final Agreement and the Backup Bid shall remain open until the consummation of the transaction contemplated by the Winning Bid (and, for greater certainty, the Monitor shall be entitled to continue to hold the Deposit in respect of the Backup Bid until such time as the transaction contemplated by the Winning Bid is consummated).

35. In the event that (a) no Qualified Bidder submits or is deemed to have submitted a Qualified Final Bid, (b) the Petitioners, with the approval of the Monitor and the Lender, determines that none of the Qualified Final Bids should be accepted, or (c) that a Final Agreement has not been entered into before the Final Agreement Deadline, this SISP shall terminate.

36. The highest Qualified Final Bid may not necessarily be accepted by the Petitioners. The Petitioners, with the approval of the Monitor and the Lender, reserve the right to not accept any Qualified Final Bid or to otherwise terminate the SISP. The Petitioners, with the approval of the Monitor and the Lender, further reserve the right to deal with one or more Qualified Bidders to the exclusion of other Persons, to accept a Qualified Final Bid or

Qualified Final Bids for some or all of the Property, the Petitioners or the Business, to accept multiple Qualified Final Bids and enter into multiple Final Agreements.

APPROVAL ORDERS

37. In the event that the Petitioners enter into a Final Agreement, the Petitioners shall apply for an order (the "**Approval Order**") from the Insolvency Courts on or before Thursday, September 26, 2024, in form and substance satisfactory to the Monitor, approving the transaction contemplated by the Winning Bid and any necessary related relief required to consummate the transaction contemplated by the Winning Bid, subject to the terms of the Final Agreement.

38. The Petitioners may also concurrently obtain relief approving the transaction contemplated by the Backup Bid and any necessary related relief required to consummate the transaction contemplated by the Backup Bid.

39. An Approval Order shall become a "**Final Order**" upon satisfaction of the following conditions: (i) it is in full force and effect; (ii) it has not been reversed, modified or vacated and is not subject to any stay; and (iii) all applicable appeal periods have expired and any appeals therefrom have been finally disposed of, leaving the Approval Order wholly operable.

CLOSING

40. Closing of the transactions contemplated in any Final Agreement shall occur by the later of October 11, 2024, and ten (10) days of the date upon which the Approval Orders have become Final Orders] and in any event no later than October 25, 2024, or as may be extended with the Approval of the Monitor and the Lender.

DEPOSITS

41. All Deposits paid pursuant to this SISP shall be held in trust by the Monitor. The Monitor shall hold Deposits paid by each of the Winning Bidder and the Backup Bidder in accordance with the terms outlined in this SISP. In the event that a Deposit is paid pursuant to this SISP and the Petitioners elect not to proceed to negotiate and settle the terms and conditions of a definitive agreement with the Person that paid such Deposit, the Monitor shall return the Deposit and any interest accrued thereon to that Person.

42. In the event that either of the Successful Bidder or the Backup Bidder default in the payment of performance of any obligations owed to the Petitioners, the Monitor or the Sales Agent pursuant to any Final Agreement, the Deposit paid by the Winning Bidder or the Backup Bidder, as applicable, shall be forfeited to such party as liquidated damages and not as a penalty.

INFORMATION AND CONFIDENTIALITY

43. None of directors and officers (collectively, "**Connected Persons**") are entitled to any SISP-related information or to be consulted in relation to the SISP until such time as any such party confirms in writing to the Monitor that they and their Connected Persons will

not be a bidder, or participate in any bid, in respect of the Debtors, Property or the Business (the "**Non-Bid Notice**") by July 18, 2024. For greater clarity, the Connected Persons shall not be entitled to be a bidder, or participate in any bid, in respect of the Debtors, Property or the Business after the submission of a Non-Bid Notice.

44. The Sales Agent shall keep confidential all information concerning Potential Bidders, LOIs, Qualified Bidders, Final Bids, the Successful Bidder, the Winning Bid, the Backup Bidder, the Backup Bid, and the Final Agreement.

GENERAL

45. Subject to the approval of the Monitor and the Lender, the Petitioners may at any time prior to the Final Bid Deadline apply to the Insolvency Courts for approval to accept a "stalking horse" bid in the SISP.

SCHEDULE "A"

Addresses for Deliveries

Any notice or other delivery made to the Monitor pursuant to this SISP shall be made to:

ALVAREZ & MARSAL CANADA INC.
Cathedral Place Building
925 West Georgia Street, Suite 902
Vancouver, BC V6C 3L2

Attention: Anthony Tillman / Pinky Law
Email: atillman@alvarezandmarsal.com / pinky.law@alvarezandmarsal.com

with copy to:

MCCARTHY TETRAULT LLP
745 Thurlow Street, Suite 2400
Vancouver, BC V6E 0C5

Attention: Lance Williams / Ashley Bowron
Email: lwilliams@mccarthy.ca / abowron@mccarthy.ca

Any notice or delivery made to the Sales Agent pursuant to this SISP shall be made to:

●

Attention: ●
Email: ●

Deliveries pursuant to this SISP by email or by facsimile shall be deemed to be received when sent. In all other instances, deliveries made pursuant to this SISP shall be deemed to be received when delivered to the relevant address, as identified above.