Court File No.: CV-16-11397-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BEN MOSS JEWELLERS WESTERN CANADA LTD.

APPLICANT

BOOK OF AUTHORITIES OF THE APPLICANT

(Sale Approval and Stay Extension, Returnable July 29, 2016)

July 27, 2016

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2009 QCCS 6461
Quebec Superior Court

AbitibiBowater, (Re)

2009 CarswellQue 14224, 2009 QCCS 6461, 190 A.C.W.S. (3d) 678, EYB 2009-171231

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and The other Petitioners listed on Schedules "A", "B" and "C", Petitioners and Ernst & Young Inc., Monitor

Gascon J.C.S.

Heard: November 9, 2009
Judgment: November 16, 2009
Docket: C.S. Qué. Montréal 500-11-036133-094

Counsel: Me Sean Dunphy, Me Joseph Reynaud, for Petitioners
Me Robert Thornton, for the Monitor
Me Jason Dolman, for the Monitor
Me Alain Riendeau, for Wells Fargo Bank, N.A., Administrative Agent under the Credit and Guarantee Agreement Dated April 1, 2008
Me Marc Duchesne, for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders
Me Frederick L. Myers, for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates
Me Jean-Yves Simard, for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates
Me Patrice Benoît, for Investissement Québec
Me S. Richard Orzy, for the Official Committee of Unsecured Creditors of AbitibiBowater Inc. & Al.
Me Frédéric Desmarais, for Bank of Montreal
Me Anastasia Flouris, for Alcoa

Subject: Insolvency

***Gascon J.C.S.*:**

CORRECTED JUDGMENT, NOVEMBER 23 ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING AND FOR DISTRIBUTION OF CERTAIN PROCEEDS OF THE MPCo SALE TRANSACTION TO THE TRUSTEE FOR THE SENIOR SECURED NOTES (#312)

Introduction

1 In the context of their *CCAA* [1] restructuring, the Abitibi Petitioners [2] present a Motion [3] for 1) the approval of a second DIP financing and 2) the distribution of certain proceeds of the Manicouagan Power Company ("*MPCo*") sale transaction to the Senior Secured Noteholders *("SSNs")*.

2 More particularly, the Abitibi Petitioners seek:

1) Orders authorizing Abitibi Consolidated Inc. ("*ACI*") and Abitibi Consolidated Company of Canada Inc. ("*ACCC*") to enter into a Loan Agreement (the "*ULC DIP Agreement*") with 3239432 Nova Scotia Company

("*ULC*"), as lender, providing for a *CDN$230 million super-priority secured debtor in possession credit facility* (the "*ULC DIP Facility*").

The ULC DIP Facility is to be funded from the ULC reserve of approximately CDN$282.3 million (the "*ULC Reserve*"), with terms that will be substantially in the form of the term sheet (the "*ULC DIP Term Sheet*") attached to the ULC DIP Motion;

2) Orders authorizing the distribution to the SSNs *of up to CDN$200 million* upon completion of the sale of ACCC's 60% interest in MPCo and Court approval of the ULC DIP Agreement.

The distribution is to be paid from the net proceeds of the MPCo sale transaction after the payments, holdbacks, reserves and deductions provided for in the Implementation Agreement agreed upon in regard to that transaction; and

3) Orders amending the Second Amended Initial Order to increase the super priority charge set out in paragraph 61.3 (the "*ACI DIP Charge*") in respect of the ACI DIP Facility by an amount of CDN$230 million in favour of ULC for all amounts owing in connection with the ULC DIP Facility.

This increase in the ACI DIP Charge is to still be subordinated to any and all subrogated rights in favour of the SSNs, the lenders under the ACCC Term Loan (the "*Term Lenders*") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (the "*Lien Holders*") arising under paragraph 61.10 of the Second Amended Initial Order.

3 The SSNs and the Term Lenders, the only two secured creditor groups of the Abitibi Petitioners, do not, in the end, contest the ULC DIP Motion. Pursuant to intense negotiations and following concessions made by everyone, an acceptable wording to the orders sought was finally agreed upon on the eve of the hearing. The efforts of all parties and Counsel involved are worth mentioning; the help and guidance of the Monitor and its Counsel as well.

4 Of the unsecured creditors and other stakeholders, only the Ad Hoc Unsecured Noteholders Committee *(*the "*Bondholders*"*)* opposes the ULC DIP Motion, and even there, just in part. At hearing, Counsel for the Official Committee of Unsecured Creditors set up in the corresponding U.S. proceedings pending in the State of Delaware also voiced that his client shared some of the Bondholders' concerns.

5 In short, while not contesting the request for approval of the second DIP financing, the Bondholders contend that the CDN$200 million immediate proposed distribution to the SSNs is inappropriate and uncalled for at this time.

6 Before analyzing the various orders sought, an overview of the MPCo sale transaction and of the ULC DIP Facility that are the subject of the debate is necessary.

The MPCo Sale Transaction

7 The MPCo sale transaction is central to the orders sought in the ULC DIP Motion.

8 Under the terms of an Implementation Agreement signed in that regard, Hydro-Québec *(*"*HQ*"*)* agreed to pay ACCC CDN$615 million (the "*Purchase Price*") for ACCC's 60% interest in MPCo.

9 Of this amount, it is expected that (i) CDN$25 million will be paid at closing to Alcoa, the owner of the other 40% interest in MPCo, for tax liabilities; (ii) approximately CDN$31 million will be held by HQ for two years to secure various indemnifications (the "*HQ Holdback*"); (iii) certain inter-party accounts will be settled; (iv) the CDN$282.3 million ULC Reserve, set up primarily to guarantee potential contingent pension liabilities and taxes resulting from the Proposed Transactions, will be held by the Monitor in trust for the ULC pending further Order of the Court; and (v) the ACI DIP Facility will be repaid.

10 That said, until the sale, ACCC's 60% interest in MPCo remains subject to the SSN's first ranking security. This first ranking security interest has never been contested by any party. In fact, after their review of same, the Monitor's Counsel concluded that it is valid and enforceable [4].

11 Accordingly, the proceeds of the sale less adjustments, holdbacks and reserve would normally be paid to the SSNs as holders of valid first ranking security over this asset.

12 To that end, the SSNs' claim of US$477,545,769.53 (US$413 million in principal and US$64,545,769.53 in interest as at October 1st, 2009) is not really contested except for a 0.5% to 2% additional default interest over the 13.75% original loan rate.

13 In that context, on September 29, 2009, the Court issued an Order approving the sale of ACCC's 60% interest in MPCo on certain conditions. Amongst others, the Court:

a) Approved the terms and conditions of the Implementation Agreement;

b) Authorized and directed ACI and ACCC to implement and complete the Proposed Transactions with such non-material alterations or amendments as the parties may agree to with the consent of the Monitor;

c) Declared that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of the ULC, shall constitute and be treated as proceeds of the disposition of ACCC's MPCo shares (collectively, the "*MPCo Share Proceeds*");

d) Declared that the MPCo Share Proceeds extend to and include (a) ACCC's interest in the HQ Holdback and (b) ACCC's interest in claims arising from the satisfaction of related-party claims;

e) Declared that the MPCo Share Proceeds will be subject to a replacement charge (the "*MPCo Noteholder Charge*") in favour of the SSNs with the same rank and priority as the security held in respect of the ACCC's MPCo shares;

f) Declared that the ULC Reserve is subject to a charge in favour of the SSNs which is subordinate to a charge in favour of Alcoa (the "*ULC Reserve Charge*"); and

g) Ordered that the cash component of the MPCo Share Proceeds and the ULC Reserve be paid to and held by the Monitor in an interest bearing account or investment grade marketable securities pending further Order of the Court.

14 The Proposed Transactions are not expected to close until the latter part of November or early December 2009. ACI has requested and obtained an extension from Investissement Quebec *("IQ")* to December 15, 2009 for the repayment of the ACI DIP Facility that matured on November 1st, 2009.

15 Based on the amounts of the significant payments, holdbacks, reserves and deductions from the Purchase Price, and considering that the amount drawn under the ACI DIP Facility presently stands at CDN$54.8 million, the Net Available Proceeds after payment of the ACI DIP Facility would be approximately CDN$173.9 million.

The Ulc DIP Facility

16 Pursuant to the Implementation Agreement, ULC is required to maintain the ULC Reserve. On the closing of the Proposed Transactions, ULC will hold the ULC Reserve in the amount of approximately CDN$282.3 million.

17 This amount may be used for a limited number of purposes (the "*Permitted Investments*") that are described in the Implementation Agreement. Such Permitted Investments include making a DIP loan to either ACI or ACCC.

18 Based on that, the ULC DIP Term Sheet provides that the ACI Group will borrow CDN$230 million from the ULC Reserve as a Permitted Investment.

19 According to the Monitor [5], the significant terms of the ULC DIP Term Sheet are as follows:

i) *Manner of Borrowing* — Initially, the ULC DIP Facility was to be available by way of an immediate draw of CDN$230 million. After negotiations with the Term Lenders, it was rather agreed that (i) a first draw of CDN $130 million will be advanced at closing, (ii) subsequent draws for a maximum total amount of CDN$50 million in increments of up to CDN$25 million will be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order, and (iii) the balance of CDN$50 million shall become available upon further order of the Court.

ii) *Interest Payments* — No interest will be payable on the ULC DIP Facility;

iii) *Fees* — No fees are payable in respect of the ULC DIP Facility;

iv) *Expenses* — The borrowers will pay all reasonable expenses incurred by ULC and Alcoa in connection with the ULC DIP Facility;

v) *Reporting* — Reporting will be similar to that provided under the ACI DIP Facility and copies of all financial information will be placed in the data room. Reporting will include notice of events of default or maturing events of default;

vi) *Use of Proceeds* — The ULC DIP Facility will be used for general corporate purposes in material compliance with the 13-week cash flow forecasts to be provided no less frequently than the first Friday of each month (the "*Budget*");

vii) *Events of Default* — The events of default include the following:

(a) Substantial non-compliance with the Budget;

(b) Termination of the *CCAA* Stay of Proceedings;

(c) Failure to file a *CCAA* Plan with the Court by September 30, 2010; and

(d) Withdrawal of the existing Securitization Program unless replaced with a reasonably similar facility;

viii) *Rights of Alcoa* — Alcoa will receive all reporting noted above and notices of events of default. Alcoa's consent is required for any amendments or waivers;

ix) *Rights of Senior Secured Noteholders* — The Senior Secured Noteholders'rights consist of:

(a) Receiving all reporting noted above and any notice of an Event of Default;

(b) Consent of Senior Secured Noteholders holding a majority of the principal amount of the Senior Secured Notes is required for any amendments to the maximum amount of the ULC DIP Facility or any change to the Outside Maturity Date or the interest rate;

(c) Upon an Event of Default, there is no right to accelerate payment or maturity, subject to the right to apply to Court for the termination of the ULC DIP Facility, which right is without prejudice to the right of ACI, ACCC, the ULC or Alcoa to oppose such application;

(d) Entitlement to review draft of documents, but final approval of such documents is in Alcoa's sole discretion; and

(e) Entitlement to request the approval of the Court to amend any monthly cash flow budget which has been filed;

x) *Security* — Security is similar to the existing ACI DIP Facilityand ranking immediately after the existing ACI DIP Charge. There are no charges on the assets of the Chapter 11 Debtors (as defined in the existing ACI DIP Facility).

20 The Monitor notes that the ULC DIP Facility will provide the ACI Group with additional net liquidity (after the retirement of the ACI DIP Facility and after the payment of the proposed distribution to the SSNs) in the amount of some CDN$167 million.

The Questions at Issue

21 In light of this background, the Court must answer the following questions:

1) Should the ULC DIP Facility of CDN$230 million be approved?

2) Should the proposed distribution of CDN$200 million to the SSNs be authorized?

3) Is the wording of the orders sought appropriate, notably with regard to the additions proposed by the Bondholders in terms of the future steps to be taken by the Abitibi Petitioners?

Analysis and Discussion

1) The Approval of the DIP Financing

22 In the Court's opinion, the second DIP financing, that is, the ULC DIP Facility of CDN$230 million, should be approved on the amended terms agreed upon by the numerous parties involved.

23 In this restructuring, the Court has already approved DIP financing in respect of both the Abitibi Petitioners and the Bowater Petitioners.

24 On April 22, 2009, it issued a Recognition Order (U.S. Interim DIP Order) recognizing an Interim Order of the U.S. Bankruptcy Court for a DIP loan of up to US$206 million to the Bowater Petitioners. On May 6, 2009, it approved the ACI DIP Facility, a US$100 million loan to the Abitibi Petitioners by Bank of Montreal ("*BMO*"), guaranteed by IQ.

25 The jurisdiction of the Court to approve DIP financing and the requirement of the Abitibi Petitioners for such were canvassed at length in the May 6 Judgment. The requirements of the Abitibi Petitioners for liquidity and the authority of the Court to approve agreements to satisfy those requirements have already been reviewed and ruled upon.

26 There have been no circumstances intervening since the approval of the ACI DIP Facility that can fairly be characterized as negating the requirement of the Abitibi Petitioners for DIP financing.

27 The only issue here is whether this particular ULC DIP Facility proposal, replacing as it does the prior ACI DIP Facility, is one that the Court ought to approve. As indicated earlier, the answer is yes.

28 At this stage in the proceedings where the phase of business stabilization is largely complete, the Court is not required to approach the subject of DIP financing from the perspective of excessive caution or parsimony.

29 On the one hand, as highlighted notably by the Monitor[6], the Abitibi Petitioners have presented substantial reasons to support their need for liquidity by way of a DIP loan. Suffice it to note to that end that:

a) Without an adequate cushion, in view of potential adverse exchange rate fluctuations and further adverse price declines in the market, the Abitibi Petitioners'liquidity could easily be insufficient to meet the requirements of its Securitization Program (Monitor's 19th Report at paragraphs 49, 50 and chart at paragraph 61);

b) Absent a DIP loan, there is, in fact, a "high risk of default" under the Securitization Program (Monitor's 19th Report at paragraph 32);

c) Despite Abitibi Petitioners'best efforts at forecasting, weekly cash flow forecasts have varied by as much as US $26 million. Weekly disbursements have varied by 100%. Each 1¢ variation in the foreign exchange rate as against the US dollar could produce a US$17 million negative cash flow variation. The ultimate cash flow requirements will be highly dependent on variables that the Abitibi Petitioners'cannot control (Monitor's 19th Report at paragraphs 54, 60 and 61);

d) The market decline has eroded the Abitibi Petitioners'liquidity, while foreign exchange fluctuations are placing further strain on this liquidity. Even if prices increase, the resulting need for additional working capital to increase production will paradoxically put yet further strain on this liquidity;

e) Without the ULC DIP Facility, the Abitibi Petitioners would lack access to sufficient operating credit to maintain normal operations. They would be significantly impaired in their ability to operate in the ordinary course and they would face an increase in the risk of unexpected interruptions; and

f) The Abitibi Petitioners have yet to complete their business plan and it is premature to predict the length of the proceedings (Monitor's 19th Report at paragraphs 47 and 48).

30 In fact, based upon its sensitivity analysis, the inter-month variability of the cash flows, the minimum liquidity requirements under the Securitization Program, and the requirement to repay the ACI DIP Facility, the Monitor is of the view that the Abitibi Petitioners need the new ULC DIP Facility to ensure that ACI has sufficient liquidity to complete its restructuring.

31 On the other hand, the reasonableness of the amount of the ULC DIP Facility is supported by the following facts:

a) Only about CDN$168 million of incremental liquidity is being provided and post-transaction, the Abitibi Petitioners will have, at best, about CDN$335 million of liquidity (Monitor's 19th Report at paragraph 68);

b) The Bowater Petitioners, a group of the same approximate size as the Abitibi Petitioners, enjoy liquidity of approximately US$400 million (Monitor's 19th Report at paragraph 69) and a DIP facility of approximately US $200 million;

c) Even with the ULC DIP Facility, the Abitibi Petitioners will be at the low end of average relative to their peers in terms of available liquidity relative to their size;

d) The cash flow of the Abitibi Petitioners is subject to significant intra-month variations and has risks associated with pricing and currency fluctuations which are larger the longer the period examined; and

e) The Abitibi Petitioners are required by the Securitization Facility to maintain liquidity on a rolling basis above US$100 million.

32 In addition, the Court and the stakeholders have all the means necessary at their disposal to monitor the use of liquidity without, at the same time, having to ration its access at a level far below that enjoyed by the peers with whom the Abitibi Petitioners compete.

33 In this regard, it is important to emphasize that the ULC DIP Facility includes, after all, particularly interesting conditions in terms of interest payments and associated fees. Because ULC is the lender, none are payable.

34 Finally, the provisions of section 11.2 of the amended *CCAA*, and in particular the factors for review listed in subsection 11.2(4), are instructive guidelines to the exercise of the Court's discretion to approve the ULC DIP Facility.

35 Pursuant to subsection 11.2(4) of the amended *CCAA*, for restructurings undertaken after September 18, 2009, the judge is now directed to consider the following factors in determining whether to exercise his or her discretion to make an order such as this one:

a) The period during which the company is expected to be subject to *CCAA* proceedings;

b) How the company's business and financial affairs are to be managed during the proceedings;

c) Whether the company's management has the confidence of its major creditors;

d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made;

e) The nature and value of the company's property;

f) Whether any creditor would be materially prejudiced as a result of the security or charge; and

g) The Monitor's report.

36 Applying these criteria to this case, it is, first, premature to speculate how long the Abitibi Petitioners will remain subject to proceedings under the *CCAA*.

37 The Monitor's 19th Report has considered cash flow forecasts until December 2010. The Abitibi Petitioners are hopeful of progressing to a plan outline by year-end with a view to emergence in the first or second quarter of 2010.

38 In considering a DIP financing proposal, the Court can take note of the fact that the time and energies ought, at this stage in the proceedings, to be more usefully and profitably devoted to completing the business restructuring, raising the necessary exit financing and negotiating an appropriate restructuring plan with the stakeholders.

39 Second, even if the ULC DIP Facility of CDN$230 million is a high, albeit reasonable, figure under the circumstances, access to the funds and use of the funds remain closely monitored.

40 Based on the compromise reached with the Term Lenders, access to the funds will be progressive and subject to control. The initial draw is limited to CDN$130 million. Subsequent additional draws up to CDN$50 million will be in maximum increments of CDN$25 million and subject to prior notice. The final CDN$50 million will only be available with the Court's approval.

41 As well, the use of the funds is subject to considerable safeguards as to the interests of all stakeholders. These include the following:

a) The Monitor is on site monitoring and reviewing cash flow sources and uses in real time with full access to senior management, stakeholders and the Court;

b) Stakeholders have very close to real time access to financial information regarding sources and use of cash flow by reason of the weekly cash flow forecasts provided to their financial advisors and the weekly calls with such financial advisors, participated in by senior management;

c) The Monitor provides regular reporting to the Court including as to the tracking of variances in cash use relative to forecast and as to evolution of the business environment in which the Abitibi Petitioners are operating; and

d) All stakeholders have full access to this Court to bring such motions as they see fit should a material adverse change in the business or affairs intervene.

42 Third, there has been no suggestion that the management of the Abitibi Petitioners has lost the confidence of its major creditors. To the contrary:

a) Management has successfully negotiated a settlement of very complex and thorny issues with both the Term Lenders and the SSNs, which has enabled this ULC DIP Motion to be brought forward with their support;

b) While management does not agree with all positions taken by the Bondholders at all times, it has by and large enjoyed the support of that group throughout these proceedings;

c) Management has been attentive to the suggestions and guidance of the Monitor with the result that there have been few if any instances where the Monitor has been publicly obliged to oppose or take issue with steps taken;

d) Management has been proactive in hiring a Chief Restructuring Officer who has provided management with additional depth and strength in navigating through difficult circumstances; and

e) The Abitibi Petitioners' management conducts regular meetings with the financial advisors of their major stakeholders, in addition to having an "open door" policy.

43 The Court is satisfied that, in requesting the approval of the ULC DIP Facility, management is doing so with a broad measure of support and the confidence of its major creditor constituencies.

44 Fourth, with an adequate level of liquidity, the Abitibi Petitioners will be able to run their business as a going concern on as normal a basis as possible, with a view to enhancing and preserving its value while the restructuring process proceeds.

45 By facilitating a level of financial support that is reasonable and adequate and of sufficient duration to enable them to complete the restructuring on most reasonable assumptions, the Abitibi Petitioners will have the benefit of an umbrella of stability around their core business operations.

46 In the Court's opinion, this can only facilitate the prospects of a viable compromise or arrangement being found.

47 Fifth, there are only two secured creditor groups of the Abitibi Petitioners: the SSNs and the Term Lenders. After long and difficult negotiations, they finally agreed to an acceptable wording to the orders sought. No one argues any longer that it is prejudiced in any way by the proposed security or charge.

48 Lastly, sixth, the Monitor has carefully considered the positions of all of the stakeholders as well as the reasonableness of the Abitibi Petitioners' requirements for the proposed ULC DIP Facility. Having reviewed both the impact of the proposed ULC DIP Facility on stakeholders and its beneficial impact upon the Abitibi Petitioners, the Monitor recommends approval of the ULC DIP Facility.

49 On the whole, in approving this ULC DIP Facility, the Court supports the very large consensus reached and the fine balance achieved between the interests of all stakeholders involved.

2) The Distribution to the SSNs

50 The approval of the terms of the ULC DIP Facility by the SSNs is intertwined with the Abitibi Petitioners' agreement to support a distribution in their favor in the amount of CDN$200 million.

51 The Abitibi Petitioners and the SSNs consider that since the MPCo proceeds were and are subject to the security of the SSNs, this arrangement or compromise is a reasonable one under the circumstances.

52 They submit that the proposed distribution will be of substantial benefit to the Abitibi Petitioners. Savings of at least CDN$27.4 million per year in accruing interest costs on the CDN$200 million to be distributed will be realized based on the 13.75% interest rate payable to the SSNs.

53 Needless to say, they maintain that the costs saved will add to the potential surplus value of SSNs' collateral that could be utilized to compensate any creditor whose security may be impaired in the future in repaying the ULC DIP Facility.

54 The Bondholders oppose the CDN$200 million distribution to the SSNs.

55 In their view, given the Abitibi Petitioners'need for liquidity, the proposed payment of substantial proceeds to one group of creditors raises important issues of both propriety and timing. It also brings into focus the need for the *CCAA* process to move forward efficiently and effectively towards the goal of the timely negotiation and implementation of a plan of arrangement.

56 The Bondholders claim that the proposed distribution violates the *CCAA*. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors'leverage and voting rights.

58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

59 In the interim, they suggest that the Abitibi Petitioners should provide a business plan to their legal and financial advisors by no later than 5:00 p.m. on November 27, 2009. They submit that a restructuring and recapitalization term sheet on terms acceptable to them and their legal and financial advisors should also be provided by no later than 5:00 p.m. on December 11, 2009.

60 With all due respect for the views expressed by the Bondholders, the Court considers that, similarly to the ULC DIP Facility, the proposed distribution should be authorized.

61 To begin with, the position of the Bondholders is, under the circumstances, untenable. While they support the CDN$230 million ULC DIP Facility, they still contest the CDN$200 million proposed distribution that is directly linked to the latter.

62 The Court does not have the luxury of picking and choosing here. What is being submitted for approval is a global solution. The compromise reached must be considered as a whole. The access to additional liquidity is possible because of the corresponding distribution to the SSNs. The amounts available for both the ULC DIP Facility and the proposed distribution come from the same MPCo sale transaction.

63 The compromise negotiated in this respect, albeit imperfect, remains the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners. It follows a process and negotiations where the views and interests of most interested parties have been canvassed and considered.

64 To get such diverse interest groups as the Abitibi Petitioners, the SSNs, the Term Lenders, BMO and IQ, and ULC and Alcoa to agree on an acceptable outcome is certainly not an easy task to achieve. Without surprise, it comes with certain concessions.

65 It would be very dangerous, if not reckless, for the Court to put in jeopardy the ULC DIP Facility agreed upon by most stakeholders on the basis that, perhaps, a better arrangement could eventually be reached in terms of distribution of proceeds that, on their face, appear to belong to the SSNs.

66 The Court is satisfied that both aspects of the ULC DIP Motion are closely connected and should be approved together. To conclude otherwise would potentially put everything at risk, at a time where stability is most required.

67 Secondly, it remains that ACCC's interest in MPCo is subject to the SSNs' security. As such, all proceeds of the sale less adjustments, holdbacks and reserves should normally be paid to the SSNs. Despite this, provided they receive the CDN$200 million proposed distribution, the SSNs have consented to the sale proceeds being used by the Abitibi Petitioners to pay the existing ACI DIP Facility and to the ULC Reserve being used up to CDN$230M for the ULC DIP Facility funding.

68 It is thus fair to say that the SSNs are not depriving the Abitibi Petitioners of liquidity; they are funding part of the restructuring with their collateral and, in the end, enhancing this liquidity.

69 The net proceeds of the MPCo transaction after payment of the ACI DIP Facility are expected to be CDN$173.9 million. Accordingly, out of a CDN$200 million distribution to the SSNs, only CDN$26.1 million could technically be said to come from the ULC DIP Facility. Contrary to what the Bondholders alluded to, if minor aspects of the claims of the SSNs are disputed by the Abitibi Petitioners, they do not concern the CDN$200 million at issue.

70 Thirdly, the ULC DIP Facility bears no interest and is not subject to drawdown fees, while a distribution of CDN$200 million to the SSNs will create at the same time interest savings of approximately CDN$27 million per year for the ACI Group. There is, as a result, a definite economic benefit to the contemplated distribution for the global restructuring process.

71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a *CCAA* reorganization. Nothing in the *CCAA* prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada [7].

72 While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present *CCAA* reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's approval has never been considered a breach of the stay.

73 In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN$200 million.

74 In *Windsor Machine & Stamping Ltd. (Re)*, [8] Morawetz J. dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

> 13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold Court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

75 Finally, even though the Monitor makes no recommendation in respect of the proposed distribution to the SSNs, this can hardly be viewed as an objection on its part. In the first place, this is not an issue upon which the Monitor is expected to opine. Besides, in its 19th report, the Monitor notes the following in that regard:

a) According to its Counsel, the SSNs security on the ACCC's 60% interest in MPCo is valid and enforceable;

b) The amounts owed to the SSNs far exceed the contemplated distribution while the SSNs' collateral is sufficient for the SSNs' claim to be most likely paid in full;

c) The proposed distribution entails an economy of CDN$27 million per year in interest savings; and

d) Even taking into consideration the CDN$200 million proposed distribution, the ULC DIP Facility provides the Abitibi Petitioners with the liquidity they require for most of the coming year.

76 All things considered, the Court disagrees with the Bondholders' assertion that the proposed distribution is against the goals and objectives of the *CCAA*. For some, it may only be a small step. However, it is a definite step in the right direction.

77 Securing the most needed liquidity at issue here and reducing substantially the extent of the liabilities towards a key secured creditor group no doubt enhances the chances of a successful restructuring while bringing stability to the on-going business.

78 This benefits a large community of interests that goes beyond the sole SSNs.

79 From that standpoint, the Court is satisfied that the restructuring is moving forward properly, with reasonable diligence and in accordance with the *CCAA* ultimate goals.

80 Abitibi Petitioners' firm intention, reiterated at the hearing, to shortly provide their stakeholders with a business plan and a restructuring and recapitalization term sheet confirms it as well.

3) The Orders Sought

81 In closing, the precise wording of the orders sought has been negotiated at length between Counsel. It is the result of a difficult compromise reached between many different parties, each trying to protect distinct interests.

82 Nonetheless, despite their best efforts, this wording certainly appears quite convoluted in some cases, to say the least. The proposed amendment to the subrogation provision of the Second Amended Initial Order is a vivid example. Still, the mechanism agreed upon, however complicated it might appear to some, remains acceptable to all affected creditors.

83 The delicate consensus reached in this respect must not be discarded lightly. In view of the role of the Court in *CCAA* proceedings, that is, one of judicial oversight, the orders sought will thus be granted as amended, save for limited exceptions. To avoid potential misunderstandings, the Court felt necessary to slightly correct the specific wording of some conclusions. The orders granted reflect this.

84 Turning to the conclusions proposed by the Bondholders at paragraphs 8 to 11 of the draft amended order (now paragraphs 6 to 9 of this Order), the Court considers them useful and appropriate. They assist somehow in bringing into focus the need for this *CCAA* process to continue to move forward efficiently.

85 Minor adjustments to some of the wording are, however, required in order to give the Abitibi Petitioners some flexibility in terms of compliance with the ULC DIP documents and cash flow forecast.

86 For the expected upcoming filing by the Abitibi Petitioners of their business plan and restructuring and recapitalization term sheet, the Court concludes that simply giving act to their stated intention is sufficient at this stage.

The deadlines indicated correspond to the date agreed upon by the parties for the business plan and to the expected renewal date of the Initial Order for the restructuring and recapitalization term sheet.

FOR THESE REASONS, THE COURT:

ORDERS the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

ULC DIP Financing

1 *ORDERS* that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement(the "*ULC DIP Agreement*") among ACI, as borrower, and 3239432 Nova Scotia Company, an unlimited liability company ("*ULC*"), as lender (the "*ULC DIP Lender*"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as *Exhibit R-1* in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding *$230* million.

2 *ORDERS* that the credit facility provided pursuant to the ULC DIP Agreement (the "*ULC DIP*") will be subject to the following draw conditions:

a) a first draw of $130 million to be advanced at closing;

b) subsequent draws for a maximum total amount of $50 million in increments of up to $25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and

c) the balance of $50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

3 *ORDERS* the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "*Draft ULC DIP Agreement*") to the Monitor and to any party listed on the Service List which requests a copy of same (an "*Interested Party*") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

4 *ORDERS* that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

5 *ORDERS* that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "*ULC DIP Documents*"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees,

liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

6 *ORDERS* that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

7 *ORDERS* that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

8 *GIVES ACT* to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

9 *GIVES ACT* to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

10 *ORDERS* that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "*ULC DIP Expenses*") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

11 *ORDERS* that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

12 *ORDERS* that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

a) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and

b) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

13 *ORDERS* that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

14 *ORDERS* that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "*Notice Period*") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second AmendedInitial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 *CCQ* concurrently with the written enforcement notice of a default mentioned above.

15 *ORDERS* that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

16 *ORDERS* that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

17 *AMENDS* the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

> **ORDERS** further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of *$230* million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners (other than the property of Abitibi Consolidated (U.K.) Inc.) in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November16,2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16,2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately $40 million, being the aggregate of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor.

ACI DIP Agreement

18 *ORDERS* that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

19 *ORDERS* that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of $200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

20 *ORDERS* that, subject to completion of the ULC DIP (including the initial draw of $130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of $130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

21 *ORDERS* that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

> **Subrogation to ACI DIP Charge**
>
> [61.10] **ORDERS** that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP

Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank pari passu as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary.

[21.1] **DECLARES** that for the purposes of paragraphs 1, 5, 10, 12, 13, 17 and 18 of the present Order, the term "Abitibi Petitioners" shall not include Abitibi-Consolidated (U.K.) Inc. added to the schedule of Abitibi Petitioners by Order of this Court on November 10, 2009;

22 *ORDERS* the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

23 *WITHOUT COSTS.*

Schedule "A" — Abitibi Petitioners

1. *ABITIBI-CONSOLIDATED INC.*

2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*

3. *3224112 NOVA SCOTIA LIMITED*

4. *MARKETING DONOHUE INC.*

5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*

6. *3834328 CANADA INC.*

7. *6169678 CANADA INC.*

8. *4042140 CANADA INC.*

9. *DONOHUE RECYCLING INC.*

10. *1508756 ONTARIO INC.*

11. *3217925 NOVA SCOTIA COMPANY*

12. *LA TUQUE FOREST PRODUCTS INC.*

13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*

14. *SAGUENAY FOREST PRODUCTS INC.*

15. *TERRA NOVA EXPLORATIONS LTD.*

16. *THE JONQUIERE PULP COMPANY*

17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY*

18. *SCRAMBLE MINING LTD.*

19. *9150-3383 QUÉBEC INC.*

20. *ABITIBI-CONSOLIDATED (U.K.) INC.*

Schedule "B" — Bowater Petitioners

1. *BOWATER CANADIAN HOLDINGS INC.*

2. *BOWATER CANADA FINANCE CORPORATION*

3. *BOWATER CANADIAN LIMITED*

4. *3231378 NOVA SCOTIA COMPANY*

5. *ABITIBIBOWATER CANADA INC.*

6. *BOWATER CANADA TREASURY CORPORATION*

7. *BOWATER CANADIAN FOREST PRODUCTS INC.*

8. *BOWATER SHELBURNE CORPORATION*

9. *BOWATER LAHAVE CORPORATION*

10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*

11. *BOWATER TREATED WOOD INC.*

12. *CANEXEL HARDBOARD INC.*

13. *9068-9050 QUÉBEC INC.*

14. *ALLIANCE FOREST PRODUCTS (2001) INC.*

15. *BOWATER BELLEDUNE SAWMILL INC.*

16. *BOWATER MARITIMES INC.*

17. *BOWATER MITIS INC.*

18. *BOWATER GUÉRETTE INC.*

19. *BOWATER COUTURIER INC.*

Schedule "C" — 18.6 CCAA Petitioners

1. *ABITIBIBOWATER INC.*

2. *ABITIBIBOWATER US HOLDING 1 CORP.*

3. *BOWATER VENTURES INC.*

4. *BOWATER INCORPORATED*

5. *BOWATER NUWAY INC.*

6. *BOWATER NUWAY MID-STATES INC.*

7. *CATAWBA PROPERTY HOLDINGS LLC*

8. *BOWATER FINANCE COMPANY INC.*

9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*

10. *BOWATER AMERICA INC.*

11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

Footnotes

1 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

2 In this Judgment, all capitalized terms not otherwise defined have the meaning ascribed thereto in either: 1) the *Second Amended Initial Order* issued by the Court on May 6, 2009; 2) the *Motion for the Distribution by the Monitor of Certain Proceeds of the MPCo Sale Transaction to U.S. Bank National Association, Indenture and Collateral Trustee for the Senior Secured Noteholders* (the "*Distribution Motion*") of the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes (respectively, the "*Committee*" and "*Trustee*", collectively the "*SSNs*") dated October 6, 2009; or 3) the Abitibi Petitioners' *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* (the "*ULC DIP Motion*") dated November 9, 2009.

3 *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* dated November 9, 2009 (the "*ULC DIP Motion*").

4 See Monitor's 19th Report dated October 27, 2009.

5 See Monitor's 19th Report dated October 27, 2009.

6 See Monitor's 19th Report dated October 27, 2009.

7 See *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.); *Re Rol-Land Farms Limited* (October 5, 2009), Toronto 08-CL-7889 (Ont. Sup. Ct.); and *Re Pangeo Pharma Inc.*, (August 14, 2003), Montreal 500-11-021037-037 (Que. Sup. Ct.).

8 *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.).

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Tab 2

2010 QCCS 1742
Quebec Superior Court

AbitibiBowater, Re

2010 CarswellQue 4082, 2010 QCCS 1742, 190 A.C.W.S. (3d) 679, 71 C.B.R. (5th) 220, J.E. 2010-962, EYB 2010-173333

In the Matter of A Plan of Compromise or Arrangement of: AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and The other Petitioners listed on Schedules "A", "B" and "C" (Debtors) and Ernst & Young Inc. (Monitor) and The Land Registrar for the Land Registry Office for the Registration Division of Montmorency, The Land Registrar for the Land Registry Office for the Registration Division of Portneuf, The Land Registrar for the Restigouche County Land Registry Office, The Land Registrar for the Thunder Bay Land Registry Office and The Registrar of the Register of Personal and Movable Real Rights (mis en cause)

Clément Gascon, J.C.S.

Heard: April 26, 2010
Judgment: May 3, 2010
Docket: C.S. Montréal 500-11-036133-094

Counsel: Me Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud, for the Debtors
Me Avram Fishman for the Monitor
Me Robert E. Thornton for the Monitor
Me Serge F. Guérette for the Term Lenders
Me Nicolas Gagné for Ville de Beaupré
Me Éric Vallière for the Intervenor, American Iron & Metal LP
Me Marc Duchesne for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders
Me Frederick L. Myers for the Ad hoc Committee of Bondholders
Me Bertrand Giroux for the Intervenor, Recyclage Arctic Béluga Inc.

Subject: Insolvency; Civil Practice and Procedure

MOTION by corporation seeking Court's approval of sale.

***Clément Gascon, J.C.S*:**

REASONS FOR JUDGMENT AND VESTING ORDER IN RESPECT OF THE BEAUPRÉ, DALHOUSIE, DONNACONA AND FORT WILLIAM ASSETS (#513)

Introduction

1 This judgment deals with the approval of a sale of assets contemplated by the Petitioners in the context of their CCAA restructuring.

2 At issue are, on the one hand, the fairness of the sale process involved and the appropriateness of the Monitor's recommendation in that regard, and on the other hand, the legal standing of a disgruntled bidder to contest the approval sought.

The Motion at Issue

3 Through their Amended Motion for the Issuance of an Order Authorizing the Sale of Certain Assets of the Petitioners (Four Closed Mills)(the "*Motion*"), the Petitioners seek the approval of the sale of four closed mills to American Iron & Metal LP ("*AIM*") and the issuance of two Vesting Orders [1] in connection thereto.

4 The Purchase Agreement and the Land Swap Agreement contemplated in that regard, which were executed on April 6, 15 and 21, 2010, are filed in the record as Exhibits R-1, R-1A and R-2A.

5 In short, given the current state of the North American newsprint and forest products industry, the Petitioners have had to go through a process of idling and ultimately selling certain of their mills that they no longer require to satisfy market demand and that will not form part of their mill configuration after emergence from their current CCAA proceedings.

6 So far, the Petitioners, with the assistance of the Monitor, have in fact undertaken a number of similar sales processes with respect to closed mills, including:

> (a) the pulp and paper mill in Belgo, Quebec that was sold to Recyclage Arctic Beluga Inc. ("*Arctic Beluga*"), as approved and authorized by the Court on November 24, 2009;
>
> (b) the St-Raymond sawmill that was sold to 9213-3933 Quebec Inc., as approved and authorized by the Court on December 11, 2009; and
>
> (c) the Mackenzie Facility that was sold to 1508756 Ontario Inc., as approved and authorized by the Court on March 23, 2010.

7 The transaction at issue here includes pulp and paper mills located in Dalhousie, New Brunswick (the "*Dalhousie Mill*"), Donnacona, Quebec (the "*Donnacona Mill*"), Fort William, Ontario (the "*Fort William Mill*") and Beaupré, Quebec (the "*Beaupré Mill*") (collectively, the "*Closed Mills*").

8 The assets comprising the Closed Mills include the real property, buildings, machinery and equipment located at the four sites.

9 The Closed Mills are being sold on an "as is/where is" basis, in an effort to (i) reduce the Petitioners'ongoing carrying costs, which are estimated to be approximately CDN$12 million per year, and (ii) mitigate the Petitioners'potential exposure to environmental clean-up costs if the sites are demolished in the future, which are estimated at some CDN$10 million based on the Monitor's testimony at hearing.

10 The Petitioners marketed the Closed Mills as a bundled group to maximize their value, minimize the potential future environmental liability associated with the sites, and ensure the disposal of all four sites through their current US Chapter 11 and CCAA proceedings.

11 According to the Petitioners, the proposed sale is the product of good faith, arm's length negotiations between them and AIM.

12 They believe that the marketing and sale process that was followed was fair and reasonable. While they did receive other offers that were, on their faces, higher in amount than AIM's offer, they consider that none of the other

bidders satisfactorily demonstrated an ability to consummate a sale within the time frame and on financial terms that were acceptable to them.

13 Accordingly, the Petitioners submit that the contemplated sale of the Closed Mills to AIM is in the best interest of and will generally benefit all of their stakeholders, in that:

> a) the sale forms part of Petitioners' continuing objective and strategy to elaborate a restructuring plan, which will allow them (or any successor) to be profitable over time. This includes the following previously announced measures of (a) disposing of non-strategic assets, (b) reducing indebtedness, and (c) reducing financial costs;
>
> b) the Closed Mills are not required to continue the operations of the Petitioners, nor are they vital to successfully restructure their business;
>
> c) each of the Closed Mills faces potential environmental liabilities and other clean-up costs. The Petitioners also incur monthly expenses to maintain the sites in their closed state, including tax, utility, insurance and security costs;
>
> d) the proposed transaction is on attractive terms in the current market and will provide the Petitioners with additional liquidity. In addition to realizing cash proceeds from the Closed Mills and additional proceeds from the sales of the paper machines, the projected sale will also relieve the Petitioners of potentially significant environmental liabilities; and
>
> e) the Petitioners' creditors will not suffer any prejudice as a result of the proposed sale and the issuance of the proposed vesting orders since the proceeds will be remitted to the Monitor in trust and shall stand in the place and stead of the Purchased Assets (as defined in the contemplated Purchase Agreement). As a result, all liens, charges and encumbrances on the Purchased Assets will attach to such proceeds, with the same priority as they had immediately prior to the sale.

14 In its 38th Report dated April 24, 2010, the Monitor supports the Petitioners' position and recommends that the contemplated sale to AIM be approved.

15 Some key creditors, notably the Ad Hoc Committee of the Bondholders, also support the Motion. Others (for instance, the Term Lenders and the Senior Secured Noteholders) indicate that they simply submit to the Court's decision.

16 None of the numerous Petitioners' creditors opposes the contemplated sale. None of the parties that may be affected by the wording of the Vesting Orders sought either.

17 However, Arctic Beluga, one of the unsuccessful bidders in the marketing and sale process of the Closed Mills, intervenes to the Motion and objects to its conclusions.

18 It claims that its penultimate bid [2] for the Closed Mills was a proposal for CDN$22.1 million in cash, an amount more than CDN$8.3 million greater than the amount proposed by the Petitioners in the Motion.

19 According to Arctic Beluga, the AIM bid that forms the basis of the contemplated sale is for CDN$8.8 million in cash, plus 40% of the proceeds from any sale of the machinery (of which only CDN$5 million is guaranteed within 90 days of closing), and is significantly lower than its own offer of over CDN$22 million in cash.

20 Arctic Beluga argues that it lost the ability to purchase the Closed Mills due to unfairness in the bidding process. It considers that the Court has the discretion to withhold approval of the sale where there has been unfairness in the sale process or where there are substantially higher offers available.

21 It thus requests the Court to 1) dismiss the Motion so that the Petitioners may consider its proposal for the Closed Mills, 2) refuse to authorize the Petitioners to enter into the proposed Purchase Agreement and Land Swap Agreement, and 3) declare that its proposal is the highest and best offer for the Closed Mills.

22 The Petitioners reply that Arctic Beluga has no standing to challenge the Court's approval of the sale of the Closed Mills contemplated in these proceedings.

23 Subsidiarily, in the event that Arctic Beluga is entitled to participate in the Motion, they consider that any inquiry into the integrity and fairness of the bidding process reveals that the contemplated sale to AIM is fair, reasonable and to the advantage of the Petitioners and the other interested parties, namely the Petitioners' creditors.

24 To complete this summary of the relevant context, it is worth adding that at the hearing, in view of Arctic Beluga's Intervention, AIM also intervened to support the Petitioners' Motion.

25 It is worth mentioning as well that even though he did not contest the Motion *per se*, the Ville de Beaupré's Counsel voiced his client's concerns with respect to the amount of unpaid taxes [3] currently outstanding in regard to the Beaupré Mill located on its territory.

26 Apparently, part of these outstanding taxes has been paid very recently, but there is a potential dispute remaining on the balance owed. That issue is not, however, in front of the Court at the moment.

Analysis and Discussion

27 In the Court's opinion, the Petitioners' Motion is well founded and the Vesting Orders sought should be granted.

28 The sale process followed here was beyond reproach. Nothing justifies refusing the Petitioners' request and setting aside the corresponding recommendation of the Monitor. None of the complaints raised by Arctic Beluga appears justified or legitimate under the circumstances.

29 On the issue of standing, even though the Court, to expedite the hearing, did not prevent Arctic Beluga from participating in the debate, it agrees with Petitioners that, in the end, its legal standing appeared to be most probably inexistent in this case.

30 This notwithstanding, it remains that in determining whether or not to approve the sale, the Court had to be satisfied that the applicable criteria were indeed met. Because of that, the complaints raised would have seemingly been looked at, no matter what. As part of its role as officer of the Court, the Monitor had, in fact, raised and addressed them in its 38th Report in any event.

31 The Court's brief reasons follow.

The Sale Approval

32 In a prior decision rendered in the context of this restructuring [4], the Court has indicated that, in its view, it had jurisdiction to approve a sale of assets in the course of CCAA proceedings, notably when such a sale was in the best interest of the stakeholders generally [5].

33 Here, there are sufficient and definite justifications for the sale of the Closed Mills. The Petitioners no longer use them. Their annual holding costs are important. To insure that a purchaser takes over the environmental liabilities relating thereto and to improve the Petitioners' liquidity are, no doubt, valid objectives.

34 In that prior decision, the Court noted as well that in determining whether or not to authorize such a sale of assets, it should consider the following key factors:

- 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.

35 These principles were established by the Ontario Court of Appeal in the *Royal Bank v. Soundair Corp.* [6] decision. They are applicable in a CCAA sale situation [7].

36 The *Soundair* criteria focus first and foremost on the "integrity of the process", which is integral to the administration of statutes like the CCAA. From that standpoint, the Court must be wary of reopening a bidding process, particularly where doing so could doom the transaction that has been achieved [8].

37 Here, the Monitor's 38th Report comprehensively outlines the phases of the marketing and sale process that led to the outcome now challenged by Arctic Beluga. This process is detailed at length at paragraphs 26 to 67 of the Report.

38 The Court agrees with the Monitor's view that, in trying to achieve the best possible result within the best possible time frame, the Petitioners, with the guidance and assistance of the Monitor, have conducted a fair, reasonable and thorough sale process that proved to be transparent and efficient.

39 Suffice it to note in that regard that over sixty potential purchasers were contacted during the course of the initial Phase I of the sale process and provided with bid package information, that the initial response was limited to six parties who submitted bids, three of which were unacceptable to the Petitioners, and that the subsequent Phase II involved the three finalists of Phase I.

40 By sending the bid package to over sixty potential purchasers, there can be no doubt that the Petitioners, with the assistance of the Monitor, displayed their best efforts to obtain the best price for the Closed Mills.

41 Moreover, Arctic Beluga willingly and actively participated in these phases of the bidding process. The fact that it now seeks to nevertheless challenge this process as being unfair is rather awkward. Its active participation certainly does not assist its position on the contestation of the sale approval [9].

42 In point of fact, Arctic Beluga's assertion of alleged unfairness in the sale process is simply not supported by any of the evidence adduced.

43 Arctic Beluga was not treated unfairly. The Petitioners and the Monitor diligently considered the unsolicited revised bids it tendered, even after the acceptance of AIM's offer. It was allowed every possible chance to improve its offer by submitting a proof of funds. However, it failed to do enough to convince the Petitioners and the Monitor that its bid was, in the end, the best one available.

44 Turning to the analysis of the bids received, it is again explained in details in the Monitor's 38th Report, at paragraphs 45 to 67.

45 In short, the Petitioners, with the Monitor's support, selected AIM's offer for the following reasons:

(a) the purchase price was fair and reasonable and subjected to a thorough canvassing of the market;

(b) the offer included a sharing formula, based on future gross sale proceeds from the sale of the paper machines located at the Closed Mills, that provided for potential sharing of the proceeds from the sale of any paper machines;

(c) AIM confirmed that no further due diligence was required;

(d) AIM had provided sufficient evidence of its ability to assume the environmental liabilities associated with the Closed Mills; and

(e) AIM did not have any financing conditions in its offer and had provided satisfactory evidence of its financial ability to close the sale.

46 Both the Petitioners and the Monitor considered that the proposed transaction reflected the current fair market value of the assets and that it satisfied the Petitioners'objective of identifying a purchaser for the Closed Mills that was capable of mitigating the potential environmental liabilities and closing in a timely manner, consistent with Petitioners'on-going reorganization plans.

47 The Petitioners were close to completing the sale with AIM when Arctic Beluga submitted its latest revised bid that ended up being turned down.

48 The Petitioners, again with the support of the Monitor, were of the view that it would not have been appropriate for them to risk having AIM rescind its offer, especially given that Arctic Beluga had still not provided satisfactory evidence of its financial ability to close the transaction.

49 The Court considers that their decision in this respect was reasonable and defendable. The relevant factors were weighed in an impartial and independent manner.

50 Neither the Petitioners nor the Monitor ignored or disregarded the Arctic Beluga bids. Rather, they thoroughly considered them, up to the very last revision thereof, albeit received quite late in the whole process.

51 They asked for clarifications, sometimes proper support, finally sufficient commitments.

52 In the end, through an overall assessment of the bids received, the Petitioners and the Monitor exercised their business and commercial judgment to retain the AIM offer as being the best one.

53 No evidence suggests that in doing so, the Petitioners or the Monitor acted in bad faith, with an ulterior motive or with a view to unduly favor AIM. Contrary to what Arctic Beluga suggested, there was no "fait accompli" here that would have benefited AIM.

54 The Petitioners and the Monitor rather expressed legitimate concerns over Arctic Beluga ultimate bid. These concerns focused upon the latter's commitments towards the environmental exposures issues and upon the lack of satisfactory answers in regard to the funding of their proposal.

55 In a situation where, according to the evidence, the environmental exposures could potentially be in the range of some CDN$10 million, the Court can hardly dispute these concerns as being anything but legitimate.

56 From that perspective, the concerns expressed by the Petitioners and the Monitor over the clauses of Arctic Beluga penultimate bid concerning the exclusion of liability for hazardous material were, arguably, reasonable concerns [10]. Mostly in the absence of similar exclusion in the offer of AIM.

57 Similarly, their conclusion that the answers [11] provided by that bidder for the funding requirement of their proposal were not satisfactory when compared to the ones given by AIM [12] cannot be set aside by the Court as being improper.

58 In that regard, the solicitation documentation [13] sent to Arctic Beluga and the other bidders clearly stated that selected bidders would have to provide evidence that they had secured adequate and irrevocable financing to complete the transaction.

59 A reading of clauses 4 and 5 of the "funding commitment" initially provided by Arctic Beluga [14] did raise some question as to its adequate and irrevocable nature. It did not satisfy the Petitioners that Arctic Beluga had the ability to pay the proposed purchase price and did not adequately demonstrate that it had the funds to fulfill, satisfy and fund future environmental obligations.

60 The subsequent letter received from Arctic Beluga's bankers [15] did appear to be somewhat incomplete in that regard as well.

61 Arctic Beluga's offer, although highest in price, was consequently never backed with a satisfactory proof of funding despite repeated requests by the Petitioners and the Monitor.

62 In the situation at hand, the Phase I sale process was terminated as a result of the decision to remove the Mackenzie Mill from the process. However, prior to that, the successful bidder had failed to provide satisfactory evidence that it would be able to finance the transaction despite several requests in that regard.

63 If anything, this underscored the importance of requesting and appraising evidence of any bidder's financial wherewithal to close the sale.

64 The applicable duty during a sale process such as this one is not to obtain the best possible price at any cost, but to do everything reasonably possible with a view to obtaining the best price.

65 The dollar amount of Arctic Beluga's offer is irrelevant unless it can be used to demonstrate that the Petitioners, with the assistance of the Monitor, acted improvidently in accepting AIM's offer over theirs [16].

66 Nothing in the evidence suggests that this could have been the case here.

67 In that regard, Arctic Beluga's references to the findings of the courts in *Beauty Counsellors of Canada Ltd., Re* [17] and *Selkirk, Re* [18] hardly support its argument.

68 In these decisions, the courts first emphasized that it was not desirable for a purchaser to wait to the last minute, even up to the court approval stage, to submit its best offer. Yet, the courts then added that they could still consider such a late offer if, for instance, a substantially higher offer turned up at the approval stage. In support of that view, the courts explained that in doing so, the evidence could very well show that the trustee did not properly carry out its duty to obtain the best price for the estate.

69 This reasoning has clearly no application in this matter. As stated, the process followed was appropriate and beyond reproach. The bids received were reviewed and analyzed. Arctic Beluga's bid was rejected for reasonable and defendable justifications.

70 That being so, it is not for this Court to second-guess the commercial and business judgment properly exercised by the Petitioners and the Monitor.

71 A court will not lightly interfere with the exercise of this commercial and business judgment in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient. This is certainly not a case where it should.

72 In prior decisions rendered in similar context [19], courts in this province have emphasized that they should intervene only where there is clear evidence that the Monitor failed to act properly. A subsequent, albeit higher, bid is not necessarily a valid enough reason to set aside a sale process short of any evidence of unfairness.

73 In the circumstances, the Court agrees that the Petitioners and the Monitor were "entitled to prefer a bird in the hand to two in the bush" and were reasonable in preferring a lower-priced unconditional offer over a higher-priced offer that was subject to ambiguous caveats and unsatisfactory funding commitments.

74 AIM has transferred an amount of $880,000 to the Petitioners' Counsel as a deposit required under the Purchase Agreement. It has the full financial capacity to consummate the sale within the time period provided for [20].

75 As a result, the Court finds that the Petitioners are well founded in proceeding with the sale to AIM on the basis that the offer submitted by the latter was the most advantageous and presented the fewest closing risks for the Petitioners and their creditors.

76 All in all, the Court agrees with the following summary of the situation found in the Monitor's 38th Report, at paragraph 79:

> (a) the Petitioners have used their best efforts to obtain the best purchase price possible;
>
> (b) the Petitioners have acted in a fair and reasonable manner throughout the sale process and with respect to all potential purchasers, including Arctic Beluga;
>
> (c) the Petitioners have considered the interests of the stakeholders in the CCAA proceedings;
>
> (d) the sale process with respect to the Closed Mills was thorough, extensive, fair and reasonable; and
>
> (e) Arctic Beluga had ample opportunity to present its highest and best offer for the Closed Mills, including ample opportunity to address the issues of closing risk and the ability to finance the transaction and any future environmental liabilities, and they have not done so in a satisfactory manner.

77 The contemplated sale of the Closed Mills to AIM will therefore be approved.

The Standing Issue

78 In view of the Court's finding on the sale approval, the second issue pertaining to the lack of standing of Arctic Beluga is, in the end, purely theoretical.

79 Be it as a result of Arctic Beluga's Intervention or because of the Monitor's 38th Report, it remains that the Court had, in any event, to be satisfied that the criteria applicable for the approval of the sale were met. In doing so, proper consideration of the complaints raised was necessary, no matter what.

80 Even if this standing issue does not consequently need to be decided to render judgment on the Motion, some remarks are, however, still called for in that regard.

81 Interestingly, the Court notes that in the few reported decisions [21] of this province's courts dealing with the contestation of sale approval motions, the standing issue of the disgruntled bidder has apparently not been raised or analyzed.

82 In comparison, in a leading case on the subject [22], the Ontario Court of Appeal has ruled, a decade ago, that a bitter bidder simply does not have a right that is finally disposed of by an order approving a sale of a debtor's assets. As such, it has no legal interest in a sale approval motion.

83 For the Ontario Court of Appeal, the purpose of such a motion is to consider the best interests of the parties who have a direct interest in the proceeds of sale, that is, the creditors. An unsuccessful bidder's interest is merely commercial:

> 24 [...] If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.
>
> 25 There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg*, supra.
>
> 26 Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

84 The Ontario Court of Appeal explained as follows the policy reasons underpinning its approach to the lack of standing of an unsuccessful prospective purchaser [23]:

> 30 There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court-approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands of a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

85 Along with what appears to be a strong line of cases [24], Morawetz J. recently confirmed the validity of the *Skyepharma* precedent in the context of an opposition to a sale approval filed by a disgruntled bidder in both Canadian proceedings under the CCAA and in US proceedings under Chapter 11 [25].

86 Here, Arctic Beluga stood alone in contesting the Motion. None of the creditors supported its contestation. Its only interest was to close the deal itself, arguably for the interesting profits it conceded it would reap in the very good scrap metal market that exists presently.

87 Arctic Beluga's contestation did, in the end, delay the sale approval and no doubt brought a level of uncertainty in a process where the interested parties had a definite interest in finalizing the deal without further hurdles.

88 From that perspective, Arctic Beluga's contestation proved to be, at the very least, a good example of the "à propos" of the policy reasons that seem to support the strong line of cases cited before that question the standing of bitter bidder in these debates.

For these Reasons, The Court:

1 **AUTHORIZES** Abitibi-Consolidated Company of Canada ("*ACCC*"), Bowater Maritimes Inc. ("*BMI*") and Bowater Canadian Forest Products Inc. ("*BCFPI*" and together with ACCC and BMI, the "*Vendors*") to enter into, and Abitibi-Consolidated Inc. ("*ACI*") to intervene in, the agreement entitled *Purchase and Sale Agreement* (as amended, the "*Purchase Agreement*"), by and between ACCC, BMI and BCFPI, as Vendors, American Iron & Metal LP (the

"*Purchaser*") through its general partner American Iron & Metal GP Inc., as Purchaser, American Iron & Metal Company Inc., as Guarantor, and to which ACI intervened, copy of which was filed as Exhibits R-1 and R-1(a) to the Motion, and into all the transactions contemplated therein (the "*Sale Transactions*") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor;

2 **ORDERS** and **DECLARES** that this Order shall constitute the only authorization required by the Vendors to proceed with the Sale Transactions and that no shareholder or regulatory approval shall be required in connection therewith, save and except for the satisfaction of the Land Swap Transactions and the obtaining of the U.S. Court Order (as said terms are defined in the Purchase Agreement);

3 **ORDERS** and **DECLARES** that upon the filing with this Court's registry of a Monitor's certificate substantially in the form appended as *Schedule* "*D*" hereto, (the "*First Closing Monitor's Certificate*"), all right, title and interest in and to the Beaupré Assets, Donnacona Assets and Dalhousie Assets (each as defined below and collectively, the "*First Closing Assets*"), shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims, liabilities, obligations, interests, prior claims, hypothecs, security interests (whether contractual, statutory or otherwise), liens, assignments, judgments, executions, writs of seizure and sale, options, adverse claims, levies, charges, liabilities (direct, indirect, absolute or contingent), pledges, executions, rights of first refusal or other pre-emptive rights in favour of third parties, mortgages, hypothecs, trusts or deemed trusts (whether contractual, statutory or otherwise), restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise (collectively, the "*First Closing Assets Encumbrances*"), including without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order issued on April 17, 2009 by Justice Clément Gascon, J.S.C., as amended, and/or any other CCAA order; and (ii) all charges, security interests or charges evidenced by registration, publication or filing pursuant to the *Civil Code of Québec*, the Ontario *Personal Property Security Act*, the New Brunswick *Personal Property Security Act* or any other applicable legislation providing for a security interest in personal or movable property, excluding however, the permitted encumbrances, easements and restrictive covenants listed on *Schedule* "*E*" hereto (the "*Permitted First Closing Assets Encumbrances*") and, for greater certainty, *ORDERS* that all of the First Closing Assets Encumbrances affecting or relating to the First Closing Assets be expunged and discharged as against the First Closing Assets, in each case effective as of the applicable time and date set out in the Purchase Agreement;

4 **ORDERS** and **DECLARES** that upon the filing with this Court's registry of a Monitor's certificate substantially in the form appended as *Schedule* "*F*" hereto, (the "*Second Closing Monitor's Certificate*"), all right, title and interest in and to the Fort William Assets (as defined below), shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims, liabilities, obligations, interests, prior claims, hypothecs, security interests (whether contractual, statutory or otherwise), liens, assignments, judgments, executions, writs of seizure and sale, options, adverse claims, levies, charges, liabilities (direct, indirect, absolute or contingent), pledges, executions, rights of first refusal or other pre-emptive rights in favour of third parties, mortgages, hypothecs, trusts or deemed trusts (whether contractual, statutory or otherwise), restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise (collectively, the "*Fort William Assets Encumbrances*"), including without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order issued on April 17, 2009 by Justice Clément Gascon, J.S.C., as amended, and/or any other CCAA order; and (ii) all charges, security interests or charges evidenced by registration, publication or filing pursuant to the Ontario *Personal Property Security Act* or any other applicable legislation providing for a security interest in personal or movable property, excluding however, the permitted encumbrances, notification agreements, easements and restrictive covenants generally described in *Schedule* "*G*" (the "*Permitted Fort William Assets Encumbrances*") upon their registration on title. This Order shall not be registered on title to the Fort William Assets until all of such generally described Permitted Fort William Assets Encumbrances are registered on title, at which time the Petitioners shall be at liberty to obtain, without notice, an Order of this Court amending the within Order to incorporate herein the registration particulars of such Permitted Fort William Assets Encumbrances in Schedule "G";

5 **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Montmorency, upon presentation of the Monitor's First Closing Certificate, in the form appended as Schedule "D", and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser as the absolute owner in regards to the First Closing Purchased Assets located at Beaupré, in the Province of Quebec, corresponding to an immovable property known and designated as being composed of lots 3 681 089, 3 681 454, 3 681 523, 3 681 449, 3 682 466, 3 681 122, 3 681 097, 3 681 114, 3 681 205, 3 682 294, 3 681 022 and 3 681 556 of the Cadastre of Quebec, Registration Division of Montmorency, with all buildings thereon erected bearing civic number 1 du Moulin Street, Beaupré, Québec, Canada, G0A 1E0 (the "*Beaupré Assets*"); and (ii) proceed with the cancellation of any and all First Closing Assets Encumbrances on the Beaupré Assets, including, without limitation, the following registrations published at the said Land Registry:

• Hypothec dated February 17, 2000 registered under number 140 085 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency (legal construction);

• Hypothec dated April 1, 2008 registered under number 15 079 215 and assigned on January 21, 2010 under number 16 882 450 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

• Hypothec dated August 18, 2008 registered under number 15 504 248 in the index of immovables with respect to lot 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

• Hypothec dated October 30, 2008 registered under number 15 683 288 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency (legal construction);

• Hypothec dated April 20, 2009 registered under number 16 123 864 in the index of immovables with respect to lot 3 681 454 (legal construction) and Prior notice for sale by judicial authority dated July 23, 2009 registered under number 16 400 646 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency; and;

• Hypothec dated May 8, 2009 registered under number 16 145 374 and subrogated on January 1, 2010 under number 16 851 224 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

• Hypothec dated May 8, 2009 registered under number 16 145 375 and subrogated on January 1, 2010 under number 16 851 224 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency; and

• Hypothec dated December 9, 2009 registered under number 16 789 817 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

6 **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Portneuf, upon presentation of the Monitor's First Closing Certificate, in the form appended as Schedule "D", and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser as the absolute owner in regards to the First Closing Purchased Assets located at Donnacona, in the Province of Québec, corresponding to an immovable property known and designated as being composed of lots 3 507 098, 3 507 099, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf, with all buildings thereon erected bearing civic number 1 Notre-Dame Street, Donnacona, Québec, Canada, G0A 1T0 (the "*Donnacona Assets*"); and (ii) proceed with the cancellation of any and all First Closing Assets Encumbrances on the Donnacona Assets, including, without limitation, the following registrations published at the said Land Registry:

• Hypothec dated March 9, 2009 registered under number 16 000 177 with respect to lot 3 507 098 (legal construction) and Notice for sale by judicial authority dated September 24, 2009 registered under number 16 573 711 with respect to lots 3 507 098, 3 507 099, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf;

• Hypothec dated April 30, 2009 registered under number 16 122 878 and assigned on May 22, 2009 under number 16 184 386 with respect to lots 3 507 098, 3 507 099, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf;

• Hypothec dated March 18, 1997 registered under number 482 357 modified on August 30, 1999 under registration number 497 828 with respect to lots 3 507 098, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf; and

• Hypothec dated November 24, 1998 registered under number 493 417 and modified on August 30, 1999 under registration number 497 828 with respect to lots 3 507 098, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf;

7 **ORDERS** the Quebec Personal and Movable Real Rights Registrar, upon presentation of the required form with a true copy of this Vesting Order and the First Closing Monitor's Certificate, to reduce the scope of the hypothecs registered under numbers: 06-0308066-0001, 08-0674019-0001, 09-0216695-0002, 09-0481801-0001 and 09-0236637-0016[26] in connection with the Donnacona Assets and 08-0163796-0002, 08-0163791-0002, 08-0695718-0002, 09-0481801-0002, 09-0256803-0016[27], 09-0256803-0002[28] and 09-0762559-0002 in connection with the Beaupré Assets and to cancel, release and discharge all of the First Closing Assets Encumbrances in order to allow the transfer to the Purchaser of the Beaupré Assets and the Donnacona Assets, as described in the Purchase Agreement, free and clear of any and all encumbrances created by those hypothecs;

8 **ORDERS** that upon registration in the Land Registry Office for the Registry Division of Restigouche County of an Application for Vesting Order in the form prescribed by the *Registry Act* (New Brunswick) duly executed by the Monitor, the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in *Schedule* "*H*" hereto (the "*Dalhousie Assets*") in fee simple, and is hereby directed to delete and expunge from title to the Dalhousie Assets any and all First Closing Assets Encumbrances on the Dalhousie Assets;

9 **ORDERS** that upon the filing of the First Closing Monitor's Certificate with this Court's registry, the Vendors shall be authorized to take all such steps as may be necessary to effect the discharge of all liens, charges and encumbrances registered against the Dalhousie Assets, including filing such financing change statements in the New Brunswick Personal Property Registry (the "*NBPPR*") as may be necessary, from any registration filed against the Vendors in the NBPPR, provided that the Vendors shall not be authorized to effect any discharge that would have the effect of releasing any collateral other than the Dalhousie Assets, and the Vendors shall be authorized to take any further steps by way of further application to this Court;

10 **ORDERS** that upon registration in the Land Registry Office:

(a) for the Land Titles Division of Thunder Bay of an Application for Vesting Order in the form prescribed by the *Land Registration Reform Act* (Ontario), (and including a law statement confirming the filing of the Second Closing Monitor's Certificate, as set out in section 4 above, has been made) the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in *Schedule* "*I*", *Section 1* (the "*Fort William Land Titles Assets*") hereto in fee simple, and is hereby directed to delete and expunge from title to the Fort William Land Titles Assets all of the Fort William Assets Encumbrances, which for the sake of clarity do not include the Permitted Fort William Land Titles Assets Encumbrances listed on Schedule G, Section 1, hereto;

(b) for the Registry Division of Thunder Bay of a Vesting Order in the form prescribed by the *Land Registration Reform Act* (Ontario), (and including a law statement confirming the filing of the Second Closing Monitor's Certificate, as set out in section 4 above, has been made) the Land Registrar is hereby directed to record such Vesting Order in respect of the subject real property identified in *Schedule* "*I*", *Section 2* (the "*Fort William Registry Assets*");

11 **ORDERS** that upon the filing of the Second Closing Monitor's Certificate with this Court's registry, the Vendors shall be authorized to take all such steps as may be necessary to effect the discharge of all liens, charges and encumbrances registered against the Fort William Assets, including filing such financing change statements in the Ontario Personal Property Registry ("*OPPR*") as may be necessary, from any registration filed against the Vendors in the OPPR, provided that the Vendors shall not be authorized to effect any discharge that would have the effect of releasing any collateral other than the Fort William Assets, and the Vendors shall be authorized to take any further steps by way of further application to this Court;

12 **ORDERS** that the proceeds from the sale of the First Closing Assets and the Fort William Assets, net of the payment of all outstanding Taxes (as defined in the Purchase Agreement) and all transaction-related costs, including without limitation, attorney's fees (the "*Net Proceeds*") shall be remitted to Ernst & Young Inc., in its capacity as Monitor of the Petitioners, until the issuance of directions by this Court with respect to the allocation of said Net Proceeds;

13 **ORDERS** that for the purposes of determining the nature and priority of the First Closing Assets Encumbrances, the Net Proceeds from the sale of the First Closing Assets shall stand in the place and stead of the First Closing Assets, and that upon payment of the First Closing Purchase Price (as defined in the Purchase Agreement) by the Purchaser, all First Closing Assets Encumbrances except those listed in Schedule E hereto shall attach to the Net Proceeds with the same priority as they had with respect to the First Closing Assets immediately prior to the sale, as if the First Closing Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale;

14 **ORDERS** that for the purposes of determining the nature and priority of the Fort William Assets Encumbrances, the Net Proceeds from the sale of the Fort William Assets shall stand in the place and stead of the Fort William Assets, and that upon payment of the Second Closing Purchase Price (as defined in the Purchase Agreement) by the Purchaser, all Fort William Assets Encumbrances except those listed in Schedule G hereto shall attach to the Net Proceeds with the same priority as they had with respect to the Fort William Assets immediately prior to the sale, as if the Fort William Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale;

15 **ORDERS** that notwithstanding:

(i) the proceedings under the CCAA;

(ii) any petitions for a receiving order now or hereafter issued pursuant to the Bankruptcy and Insolvency Act ("*BIA*") and any order issued pursuant to any such petition; or

(iii) the provisions of any federal or provincial legislation;

the vesting of the First Closing Assets and the Fort William Assets contemplated in this Vesting Order, as well as the execution of the Purchase Agreement pursuant to this Vesting Order, are to be binding on any trustee in bankruptcy that may be appointed, and shall not be void or voidable nor deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, nor shall it give rise to an oppression or any other remedy;

16 **ORDERS AND DECLARES** that the Sale Transactions are exempt from the application of the *Bulk Sales Act* (Ontario);

17 **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order, including without limitation, the United States Bankruptcy Court for the District of Delaware, and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order;

18 **ORDERS** the provisional execution of this Vesting Order notwithstanding any appeal and without the necessity of furnishing any security;

19 **WITHOUT COSTS**.

Schedule "A" — Abitibi Petitioners

1. *ABITIBI-CONSOLIDATED INC.*

2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*

3. *3224112 NOVA SCOTIA LIMITED*

4. *MARKETING DONOHUE INC.*

5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*

6. *3834328 CANADA INC.*

7. *6169678 CANADA INC.*

8. *4042140 CANADA INC.*

9. *DONOHUE RECYCLING INC.*

10. *1508756 ONTARIO INC.*

11. *3217925 NOVA SCOTIA COMPANY*

12. *LA TUQUE FOREST PRODUCTS INC.*

13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*

14. *SAGUENAY FOREST PRODUCTS INC.*

15. *TERRA NOVA EXPLORATIONS LTD.*

16. *THE JONQUIERE PULP COMPANY*

17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY*

18. *SCRAMBLE MINING LTD.*

19. *9150-3383 QUÉBEC INC.*

20. *ABITIBI-CONSOLIDATED (U.K.) INC.*

Schedule "B" — Bowater Petitioners

1. *BOWATER CANADIAN HOLDINGS INC.*
2. *BOWATER CANADA FINANCE CORPORATION*
3. *BOWATER CANADIAN LIMITED*
4. *3231378 NOVA SCOTIA COMPANY*
5. *ABITIBIBOWATER CANADA INC.*
6. *BOWATER CANADA TREASURY CORPORATION*
7. *BOWATER CANADIAN FOREST PRODUCTS INC.*
8. *BOWATER SHELBURNE CORPORATION*
9. *BOWATER LAHAVE CORPORATION*
10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*
11. *BOWATER TREATED WOOD INC.*
12. *CANEXEL HARDBOARD INC.*
13. *9068-9050 QUÉBEC INC.*
14. *ALLIANCE FOREST PRODUCTS (2001) INC.*
15. *BOWATER BELLEDUNE SAWMILL INC.*
16. *BOWATER MARITIMES INC.*
17. *BOWATER MITIS INC.*
18. *BOWATER GUÉRETTE INC.*
19. *BOWATER COUTURIER INC.*

Schedule "C" — 18.6 CCAA Petitioners

1. *ABITIBIBOWATER INC.*
2. *ABITIBIBOWATER US HOLDING 1 CORP.*
3. *BOWATER VENTURES INC.*
4. *BOWATER INCORPORATED*
5. *BOWATER NUWAY INC.*
6. *BOWATER NUWAY MID-STATES INC.*

7. *CATAWBA PROPERTY HOLDINGS LLC*

8. *BOWATER FINANCE COMPANY INC.*

9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*

10. *BOWATER AMERICA INC.*

11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

Schedule "D" — First Closing Monitor's Certificate

CANADA

PROVINCE OF QUEBEC DISTRICT OF MONTRÉL

No.: 500-11-036133-094

SUPERIOR COURT

Commercial Division (Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC., AND ABITIBI-CONSOLIDATED INC., AND BOWATER CANADIAN HOLDINGS INC., AND THE OTHER PETITIONERS LISTED HEREIN, PETITIONERS AND ERNST & YOUNG INC., MONITOR

CERTIFICATE OF THE MONITOR

Recitals:

WHEREAS on April 17, 2009, the Superior Court of Quebec (the "*Court*") issued an order (as subsequently amended and restated, the "*Initial Order*") pursuant to the *Companies' Creditors Arrangement Act* (the "*CCAA*") in respect of (i) Abitibi-Consolidated Inc. ("*ACI*") and subsidiaries thereof (collectively, the "*Abitibi Petitioners*"), [29] (ii) Bowater Canadian Holdings Inc. and subsidiaries and affiliates thereof (collectively, the "*Bowater Petitioners*") [30] and (iii) certain partnerships [31] . Any undefined capitalized expression used herein has the meaning set forth in the Initial Order and in the Closed Mills Vesting Order (as defined below);

WHEREAS pursuant to the terms of the Initial Order, Ernst & Young Inc. (the "*Monitor*") was named monitor of, *inter alia*, the Abitibi Petitioners; and

WHEREAS on •, 2010, the Court issued an Order (the "*Closed Mills Vesting Order*") thereby, *inter alia*, authorizing and approving the execution by Abitibi-Consolidated Company of Canada ("*ACCC*"), Bowater Maritimes Inc. ("*BMI*") and Bowater Canadian Forest Products Inc. ("*BCFPI*" and together with ACCC and BMI, the "*Vendors*") of an agreement entitled *Purchase and Sale Agreement* (the "*Purchase Agreement*") by and between ACCC, BMI and BCFPI, as Vendors, American Iron & Metal LP (the "*Purchaser*") through its general partner American Iron & Metal GP Inc., as Purchaser, American Iron & Metal Company Inc., as Guarantor, and to which ACI intervened, copy of which was filed and into all the transactions contemplated therein (the "*Sale Transactions*") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.

WHEREAS the Purchase Agreement contemplates two distinct closing in order to complete the Sale Transactions, namely a First Closing in respect of the First Closing Purchased Assets and a Second Closing in respect of the Fort William Purchased Assets (all capitalized terms as defined in the Purchase Agreement).

The Monitor Certifies that it has been Advised by the Vendors and the Purchaser as to the Following:

(a) the Purchase Agreement has been executed and delivered;

(b) the portion of the First Closing Purchase Price payable upon the First Closing and all applicable taxes have been paid (all capitalized terms as defined in the Purchase Agreement);

(c) all conditions to the First Closing under the Purchase Agreement have been satisfied or waived by the parties thereto.

This Certificate was delivered by the Monitor at ____ *[TIME]* on _____ *[DATE]*.

Ernst & Young Inc. in its capacity as the monitor for the restructuration proceedings under the *CCAA* undertaken by AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and the other Petitioners listed herein, and not in its personal capacity.

Name: _____

Title: _____

Schedule "E" — Permitted First Closing Assets Encumbrances

1. Beaupré Mill

a. Servitudes dated February 10, 1954 registered under numbers 34 173, 34 174, 34 175, 34 176, 34 177, 34 178, 34 179, 34 180 in the index of immovables with respect to lot 3 681 454 in the Registration Division of Montmorency, Cadastre of Québec;

b. Servitude dated April 4, 1964 registered under number 45 815 in the index of immovables with respect to lot 3 681 454 in the Registration Division of Montmorency, Cadastre of Québec;

c. Servitudes dated December 17, 1980 registered under numbers 83 049, 83 050, 83 051, 83 052 and 83 053 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

d. Servitudes dated December 18, 1980 registered under number 83 095, 83 096 and 83 097 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

e. Servitude dated December 23, 1980 registered under number 83 121 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

f. Servitudes dated December 24, 1980 registered under numbers 83 140, 83 141, 83 142, 83 143, 83 144, 83 145, 83 146 and 83 147 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

g. Servitude dated December 30, 1980 registered under number 83 182 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

h. Servitudes dated January 7, 1981 registered under numbers 83 196, 83 197, 83 198 and 83 199 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

i. Servitudes dated January 9, 1981 registered under numbers 83 215 and 83 216 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

j. Servitude dated March 20, 1981 registered under number 83 751 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

k. Servitude dated June 22, 1981 registered under number 84 426 in the index of immovables with respect to lot 3 682 466 in the Registration Division of Montmorency, Cadastre of Québec;

l. Servitude dated November 13, 1981 registered under number 85 429 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

m. Servitude dated December 4, 1981 registered under number 85 555 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

n. Servitude dated December 9, 1981 registered under number 85 567 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

o. Servitude dated December 14, 1981 registered under number 85 602 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

p. Servitude dated December 16, 1981 registered under number 85 617 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

q. Servitude dated December 7, 1982 registered under number 87 882 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

r. Servitude dated December 20, 1982 registered under number 88 007 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

s. Servitude dated March 23, 1983 registered under number 91 937 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

t. Servitude dated September 9, 1983 registered under number 90 365 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

u. Servitude dated April 25, 1985 registered under number 91 154 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

v. Servitude dated July 7, 1986 registered under number 98 833 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

w. Servitude dated September 8, 1986 registered under number 99 187 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

x. Servitude dated December 23, 1997 registered under number 91 937 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

y. Servitude dated December 23, 1997 registered under number 134 993 in the index of immovables with respect to lots 3 681 089 and 3 681 097 in the Registration Division of Montmorency, Cadastre of Québec;

z. Servitude dated December 23, 1997 registered under number 134 994 in the index of immovables with respect to lot 3 681 097 in the Registration Division of Montmorency, Cadastre of Québec; and

aa. Servitude dated July 25, 2000 registered under number 141 246 in the index of immovables with respect to lots 3 681 089 and 3 681 097 in the Registration Division of Montmorency, Cadastre of Québec.

2. Dalhousie Mill

None

3. Donnacona Mill

a. Servitude dated November 12, 1920 registered under number 68 747 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

b. Servitude dated October 26, 1931 registered under number 80007 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

c. Servitude dated May 11, 1933 registered under number 87 789 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

d. Servitude dated April 10, 1946 registered under number 109891 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

e. Servitude dated October 6, 1951 registered under number 125685 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

f. Servitude dated February 16, 1961 registered under number 154 517 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

g. Servitude dated February 1, 1983 registered under number 272521 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

h. Servitude dated April 14, 1986 registered under number 293891 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

i. Servitudes dated March 25, 1987 registered under numbers 301930, 301931 and 302028 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

j. Servitude dated October 30, 1990 registered under number 333377 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

k. Servitude dated April 19, 1996 registered under number 476330 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

l. Servitude dated April 19, 1996 registered under number 476331 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec; and

m. Servitude dated May 20, 2003 registered under number 10 410 139 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec.

Schedule "F" — Second Closing Monitor's Certificate

CANADA

PROVINCE OF QUEBEC DISTRICT OF MONTRÉL

No.: 500-11-036133-094

SUPERIOR COURT

Commercial Division (Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC., AND ABITIBI-CONSOLIDATED INC., AND BOWATER CANADIAN HOLDINGS INC., AND THE OTHER PETITIONERS LISTED HEREIN, PETITIONERS AND ERNST & YOUNG INC., MONITOR

CERTIFICATE OF THE MONITOR

Recitals:

WHEREAS on April 17, 2009, the Superior Court of Quebec (the "*Court*") issued an order (as subsequently amended and restated, the "*Initial Order*") pursuant to the *Companies' Creditors Arrangement Act* (the "*CCAA*") in respect of (i) Abitibi-Consolidated Inc. ("*ACI*") and subsidiaries thereof (collectively, the "*Abitibi Petitioners*"), [32] (ii) Bowater Canadian Holdings Inc. and subsidiaries and affiliates thereof (collectively, the "*Bowater Petitioners*") [33] and (iii) certain partnerships [34]. Any undefined capitalized expression used herein has the meaning set forth in the Initial Order and in the Closed Mills Vesting Order (as defined below);

WHEREAS pursuant to the terms of the Initial Order, Ernst & Young Inc. (the "*Monitor*") was named monitor of, *inter alia*, the Abitibi Petitioners; and

WHEREAS on •, 2010, the Court issued an Order (the "*Closed Mills Vesting Order*") thereby, *inter alia*, authorizing and approving the execution by Abitibi-Consolidated Company of Canada ("*ACCC*"), Bowater Maritimes Inc. ("*BMI*") and Bowater Canadian Forest Products Inc. ("*BCFPI*" and together with ACCC and BMI, the "*Vendors*") of an agreement entitled *Purchase and Sale Agreement* (the "*Purchase Agreement*") by and between ACCC, BMI and BCFPI, as Vendors, American Iron & Metal LP (the "*Purchaser*") through its general partner American Iron & Metal GP Inc., as Purchaser, American Iron & Metal Company Inc., as Guarantor, and to which ACI intervened, copy of which was filed and into all the transactions contemplated therein (the "*Sale Transactions*") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.

WHEREAS the Purchase Agreement contemplates two distinct closing in order to complete the Sale Transactions, namely a First Closing in respect of the First Closing Purchased Assets and a Second Closing in respect of the Fort William Purchased Assets (all capitalized terms as defined in the Purchase Agreement).

The Monitor Certifies that it has been Advised by the Vendors and the Purchaser as to the Following:

(a) the Purchase Agreement has been executed and delivered;

(b) the portion of the Second Closing Purchase Price payable upon the Second Closing and all applicable taxes have been paid (all capitalized terms as defined in the Purchase Agreement);

(c) all conditions to the Second Closing under the Purchase Agreement have been satisfied or waived by the parties thereto.

This Certificate was delivered by the Monitor at ____ *[TIME]* on _____ *[DATE]*.

Ernst & Young Inc. in its capacity as the monitor for the restructuration proceedings under the *CCAA* undertaken by AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and the other Petitioners listed herein, and not in its personal capacity.

Name: _____

Title: _____

Schedule "G" — Permitted Fort William Assets Encumbrances

Section 1 Permitted Fort William Land Titles Assets Encumbrances

1. Notification Agreement in favour of the City of Thunder Bay, registered on PIN 62261-0314, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres; PT Water LT in front of Indian Reserve No. 52 (Grand Trunk Pacific Railway Company) PT 1, 2, 3, 55R-10429; Thunder Bay, save and except Parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 22, 23 and 24, 55R-13027

2. Water Easement in favour of the City of Thunder Bay registered on Part of PIN 62261-0314, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres; PT Water LT in front of Indian Reserve No. 52 (Grand Trunk Pacific Railway Company) PT 1, 2,3, 55R-10429; Thunder Bay, save and except Parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 22, 23 and 24, 55R-13027, being Part 10, 55R-13027

Section 2 Permitted Fort William Registry Assets Encumbrances

3. Notification Agreement in favour of the City of Thunder Bay, Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 11, 12, 13, 14, 15, 16 and 25, 55R-13027

4. Telephone Easement in favour of the City of Thunder Bay registered on Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Part 20, 55R-13027

5. Water Easement in favour of the City of Thunder Bay, registered on Part of PIN 62261-0533, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 12 and 15, 55R-13027

6. Easement in favour of Union Gas, registered on Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 20 and 25, 55R-13027

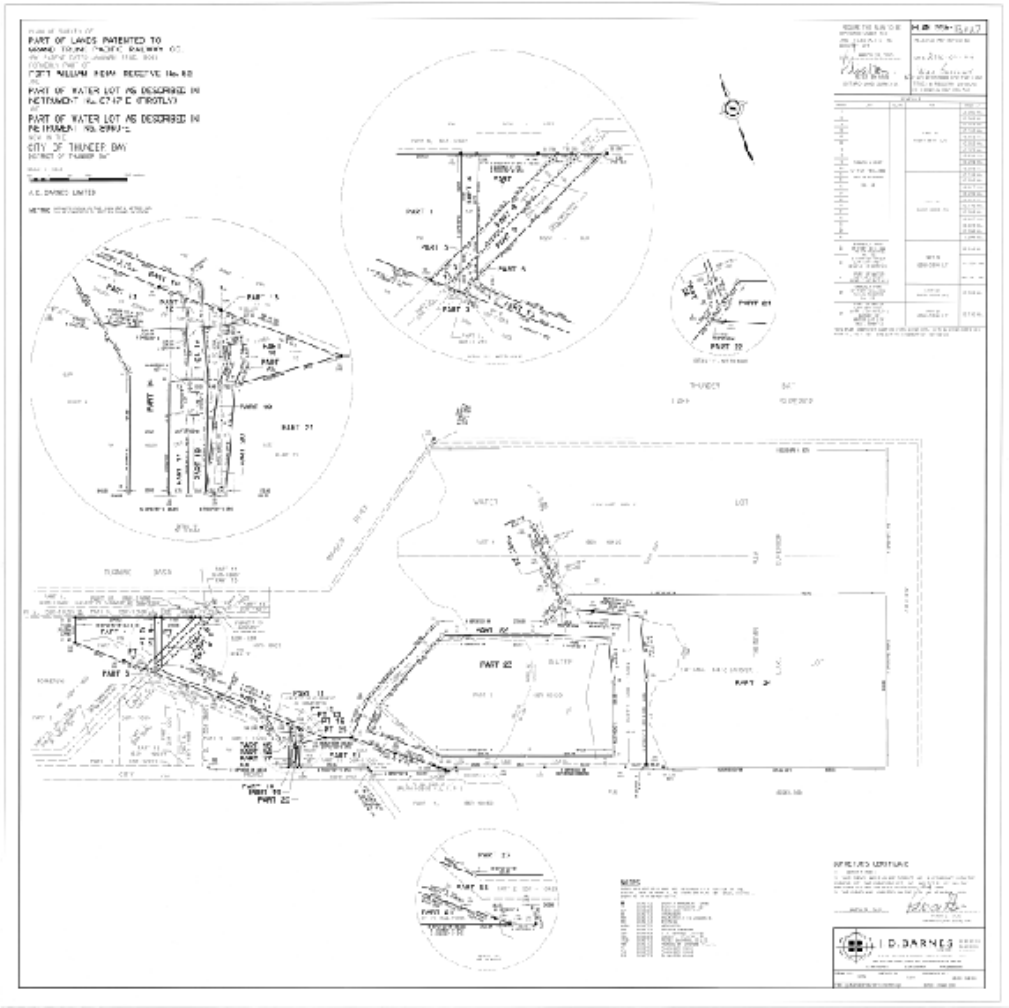
7. Agreement registered as Instrument #403730 on July 14, 1999

8. Easement registered as Instrument #403729 on July 14, 1999

The said registered reference plan 55R13027 is attached as Annex A to this Schedule G (the "*Reference Plan*").

Motion granted.

Annex A



Graphic 1

Schedule "H" — Dalhousie Assets

Municipal address:

451 William St., Dalhousie, New Brunswick, Canada, E8C 2X9

Legal description (Property Identifier No.):

50173616, 50172030, 50173715, 50172667, 50172634, 50173574, 50173582, 50173590, 50172626, 50173640, 50173624, 50173632, 50173657, 50173681, 50173673, 50173665, 50173749, 50173756, 50173764, 50105394, 50251354, 50172774, 50173566, 50173707

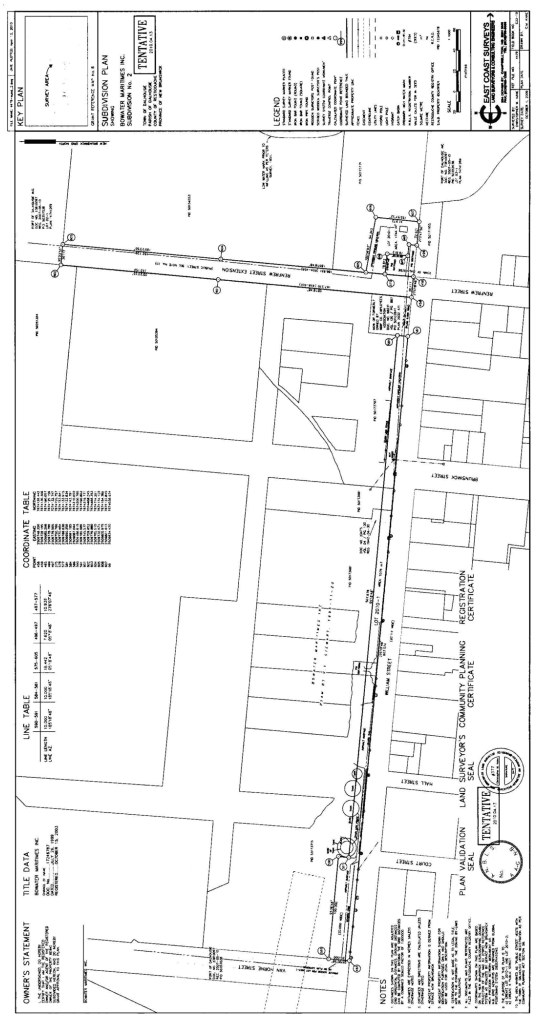
Save and Except for

The surveyed land bounded by the bolded line in the plan attached in Annex A to this Schedule H (the "*Dalhousie Plan*").

For greater certainty, the following property is not included in the sale:

Legal description (Property Identifier No.): 50191857, 50191865, 50191881, 50191873, 50191899, 50191915, 50191931, 50192384, 50192400, 50068832, 50193002, 50192996, 50192988, 50192970, 50192418, 50260538, 50260520, 50260512, 50072131, 50340959, 50340942, 50340934, 50340926, 50340918, 50340900, 50340892, 50340884, 50340645, 50340637, 50340629, 50340611, 50339779, 50192392, 50191949, 50191923, 50191907, 50172949, 50172931, 50172907, 50056506, 50241611, 50172899, 50172881, 50172873, 50172865, 50172857, 50172840, 50172832, 50172824, 50172444, 50171966, 50171958, 50173699, 50104553, 50173731, 50172923, 50172915.

Annex A — Dalhousie Plan



Graphic 2

Schedule "I" — Fort William Assets

Municipal address:

1735 City Road, Thunder Bay, Ontario, Canada, P7B 6T7

Legal description:

Section 1 Fort William Land Titles Assets

PIN 62261-0314, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres; PT Water LT in front of Indian Reserve No. 52 (Grand Trunk Pacific Railway Company) PT 1, 2 ,3, 55R-10429; Thunder Bay, save and except Parts 1, 2, 3, 4, 5, 6, 7, 8, 9, 22, 23 and 24, 55R-13027

Section 2 Fort William Registry Assets

Part of PIN 62261-0533, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 11, 12, 13, 14, 15, 16 and 25, 55R-13027

Footnotes

1 Namely, a first Vesting Order in respect of the Beaupré, Dalhousie, Donnacona and Fort William closed mills assets (Exhibit R-3A) and a second Vesting Order in respect of the corresponding Fort William land swap (Exhibit R-4A).

2 Dated March 22, 2010 and included in Exhibit I-1.

3 Exhibits VB-1 and I-5.

4 *AbitibiBowater Inc., Re*, 2009 QCCS 6460 (C.S. Que.), at para. 36 and 37.

5 See, in this respect, *Rail Power Technologies Corp., Re*, 2009 QCCS 2885 (C.S. Que.), at para. 96 to 99; *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]), at para. 35; *Boutique Euphoria inc., Re*, 2007 QCCS 7128 (C.S. Que.), at para. 91 to 95; *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.), and *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.).

6 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at para. 16.

7 See, for instance, the decisions cited at Note 5 and *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), leave to appeal refused (2005), 19 C.B.R. (5th) 53 (Ont. C.A.); *PSINET Ltd., Re*, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]), at para. 6; and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, 1998 CarswellOnt 3346 (Ont. S.C.J. [Commercial List]), at para. 47.

8 *Grant Forest Products Inc., Re*, 2010 ONSC 1846 (Ont. S.C.J. [Commercial List]), at para. 30-33.

9 See, on that point, *Consumers Packaging Inc., Re* (Ont. C.A.), at para. 8, and *Canwest Global Communications Corp., Re*, 2010 ONSC 1176 (Ont. S.C.J. [Commercial List]), at para. 42.

10 See Exhibit I-1 and general condition # 5 of the Arctic Beluga penultimate bid.

11 See Exhibits I-6, I-8 and I-9.

12 See Exhibit I-7.

13 See Exhibit I-2.

14 See Exhibit I-6.

15 See Exhibit I-9.

16 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at para. 30.

17 (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.)

18 (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.)

19 *Rail Power Technologies Corp., Re*, 2009 QCCS 2885 (C.S. Que.), at para. 96 to 99, and *Boutique Euphoria inc., Re*, 2007 QCCS 7128 (C.S. Que.), at para. 91 to 95.

20 Exhibits AIM-1 and AIM-2.

21 See, for instance, the judgments rendered in *Rail Power Technologies Corp., Re*, 2009 QCCS 2885 (C.S. Que.); *Boutique Euphoria inc., Re*, 2007 QCCS 7128 (C.S. Que.); and *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.).

22 *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [2000] O.J. No. 467 (Ont. C.A.), affirming (Ont. S.C.J. [Commercial List]) ("Skyepharma").

23 *Id*, at para. 30. See also, *Consumers Packaging Inc., Re* (Ont. C.A.), at para. 7.

24 See *Consumers Packaging Inc., Re* (Ont. C.A.), at para. 7; *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 637 (Ont. C.A. [In Chambers]), at para. 20; *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 665 (Ont. C.A.), at para. 8.

25 *In the Matter of Nortel Networks Corporation*, 2010 ONSC 126, at para. 3.

26 Assigned to Law Debenture Trust Company of New York registered under number 09-0288002-0001.

27 Assigned to U.S. Bank National Association and Wells Fargo Bank, N.A. under number 10-0018318-0001.

28 *Ibid.*

29 The Abitibi Petitioners are Abitibi-Consolidated Inc., Abitibi-Consolidated Company of Canada, 3224112 Nova Scotia Limited, Marketing Donohue Inc., Abitibi-Consolidated Canadian Office Products Holdings Inc., 3834328 Canada Inc., 6169678 Canada Incorporated., 4042140 Canada Inc., Donohue Recycling Inc., 1508756 Ontario Inc., 3217925 Nova Scotia Company, La Tuque Forest Products Inc., Abitibi-Consolidated Nova Scotia Incorporated, Saguenay Forest Products Inc., Terra Nova Explorations Ltd., The Jonquière Pulp Company, The International Bridge and Terminal Company, Scramble Mining Ltd., 9150-3383 Québec Inc. and Abitibi-Consolidated (U.K.) Inc.

30 The Bowater Petitioners are Bowater Canadian Holdings Incorporated., Bowater Canada Finance Corporation, Bowater Canadian Limited, 3231378 Nova Scotia Company, AbitibiBowater Canada Inc., Bowater Canada Treasury Corporation, Bowater Canadian Forest Products Inc., Bowater Shelburne Corporation, Bowater LaHave Corporation, St. Maurice River Drive Company Limited, Bowater Treated Wood Inc., Canexel Hardboard Inc., 9068-9050 Québec Inc., Alliance Forest Products (2001) Inc., Bowater Belledune Sawmill Inc., Bowater Maritimes Inc., Bowater Mitis Inc., Bowater Guérette Inc. and Bowater Couturier Inc.

31 The partnerships are Bowater Canada Finance Limited Partnership, Bowater Pulp and Paper Canada Holdings Limited Partnership and Abitibi-Consolidated Finance LP.

32 The Abitibi Petitioners are Abitibi-Consolidated Inc., Abitibi-Consolidated Company of Canada, 3224112 Nova Scotia Limited, Marketing Donohue Inc., Abitibi-Consolidated Canadian Office Products Holdings Inc., 3834328 Canada Inc., 6169678 Canada Incorporated., 4042140 Canada Inc., Donohue Recycling Inc., 1508756 Ontario Inc., 3217925 Nova Scotia Company, La Tuque Forest Products Inc., Abitibi-Consolidated Nova Scotia Incorporated, Saguenay Forest Products Inc., Terra Nova Explorations Ltd., The Jonquière Pulp Company, The International Bridge and Terminal Company, Scramble Mining Ltd., 9150-3383 Québec Inc. and Abitibi-Consolidated (U.K.) Inc.

33 The Bowater Petitioners are Bowater Canadian Holdings Incorporated., Bowater Canada Finance Corporation, Bowater Canadian Limited, 3231378 Nova Scotia Company, AbitibiBowater Canada Inc., Bowater Canada Treasury Corporation, Bowater Canadian Forest Products Inc., Bowater Shelburne Corporation, Bowater LaHave Corporation, St. Maurice River Drive Company Limited, Bowater Treated Wood Inc., Canexel Hardboard Inc., 9068-9050 Québec Inc., Alliance Forest

Products (2001) Inc., Bowater Belledune Sawmill Inc., Bowater Maritimes Inc., Bowater Mitis Inc., Bowater Guérette Inc. and Bowater Couturier Inc.

34 The partnerships are Bowater Canada Finance Limited Partnership, Bowater Pulp and Paper Canada Holdings Limited Partnership and Abitibi-Consolidated Finance LP.

End of Document

Tab 3

2009 CarswellOnt 7169
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 7169, 183 A.C.W.S. (3d) 325

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS LISTED ON SCHEDULE "A"

Pepall J.

Judgment: November 12, 2009
Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Jeremy Dacks for Applicants

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

APPLICATION by corporations under protection of *Companies' Creditors Arrangement Act* for order approving Transition and Reorganization Agreement.

***Pepall J.*:**

Relief Requested

1 The CMI Entities move for an order approving the Transition and Reorganization Agreement by and among Canwest Global Communications Corporation ("Canwest Global"), Canwest Limited Partnership/Canwest Societe en Commandite (the "Limited Partnership"), Canwest Media Inc. ("CMI"), Canwest Publishing Inc./Publications Canwest Inc ("CPI"), Canwest Television Limited Partnership ("CTLP") and The National Post Company/ La Publication National Post (the "National Post Company") dated as of October 26, 2009, and which includes the New Shared Services Agreement and the National Post Transition Agreement.

2 In addition they ask for a vesting order with respect to certain assets of the National Post Company and a stay extension order.

3 At the conclusion of oral argument, I granted the order requested with reasons to follow.

Backround Facts

(a) Parties

4 The CMI Entities including Canwest Global, CMI, CTLP, the National Post Company, and certain subsidiaries were granted *Companies' Creditors Arrangement Act ("CCAA")* protection on Oct 6, 2009. Certain others including the Limited Partnership and CPI did not seek such protection. The term Canwest will be used to refer to the entire enterprise.

5 The National Post Company is a general partnership with units held by CMI and National Post Holdings Ltd. (a wholly owned subsidiary of CMI). The National Post Company carries on business publishing the National Post newspaper and operating related on line publications.

(b) History

6 To provide some context, it is helpful to briefly review the history of Canwest. In general terms, the Canwest enterprise has two business lines: newspaper and digital media on the one hand and television on the other. Prior to 2005, all of the businesses that were wholly owned by Canwest Global were operated directly or indirectly by CMI using its former name, Canwest Mediaworks Inc. As one unified business, support services were shared. This included such things as executive services, information technology, human resources and accounting and finance.

7 In October, 2005, as part of a planned income trust spin-off, the Limited Partnership was formed to acquire Canwest Global's newspaper publishing and digital media entities as well as certain of the shared services operations. The National Post Company was excluded from this acquisition due to its lack of profitability and unsuitability for inclusion in an income trust. The Limited Partnership entered into a credit agreement with a syndicate of lenders and the Bank of Nova Scotia as administrative agent. The facility was guaranteed by the Limited Partner's general partner, Canwest (Canada) Inc. ("CCI"), and its subsidiaries, CPI and Canwest Books Inc. (CBI") (collectively with the Limited Partnership, the "LP Entities"). The Limited Partnership and its subsidiaries then operated for a couple of years as an income trust.

8 In spite of the income trust spin off, there was still a need for the different entities to continue to share services. CMI and the Limited Partnership entered into various agreements to govern the provision and cost allocation of certain services between them. The following features characterized these arrangements:

- the service provider, be it CMI or the Limited Partnership, would be entitled to reimbursement for all costs and expenses incurred in the provision of services;
- shared expenses would be allocated on a commercially reasonable basis consistent with past practice; and
- neither the reimbursement of costs and expenses nor the payment of fees was intended to result in any material financial gain or loss to the service provider.

9 The multitude of operations that were provided by the LP Entities for the benefit of the National Post Company rendered the latter dependent on both the shared services arrangements and on the operational synergies that developed between the National Post Company and the newspaper and digital operations of the LP Entities.

10 In 2007, following the Federal Government's announcement on the future of income fund distributions, the Limited Partnership effected a going-private transaction of the income trust. Since July, 2007, the Limited Partnership has been a 100% wholly owned indirect subsidiary of Canwest Global. Although repatriated with the rest of the Canwest enterprise in 2007, the LP Entities have separate credit facilities from CMI and continue to participate in the shared services arrangements. In spite of this mutually beneficial interdependence between the LP Entities and the CMI Entities, given the history, there are misalignments of personnel and services.

(c) Restructuring

11 Both the CMI Entities and the LP Entities are pursuing independent but coordinated restructuring and reorganization plans. The former have proceeded with their *CCAA* filing and prepackaged recapitalization transaction and the latter have entered into a forbearance agreement with certain of their senior lenders. Both the recapitalization transaction and the forbearance agreement contemplate a disentanglement and/or a realignment of the shared services arrangements. In addition, the term sheet relating to the CMI recapitalization transaction requires a transfer of the assets and business of the National Post Company to the Limited Partnership.

12 The CMI Entities and the LP Entities have now entered into the Transition and Reorganization Agreement which addresses a restructuring of these inter-entity arrangements. By agreement, it is subject to court approval. The terms were negotiated amongst the CMI Entities, the LP Entities, their financial and legal advisors, their respective chief

restructuring advisors, the Ad Hoc Committee of Noteholders, certain of the Limited Partnership's senior lenders and their respective financial and legal advisors.

13 Schedule A to that agreement is the New Shared Services Agreement. It anticipates a cessation or renegotiation of the provision of certain services and the elimination of certain redundancies. It also addresses a realignment of certain employees who are misaligned and, subject to approval of the relevant regulator, a transfer of certain misaligned pension plan participants to pension plans that are sponsored by the appropriate party. The LP Entities, the CMI Chief Restructuring Advisor and the Monitor have consented to the entering into of the New Shared Services Agreement.

14 Schedule B to the Transition and Reorganization Agreement is the National Post Transition Agreement.

15 The National Post Company has not generated a profit since its inception in 1998 and continues to suffer operating losses. It is projected to suffer a net loss of $9.3 million in fiscal year ending August 31, 2009 and a net loss of $0.9 million in September, 2009. For the past seven years these losses have been funded by CMI and as a result, the National Post Company owes CMI approximately $139.1 million. The members of the Ad Hoc Committee of Noteholders had agreed to the continued funding by CMI of the National Post Company's short-term liquidity needs but advised that they were no longer prepared to do so after October 30, 2009. Absent funding, the National Post, a national newspaper, would shut down and employment would be lost for its 277 non-unionized employees. Three of its employees provide services to the LP Entities and ten of the LP Entities' employees provide services to the National Post Company. The National Post Company maintains a defined benefit pension plan registered under the Ontario Pension Benefits Act. It has a solvency deficiency as of December 31, 2006 of $1.5 million and a wind up deficiency of $1.6 million.

16 The National Post Company is also a guarantor of certain of CMI's and Canwest Global's secured and unsecured indebtedness as follows:

Irish Holdco Secured Note- $187.3 million

CIT Secured Facility- $10.7 million

CMI Senior Unsecured Subordinated Notes- US$393.2 million

Irish Holdco Unsecured Note- $430.6 million

17 Under the National Post Transition Agreement, the assets and business of the National Post Company will be transferred as a going concern to a new wholly-owned subsidiary of CPI (the "Transferee"). Assets excluded from the transfer include the benefit of all insurance policies, corporate charters, minute books and related materials, and amounts owing to the National Post Company by any of the CMI Entities.

18 The Transferee will assume the following liabilities: accounts payable to the extent they have not been due for more than 90 days; accrued expenses to the extent they have not been due for more than 90 days; deferred revenue; and any amounts due to employees. The Transferee will assume all liabilities and/or obligations (including any unfunded liability) under the National Post pension plan and benefit plans and the obligations of the National Post Company under contracts, licences and permits relating to the business of the National Post Company. Liabilities that are not expressly assumed are excluded from the transfer including the debt of approximately $139.1 million owed to CMI, all liabilities of the National Post Company in respect of borrowed money including any related party or third party debt (but not including approximately $1,148,365 owed to the LP Entities) and contingent liabilities relating to existing litigation claims.

19 CPI will cause the Transferee to offer employment to all of the National Post Company's employees on terms and conditions substantially similar to those pursuant to which the employees are currently employed.

20 The Transferee is to pay a portion of the price or cost in cash: (i) $2 million and 50% of the National Post Company's negative cash flow during the month of October, 2009 (to a maximum of $1 million), less (ii) a reduction equal to the

amount, if any, by which the assumed liabilities estimate as defined in the National Post Transition Agreement exceeds $6.3 million.

21 The CMI Entities were of the view that an agreement relating to the transfer of the National Post could only occur if it was associated with an agreement relating to shared services. In addition, the CMI Entities state that the transfer of the assets and business of the National Post Company to the Transferee is necessary for the survival of the National Post as a going concern. Furthermore, there are synergies between the National Post Company and the LP Entities and there is also the operational benefit of reintegrating the National Post newspaper with the other newspapers. It cannot operate independently of the services it receives from the Limited Partnership. Similarly, the LP Entities estimate that closure of the National Post would increase the LP Entities' cost burden by approximately $14 million in the fiscal year ending August 31, 2010.

22 In its Fifth Report to the Court, the Monitor reviewed alternatives to transitioning the business of the National Post Company to the LP Entities. RBC Dominion Securities Inc. who was engaged in December, 2008 to assist in considering and evaluating recapitalization alternatives, received no expressions of interest from parties seeking to acquire the National Post Company. Similarly, the Monitor has not been contacted by anyone interested in acquiring the business even though the need to transfer the business of the National Post Company has been in the public domain since October 6, 2009, the date of the Initial Order. The Ad Hoc Committee of Noteholders will only support the short term liquidity needs until October 30, 2009 and the National Post Company is precluded from borrowing without the Ad Hoc Committee's consent which the latter will not provide. The LP Entities will not advance funds until the transaction closes. Accordingly, failure to transition would likely result in the forced cessation of operations and the commencement of liquidation proceedings. The estimated net recovery from a liquidation range from a negative amount to an amount not materially higher than the transfer price before costs of liquidation. The senior secured creditors of the National Post Company, namely the CIT Facility lenders and Irish Holdco, support the transaction as do the members of the Ad Hoc Committee of Noteholders.

23 The Monitor has concluded that the transaction has the following advantages over a liquidation:

- it facilitates the reorganizaton and orderly transition and subsequent termination of the shared services arrangements between the CMI Entities and the LP Entities;
- it preserves approximately 277 jobs in an already highly distressed newspaper publishing industry;
- it will help maintain and promote competition in the national daily newspaper market for the benefit of Canadian consumers; and
- the Transferee will assume substantially all of the National Post Company's trade payables (including those owed to various suppliers) and various employment costs associated with the transferred employees.

Issues

24 The issues to consider are whether:

(a) the transfer of the assets and business of the National Post is subject to the requirements of section 36 of the *CCAA*;

(b) the Transition and Reorganization Agreement should be approved by the Court; and

(c) the stay should be extended to January 22, 2010.

Discussion

(A) Section 36 of the CCAA

25 Section 36 of the *CCAA* was added as a result of the amendments which came into force on September 18, 2009. Counsel for the CMI Entities and the Monitor outlined their positions on the impact of the recent amendments to the *CCAA* on the motion before me. As no one challenged the order requested, no opposing arguments were made.

26 Court approval is required under section 36 if:

(a) a debtor company under CCAA protection

(b) proposes to sell or dispose of assets outside the ordinary course of business.

27 Court approval under this section of the Act [1] is only required if those threshold requirements are met. If they are met, the court is provided with a list of non-exclusive factors to consider in determining whether to approve the sale or disposition. Additionally, certain mandatory criteria must be met for court approval of a sale or disposition of assets to a related party. Notice is to be given to secured creditors likely to be affected by the proposed sale or disposition. The court may only grant authorization if satisfied that the company can and will make certain pension and employee related payments.

28 Specifically, section 36 states:

(1) Restriction on disposition of business assets - 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.

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

(3) Factors to be considered - In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

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

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

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

(7) Restriction — employers - The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement. [2]

29 While counsel for the CMI Entities states that the provisions of section 36 have been satisfied, he submits that section 36 is inapplicable to the circumstances of the transfer of the assets and business of the National Post Company because the threshold requirements are not met. As such, the approval requirements are not triggered. The Monitor supports this position.

30 In support, counsel for the CMI Entities and for the Monitor firstly submit that section 36(1) makes it clear that the section only applies to a debtor company. The terms "debtor company" and "company" are defined in section 2(1) of the *CCAA* and do not expressly include a partnership. The National Post Company is a general partnership and therefore does not fall within the definition of debtor company. While I acknowledge these facts, I do not accept this argument in the circumstances of this case. Relying on case law and exercising my inherent jurisdiction, I extended the scope of the Initial Order to encompass the National Post Company and the other partnerships such that they were granted a stay and other relief. In my view, it would be inconsistent and artificial to now exclude the business and assets of those partnerships from the ambit of the protections contained in the statute.

31 The CMI Entities' and the Monitor's second argument is that the Transition and Reorganization Agreement represents an internal corporate reorganization that is not subject to the requirements of section 36. Section 36 provides for court approval where a debtor under *CCAA* protection proposes to sell or otherwise dispose of assets "outside the ordinary course of business". This implies, so the argument goes, that a transaction that is in the ordinary course of business is not captured by section 36. The Transition and Reorganization Agreement is an internal corporate reorganization which is in the ordinary course of business and therefore section 36 is not triggered state counsel for the CMI Entities and for the Monitor. Counsel for the Monitor goes on to submit that the subject transaction is but one aspect of a larger transaction. Given the commitments and agreements entered into with the Ad Hoc Committee of Noteholders and the Bank of Nova Scotia as agent for the senior secured lenders to the LP Entities, the transfer cannot be treated as an independent sale divorced from its rightful context. In these circumstances, it is submitted that section 36 is not engaged.

32 The *CCAA* is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book [3] on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse." [4]

33 The term "ordinary course of business" is not defined in the *CCAA* or in the *Bankruptcy and Insolvency Act* [5]. As noted by Cullity J. in *Millgate Financial Corp. v. BCED Holdings Ltd.* [6], authorities that have considered the use of

the term in various statutes have not provided an exhaustive definition. As one author observed in a different context, namely the *Bulk Sales Act* [7], courts have typically taken a common sense approach to the term "ordinary course of business" and have considered the normal business dealings of each particular seller [8]. In *Pacific Mobile Corp., Re* [9], the Supreme Court of Canada stated:

> It is not wise to attempt to give a comprehensive definition of the term "ordinary course of business" for all transactions. Rather, it is best to consider the circumstances of each case and to take into account the type of business carried on by the debtor and creditor.
>
> We approve of the following passage from Monet J.A.'s reasons discussing the phrase "ordinary course of business"...
>
> 'It is apparent from these authorities, it seems to me, that the concept we are concerned with is an abstract one and that it is the function of the courts to consider the circumstances of each case in order to determine how to characterize a given transaction. This in effect reflects the constant interplay between law and fact.'

34 In arguing that section 36 does not apply to an internal corporate reorganization, the CMI Entities rely on the commentary of Industry Canada as being a useful indicator of legislative intent and descriptive of the abuse the section was designed to prevent. That commentary suggests that section 36(4),which deals with dispositions of assets to a related party, was intended to:

> ...prevent the possible abuse by "phoenix corporations". Prevalent in small business, particularly in the restaurant industry, phoenix corporations are the result of owners who engage in serial bankruptcies. A person incorporates a business and proceeds to cause it to become bankrupt. The person then purchases the assets of the business at a discount out of the estate and incorporates a "new" business using the assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid. [10]

35 In my view, not every internal corporate reorganization escapes the purview of section 36. Indeed, a phoenix corporation to one may be an internal corporate reorganization to another. As suggested by the decision in *Pacific Mobile Corp.* [11]., a court should in each case examine the circumstances of the subject transaction within the context of the business carried on by the debtor.

36 In this case, the business of the National Post Company and the CP Entities are highly integrated and interdependent. The Canwest business structure predated the insolvency of the CMI Entities and reflects in part an anomaly that arose as a result of an income trust structure driven by tax considerations. The Transition and Reorganization Agreement is an internal reorganization transaction that is designed to realign shared services and assets within the Canwest corporate family so as to rationalize the business structure and to better reflect the appropriate business model. Furthermore, the realignment of the shared services and transfer of the assets and business of the National Post Company to the publishing side of the business are steps in the larger reorganization of the relationship between the CMI Entities and the LP Entities. There is no ability to proceed with either the Shared Services Agreement or the National Post Transition Agreement alone. The Transition and Reorganization Agreement provides a framework for the CMI Entities and the LP Entities to properly restructure their inter-entity arrangements for the benefit of their respective stakeholders. It would be commercially unreasonable to require the CMI Entities to engage in the sort of third party sales process contemplated by section 36(4) and offer the National Post for sale to third parties before permitting them to realign the shared services arrangements. In these circumstances, I am prepared to accept that section 36 is inapplicable.

(b) Transition and Reorganization Agreement

37 As mentioned, the Transition and Reorganization Agreement is by its terms subject to court approval. The court has a broad jurisdiction to approve agreements that facilitate a restructuring: *Stelco Inc., Re*[12] Even though I have accepted that in this case section 36 is inapplicable, court approval should be sought in circumstances where the sale or disposition is to a related person and there is an apprehension that the sale may not be in the ordinary course of business. At that time, the court will confirm or reject the ordinary course of business characterization. If confirmed, at minimum, the court will determine whether the proposed transaction facilitates the restructuring and is fair. If rejected, the court will determine whether the proposed transaction meets the requirements of section 36. Even if the court confirms that the proposed transaction is in the ordinary course of business and therefore outside the ambit of section 36, the provisions of the section may be considered in assessing fairness.

38 I am satisfied that the proposed transaction does facilitate the restructuring and is fair and that the Transition and Reorganization Agreement should be approved. In this regard, amongst other things, I have considered the provisions of section 36. I note the following. The CMI recapitalization transaction which prompted the Transition and Reorganization Agreement is designed to facilitate the restructuring of CMI into a viable and competitive industry participant and to allow a substantial number of the businesses operated by the CMI Entities to continue as going concerns. This preserves value for stakeholders and maintains employment for as many employees of the CMI Entities as possible. The Transition and Reorganization Agreement was entered into after extensive negotiation and consultation between the CMI Entities, the LP Entities, their respective financial and legal advisers and restructuring advisers, the Ad Hoc Committee and the LP senior secured lenders and their respective financial and legal advisers. As such, while not every stakeholder was included, significant interests have been represented and in many instances, given the nature of their interest, have served as proxies for unrepresented stakeholders. As noted in the materials filed by the CMI Entities, the National Post Transition Agreement provides for the transfer of assets and certain liabilities to the publishing side of the Canwest business and the assumption of substantially all of the operating liabilities by the Transferee. Although there is no guarantee that the Transferee will ultimately be able to meet its liabilities as they come due, the liabilities are not stranded in an entity that will have materially fewer assets to satisfy them.

39 There is no prejudice to the major creditors of the CMI Entities. Indeed, the senior secured lender, Irish Holdco., supports the Transition and Reorganization Agreement as does the Ad Hoc Committee and the senior secured lenders of the LP Entities. The Monitor supports the Transition and Reorganization Agreement and has concluded that it is in the best interests of a broad range of stakeholders of the CMI Entities, the National Post Company, including its employees, suppliers and customers, and the LP Entities. Notice of this motion has been given to secured creditors likely to be affected by the order.

40 In the absence of the Transition and Reorganization Agreement, it is likely that the National Post Company would be required to shut down resulting in the consequent loss of employment for most or all the National Post Company's employees. Under the National Post Transition Agreement, all of the National Post Company employees will be offered employment and as noted in the affidavit of the moving parties, the National Post Company's obligations and liabilities under the pension plan will be assumed, subject to necessary approvals.

41 No third party has expressed any interest in acquiring the National Post Company. Indeed, at no time did RBC Dominion Securities Inc. who was assisting in evaluating recapitalization alternatives ever receive any expression of interest from parties seeking to acquire it. Similarly, while the need to transfer the National Post has been in the public domain since at least October 6, 2009, the Monitor has not been contacted by any interested party with respect to acquiring the business of the National Post Company. The Monitor has approved the process leading to the sale and also has conducted a liquidation analysis that caused it to conclude that the proposed disposition is the most beneficial outcome. There has been full consultation with creditors and as noted by the Monitor, the Ad Hoc Committee serves as a good proxy for the unsecured creditor group as a whole. I am satisfied that the consideration is reasonable and fair given the evidence on estimated liquidation value and the fact that there is no other going concern option available.

42 The remaining section 36 factor to consider is section 36(7) which provides that the court should be satisfied that the company can and will make certain pension and employee related payments that would have been required if the court had sanctioned the compromise or arrangement. In oral submissions, counsel for the CMI Entities confirmed that they had met the requirements of section 36. It is agreed that the pension and employee liabilities will be assumed by the Transferee. Although present, the representative of the Superintendent of Financial Services was unopposed to the order requested. If and when a compromise and arrangement is proposed, the Monitor is asked to make the necessary inquiries and report to the court on the status of those payments.

Stay Extension

43 The CMI Entities are continuing to work with their various stakeholders on the preparation and filing of a proposed plan of arrangement and additional time is required. An extension of the stay of proceedings is necessary to provide stability during that time. The cash flow forecast suggests that the CMI Entities have sufficient available cash resources during the requested extension period. The Monitor supports the extension and nobody was opposed. I accept the statements of the CMI Entities and the Monitor that the CMI Entities have acted, and are continuing to act, in good faith and with due diligence. In my view it is appropriate to extend the stay to January 22, 2010 as requested.

Application granted.

Footnotes

1 Court approval may nonetheless be required by virtue of the terms of the Initial or other court order or at the request of a stakeholder.

2 The reference to paragraph 6(4)a should presumably be 6(6)a.

3 Industry Canada "Bill C-55: Clause by Clause Analysis — Bill Clause No. 131 — CCAA Section 36".

4 Ibid.

5 R.S.C. 1985, c.C-36 as amended.

6 (2003), 47 C.B.R. (4th) 278 (Ont. S.C.J. [Commercial List]) at para.52.

7 R.S.O. 1990, c. B. 14, as amended.

8 D.J. Miller "Remedies under the Bulk Sales Act: (Necessary, or a Nuisance?)", Ontario Bar Association, October, 2007.

9 [1985] 1 S.C.R. 290 (S.C.C.).

10 Supra, note 3.

11 Supra, note 9.

12 (2005), 15 C.B.R. (5th) 288 (Ont. C.A.).

Tab 4

2010 ONSC 2870
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc./Publications Canwest Inc., Re

2010 CarswellOnt 3509, 2010 ONSC 2870, 189 A.C.W.S. (3d) 598, 68 C.B.R. (5th) 233

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC. (Applicants)

Pepall J.

Judgment: May 21, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Betsy Putnam for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders Syndicate
M.P. Gottlieb, J.A. Swartz for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
Robert Chadwick, Logan Willis for 7535538 Canada Inc.
Deborah McPhail for Superintendant of Financial Services (FSCO)
Thomas McRae for Certain Canwest Employees

Subject: Insolvency; Estates and Trusts

APPLICATION by LP entities for various relief relating to *Companies' Creditors Arrangement Act* proceedings.

***Pepall J.*:**

Endorsement

Relief Requested

1 The LP Entities seek an order: (1) authorizing them to enter into an Asset Purchase Agreement based on a bid from the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders ("the AHC Bid"); (2) approving an amended claims procedure; (3) authorizing the LP Entities to resume the claims process; and (4) amending the SISP procedures so that the LP Entities can advance the Ad Hoc Committee transaction (the AHC Transaction") and the Support Transaction concurrently. They also seek an order authorizing them to call a meeting of unsecured creditors to vote on the Ad Hoc Committee Plan on June 10, 2010. Lastly, they seek an order conditionally sanctioning the Senior Lenders' CCAA Plan.

AHC Bid

2 Dealing firstly with approval of the AHC Bid, in my Initial Order of January 8, 2010, I approved the Support Agreement between the LP Entities and the Administrative Agent for the Senior Lenders and authorized the LP Entities to file a Senior Lenders' Plan and to commence a sale and investor solicitation process (the SISP). The objective of the SISP was to test the market and obtain an offer that was superior to the terms of the Support Transaction.

3 On January 11, 2010, the Financial Advisor, RBC Capital Markets, commenced the SISP. Qualified Bids (as that term was defined in the SISP) were received and the Monitor, in consultation with the Financial Advisor and the LP CRA, determined that the AHC Bid was a Superior Cash Offer and that none of the other bids was a Superior Offer as those terms were defined in the SISP.

4 The Monitor recommended that the LP Entities pursue the AHC Transaction and the Special Committee of the Board of Directors accepted that recommendation.

5 The AHC Transaction contemplates that 7535538 Canada Inc. ("Holdco") will effect a transaction through a new limited partnership (Opco LP) in which it will acquire substantially all of the financial and operating assets of the LP Entities and the shares of National Post Inc. and assume certain liabilities including substantially all of the operating liabilities for a purchase price of $1.1 billion. At closing, Opco LP will offer employment to substantially all of the employees of the LP Entities and will assume all of the pension liabilities and other benefits for employees of the LP Entities who will be employed by Opco LP, as well as for retirees currently covered by registered pension plans or other benefit plans. The materials submitted with the AHC Bid indicated that Opco LP will continue to operate all of the businesses of the LP Entities in substantially the same manner as they are currently operated, with no immediate plans to discontinue operations, sell material assets or make significant changes to current management. The AHC Bid will also allow for a full payout of the debt owed by the LP Entities to the LP Secured Lenders under the LP credit agreement and the Hedging Creditors and provides an additional $150 million in value which will be available for the unsecured creditors of the LP Entities.

6 The purchase price will consist of an amount in cash that is equal to the sum of the Senior Secured Claims Amount (as defined in the AHC Asset Purchase Agreement), a promissory note of $150 million (to be exchanged for up to 45% of the common shares of Holdco) and the assumption of certain liabilities of the LP Entities.

7 The Ad Hoc Committee has indicated that Holdco has received commitments for $950 million of funded debt and equity financing to finance the AHC Bid. This includes $700 million of new senior funded debt to be raised by Opco LP and $250 million of mezzanine debt and equity to be raised including from the current members of the Ad Hoc Committee.

8 Certain liabilities are excluded including pre-filing liabilities and restructuring period claims, certain employee related liabilities and intercompany liabilities between and among the LP Entities and the CMI Entities. Effective as of the closing date, Opco LP will offer employment to all full-time and part-time employees of the LP Entities on substantially similar terms as their then existing employment (or the terms set out in their collective agreement, as applicable), subject to the option, exercisable on or before May 30, 2010, to not offer employment to up to 10% of the non-unionized part-time or temporary employees employed by the LP Entities.

9 The AHC Bid contemplates that the transaction will be implemented pursuant to a plan of compromise or arrangement between the LP Entities and certain unsecured creditors (the "AHC Plan"). In brief, the AHC Plan would provide that Opco LP would acquire substantially all of the assets of the LP Entities. The Senior Lenders would be unaffected creditors and would be paid in full. Unsecured creditors with proven claims of $1,000 or less would receive cash. The balance of the consideration would be satisfied by an unsecured demand note of $150 million less the amounts paid to the $1,000 unsecured creditors. Ultimately, affected unsecured creditors with proven claims would receive shares in Holdco and Holdco would apply for the listing of its common shares on the Toronto Stock Exchange.

10 The Monitor recommended that the AHC Asset Purchase Agreement based on the AHC Bid be authorized. Certain factors were particularly relevant to the Monitor in making its recommendation:

- the Senior Lenders will received 100 cents on the dollar;

• the AHC Transaction will preserve substantially all of the business of the LP Entities to the benefit of the LP Entities' suppliers and the millions of people who rely on the LP Entities' publications each day;

• the AHC Transaction preserves the employment of substantially all of the current employees and largely protects the interests of former employees and retirees;

• the AHC Bid contemplates that the transaction will be implemented through a Plan under which $150 million in cash or shares will be available for distribution to unsecured creditors;

• unlike the Support Transaction, there is no option *not* to assume certain pension or employee benefits obligations.

11 The Monitor, the LP CRA and the Financial Advisor considered closing risks associated with the AHC Bid and concluded that the Bid was credible, reasonably certain and financially viable. The LP Entities agreed with that assessment. All appearing either supported the AHC Transaction or were unopposed.

12 Clearly the SISP was successful and in my view, the LP Entities should be authorized to enter the Ad Hoc Committee Asset Purchase Agreement as requested.

13 The proposed disposition of assets meets the section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.* [1] decision. Indeed, to a large degree, the criteria overlap. The process was reasonable and the Monitor was content with it. Sufficient efforts were made to attract the best possible bid; the SISP was widely publicized; ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy. The logical extension of that conclusion is that the AHC Transaction is as well. The LP Entities' Senior Lenders were either consulted and/or had the right to approve the various steps in the SISP. The effect of the proposed sale on other interested parties is very positive. Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors. The consideration to be received is reasonable and fair. The Financial Advisor and the Monitor were both of the opinion that the SISP was a thorough canvassing of the market. The AHC Transaction was the highest offer received and delivers considerably more value than the Support Transaction which was in essence a "stalking horse" offer made by the single largest creditor constituency. The remaining subsequent provisions of section 36 of the CCAA are either inapplicable or have been complied with. In conclusion the AHC Transaction ought to be and is approved.

Claims Procedure Order and Meeting Order

14 Turning to the Claims Procedure Order, as a result of the foregoing, the scope of the claims process needs to be expanded. Claims that have been filed will move to adjudication and resolution and in addition, the scope of the process needs to be expanded so as to ensure that as many creditors as possible have an opportunity to participate in the meeting to consider the Ad Hoc Committee Plan and to participate in distributions. Dates and timing also have to be adjusted. In these circumstances the requested Claims Procedure Order should be approved. Additionally, the Meeting Order required to convene a meeting of unsecured creditors on June 10, 2010 to vote on the Ad Hoc Committee Plan is granted.

SISP Amendment

15 It is proposed that the LP Entities will work diligently to implement the AHC Transaction while concurrently pursuing such steps as are required to effect the Support Transaction. The SISP procedures must be amended. The AHC Transaction which is to be effected through the Ad Hoc Committee Plan cannot be completed within the sixty days contemplated by the SISP. On consent of the Monitor, the LP Administrative Agent, the Ad Hoc Committee and the LP Entities, the SISP is amended to extend the date for closing of the AHC Transaction and to permit the proposed dual track procedure. The proposed amendments to the SISP are clearly warranted as a practical matter and so as to procure the best available going concern outcome for the LP Entities and their stakeholders. Paragraph 102 of the Initial

Order contains a comeback clause which provides that interested parties may move to amend the Initial Order on notice. This would include a motion to amend the SISP which is effectively incorporated into the Initial Order by reference. The Applicants submit that I have broad general jurisdiction under section 11 of the CCAA to make such amendments. In my view, it is unnecessary to decide that issue as the affected parties are consenting to the proposed amendments.

Dual Track and Sanction of Senior Lenders' CCAA Plan

16 In my view, it is prudent for the LP Entities to simultaneously advance the AHC Transaction and the Support Transaction. To that end, the LP Entities seek approval of a conditional sanction order. They ask for conditional authorization to enter into the Acquisition and Assumption Agreement pursuant to a Credit Acquisition Sanction, Approval and Vesting Order.

17 The Senior Lenders' meeting was held January 27, 2010 and 97.5% in number and 88.7% in value of the Senior Lenders holding Proven Principal Claims who were present and voting voted in favour of the Senior Lenders' Plan. This was well in excess of the required majorities.

18 The LP Entities are seeking the sanction of the Senior Lenders' CCAA Plan on the basis that its implementation is conditional on the delivery of a Monitor's Certificate. The certificate will not be delivered if the AHC Bid closes. Satisfactory arrangements have been made to address closing timelines as well as access to advisor and management time. Absent the closing of the AHC Transaction, the Senior Lenders' CCAA Plan is fair and reasonable as between the LP Entities and its creditors. If the AHC Transaction is unable to close, I conclude that there are no available commercial going concern alternatives to the Senior Lenders' CCAA Plan. The market was fully canvassed during the SISP; there was ample time to conduct such a canvass; it was professionally supervised; and the AHC Bid was the only Superior Offer as that term was defined in the SISP. For these reasons, I am prepared to find that the Senior Lenders' CCAA Plan is fair and reasonable and may be conditionally sanctioned. I also note that there has been strict compliance with statutory requirements and nothing has been done or purported to have been done which was not authorized by the CCAA. As such, the three part test set forth in the *Canadian Airlines Corp., Re*[2] has been met. Additionally, there has been compliance with section 6 of the CCAA. The Crown, employee and pension claims described in section 6 (3),(5), and (6) have been addressed in the Senior Lenders' Plan at sections 5.2, 5.3 and 5.4.

Conclusion

19 In conclusion, it is evident to me that the parties who have been engaged in this CCAA proceeding have worked diligently and cooperatively, rigorously protecting their own interests but at the same time achieving a positive outcome for the LP Entities' stakeholders as a whole. As I indicated in Court, for this they and their professional advisors should be commended. The business of the LP Entities affects many people - creditors, employees, retirees, suppliers, community members and the millions who rely on their publications for their news. This is a good chapter in the LP Entities' CCAA story. Hopefully, it will have a happy ending.

Application granted.

Footnotes

1 [1991] O.J. No. 1137 (Ont. C.A.).

2 2000 ABQB 442 (Alta. Q.B.), leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed 2001 ABCA 9 (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)].

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Tab 5

2012 ONSC 4423
Ontario Superior Court of Justice [Commercial List]

Northstar Aerospace Inc., Re

2012 CarswellOnt 9607, 2012 ONSC 4423, 218 A.C.W.S. (3d) 490, 91 C.B.R. (5th) 268

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C 36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Northstar Aerospace, Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company (Applicants)

Morawetz J.

Heard: July 24, 2012
Judgment: July 30, 2012
Docket: CV-12-9761-00CL

Counsel: A.J. Taylor, K. Esaw for Applicants
Craig J. Hill for Court-Appointed Monitor, Ernst & Young Inc.
D.S. Grieve for Heligear Canada
A. Dale for CAW-Canada
G. Moffat for Chief Restructuring Officer
J.L. Wall for Her Majesty The Queen in Right of Ontario as represented by the Ministry of the Environment
R. Brookes for Region of Waterloo
S. Weisz, L. Rogers J. Willis for Fifth Third Bank as Pre-filing Agent and DIP Lender
W.P. Meagher for Corporation of the City of Cambridge
R.M. Slattery for 180 Market Portfolio
M. Jilesen for General Electric Canada
C. Prophet for Boeing Capital Loan Corporation
S. Pickens (by phone) for Fifth Third Bank

Subject: Insolvency; Constitutional; Corporate and Commercial; International

MOTION by debtor companies for approval of asset purchase agreement and other relief; MOTION by Ministry of Environment for declaration.

***Morawetz J.*:**

Overview

1 Northstar Aerospace, Inc. ("Northstar Inc."), Northstar Aerospace (Canada) Inc. ("Northstar Canada"), 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, the "CCAA Entities") brought this motion for:

> (a) approval of an agreement dated June 14, 2012 (the "Heligear Agreement") between Northstar Inc. and Northstar Canada (together, the "Canadian Vendors"), Northstar Aerospace (U.S.A.) Inc. ("Northstar USA")

and other Northstar U.S. entities, (collectively, the U.S. Vendors", and together with the Canadian Vendors, the "Vendors") and Heligear Acquisition Co. (the "U.S. Purchaser") and Heligear Canada Acquisition Corporation (the "Canadian Purchaser" and, together with the U.S. Purchaser, "Heligear") for the sale of the Purchased Assets (the "Heligear Transaction");

(b) a vesting order of all of the Canadian Purchased Assets in the Canadian Purchaser free and clear of all encumbrances and interests, other than Canadian permitted encumbrances;

(c) if necessary, assigning the rights and obligations of the Canadian Vendors under the Canadian Assumed Contracts to the Canadian Purchasers; and

(d) authorization and directions to the Monitor, on closing of the Heligear Transaction, to distribute cash or cash equivalents from the proceeds of the Heligear Transaction in an amount equal to the outstanding DIP obligations owing under the DIP Agreement to the DIP Agent for the DIP Lenders (defined below).

2 The CCAA Entities applied for and were granted protection under the *Companies' Creditors Arrangement Act* (the "CCAA") pursuant to an Initial Order of this court dated June 14, 2012 [*Northstar Aerospace Inc., Re*, 2012 CarswellOnt 8605 (Ont. S.C.J. [Commercial List])] (the "Initial Order"). Ernst & Young Inc. was appointed as Monitor (the "Monitor") of the CCAA Entities and FTI Consulting Canada Inc. ("FTI Consulting") was appointed Chief Restructuring Officer ("CRO") of the CCAA Entities.

3 Certain of Northstar Canada's direct and indirect U.S. subsidiaries (the "Chapter 11 Entities") commenced insolvency proceedings (the "Chapter 11 Proceedings") pursuant to Chapter 11 of the United States Bankruptcy Code on June 14, 2012 in the United States Bankruptcy Court for the District of Delaware (the "U.S. Court"). The CCAA Entities and the Chapter 11 Entities are sometimes collectively referred to herein as "Northstar".

4 Argument on the motion was heard in two parts. In the morning, argument was heard on Canadian only issues. In the afternoon, argument was heard on Northstar issues in a crossborder hearing with the United States Bankruptcy Court for the District of Delaware. The crossborder hearing was held in accordance with the provisions of the previously approved Cross-Border Protocol between the U.S. Court and this court.

5 The motion for approval of the Heligear Transaction was opposed by the Ministry of the Environment ("MOE"), GE Canada, the Region of Waterloo and the City of Cambridge.

6 At the conclusion of argument, a brief oral endorsement was issued approving the Heligear Transaction, with reasons to follow. These are the reasons.

Facts

7 Northstar supplies components and assemblies for the commercial and military aerospace markets, and provides related services. Northstar provides goods and services to customers all over the world, including military defence suppliers Boeing, Sikorsky Aircraft Corporation and AgustaWestland Ltd., as well as the U.S. army. Northstar's products are used in the Boeing CH-47 Chinook helicopters, Boeing AH-64 Apache helicopters, Sikorsky UH-60 Blackhawk helicopters, AgustaWestland Links/Wildcat helicopters, the Boeing F-22 Raptor Fighter aircraft and various other helicopters and aircraft.

8 Northstar owns and leases operating facilities in the United States and Canada. In addition, Northstar owns a dormant facility located at 695 Bishop Street North in Cambridge, Ontario (the "Cambridge Facility").

9 The Cambridge Facility has been non-operational since April 2010, when Northstar Canada closed it to focus on its core business of manufacturing aerospace gears and transmissions.

10 Operations at the Cambridge Facility historically involved the use of industrial solvents, including trichloroethylene ("TCE").

11 In 2004, Northstar Canada notified the MOE of potential environmental contamination at the Cambridge Facility including TCE. Additional investigations determined that the contamination had migrated from beneath the Cambridge Facility to beneath nearby homes. In response, Northstar Canada has spent in excess of $20 million for environmental testing and remediation at and near the Cambridge Facility through April 2012.

12 A separate contamination source, not attributable to Northstar Canada or its operations, has also been identified near the Cambridge Facility. This second source is known as the Borg-Warner Site. GE Canada is the corporate successor to Borg-Warner Canada Inc.

13 Since the discovery of the environmental condition at the Cambridge Facility in 2004, Northstar has conducted remediation activities, on a voluntary basis, including after the granting of the Initial Order, with the consent of the DIP Lenders.

14 On March 15, 2012, an Ontario MOE director (the "Director"), pursuant to powers under the *Environmental Protection Act*, issued Order Number 6076-8RJRUP (the "March 15 Order") to Northstar Inc. and Northstar Canada. The March 15 Order was issued as a direct result of the MOE's concerns regarding Northstar Canada's solvency.

15 The purpose of the March 15 Order was stated as "to ensure the potential adverse effects from TCE and hexavalent chromium impacted groundwater to human health and the environment continues to be monitored, mitigated and remediated where necessary".

16 The March 15 Order requires Northstar to undertake the following activities, among others:

> (a) the operation of a laboratory and retention of a professional engineer to supervise the laboratory, which will operate to prepare, complete and/or supervise the work set out in the March 15 Order;
>
> (b) the creation and implementation of an indoor air monitoring protocol, with annual assessment reports submitted to the MOE;
>
> (c) continued:
>
> > (i) operation and monitoring of the indoor air mitigation systems ("IAMS") voluntarily installed by Northstar Canada prior to the issuance of the March 15 Order;
> >
> > (ii) operation and monitoring of the soil vapour extraction systems ("SVES") voluntarily installed by Northstar prior to the issuance of the March 15 Order;
> >
> > (iii) operation and maintenance of a pump and treat system;
> >
> > (iv) groundwater remediation on or around the Cambridge Facility;
> >
> > (v) groundwater and surface water monitoring;
>
> (d) the submission of detailed annual assessment reports regarding the measures described above and, on the direction of the MOE, installation of such additional systems and adoption of such additional reporting requirements as may be required by the MOE; and
>
> (e) submission of an updated interim remedial action plan to the MOE and, upon approval, implementation of same, with bi-annual updated plans unless otherwise advised by the MOE.

17 These obligations and others are fully set out at pages 8-19 of the March 15 Order.

18 On May 31, 2012, the Director issued a further order, Order Number 2066-8UQP82, (the "May 31 Order", and together with the March 15 Order, the "Director's Orders") ordering Northstar Inc. and Northstar Canada to provide financial assurance in the amount of $10,352,906 by certified cheque payable to the Ontario Ministry of Finance or irrevocable Letter of Credit issued by a Canadian chartered bank by June 6, 2012 to fund the measures contemplated by the March 15 Order.

19 Northstar has continued to perform monitoring, mitigation and remediation activities contemplated by the March 15 Order to the extent it was permitted to do so under the Initial Order. In addition, the CCAA Entities, with the consent of the DIP Lenders, have sought and obtained authorization to pay the utility payments associated with the IAMS. The CCAA Entities, however, advised the MOE that any payment of utility payments by the CCAA Entities was without prejudice to their position that the Director's Orders were stayed by the Initial Order and did not constitute an admission that the CCAA Entities were obligated to make or continue to make such payments — and further that they were not committed to continue making such payments.

20 The concerns raised by the MOE, the Region of Waterloo and the City of Cambridge are significant. TCE is a carcinogen. The effects of TCE were described in the affidavit filed by Dr. Liana Nolan, the Medical Officer of Health ("MOH") for the Regional Municipality of Waterloo. Chronic effects of exposure to TCE, other than cancer, are less well understood but potential effects include those to the central nervous system, kidney, liver, respiratory, developmental and reproductive systems.

21 TCE vapour has migrated into the basements of many homes from the groundwater beneath those homes.

22 To reduce TCE vapour intrusion to more acceptable levels, there are 59 homes that have subslab depressurization systems and 93 homes that are serviced by soil vapour extraction units. These systems were installed and are operated by Northstar. In addition, Northstar has attempted to reduce the extent and concentration of the TCE contamination in the groundwater beneath the Bishop Street community through the installation and operation of a groundwater pump and treat system.

23 Dr. Nolan is of the opinion that Northstar's remediation plan should continue in order to protect the health of residents of the Bishop Street community. It is also her opinion that discontinuing the current pump and treat system will result in increased levels and concentrations of TCE contamination. It is also her belief that discontinuing the operation and maintenance of the indoor air mitigation systems (soil vapour extraction units and subslab depressurization systems) will result in increased levels of TCE vapours in affected homes and will expose residents to undue and increased health risks.

24 The materials filed by the MOE describe a number of other environmental issues, which to date have been monitored:

- Ongoing groundwater monitoring by Northstar Canada
- Continued indoor air monitoring and mitigation
- Ongoing surface water monitoring — the Grand River
- Ongoing drinking water monitoring

25 The MOE is justifiably concerned about the future of the remediation efforts as Northstar Canada has made no provision for the continuation of its investigation, monitoring, mitigation and remediation of TCE contamination after the close of the Heligear Transaction.

26 Essentially, if the monitoring, mitigation and remediation of TCE contamination is discontinued as a result of the Heligear Transaction, there will be, according to the MOE and Dr. Nolan, the City of Cambridge and the Region of Waterloo, a significant public health issue.

27 The CCAA Entities take the position that the March 15 Order requires extensive further remediation steps and they estimate that fully responding to it would require a minimum expenditure of $25 million over the next 20 years.

28 As detailed in the affidavit filed on the initial application, the CCAA Entities have been facing severe liquidity issues for many months and are unable to meet various financial and other covenants with their secured lenders and do not have the liquidity to meet their ongoing prefiling obligations.

29 Since late 2011, Northstar has issued press releases discussing, among things, concerns about its ability to continue as a going concern.

30 After a comprehensive marketing process conducted with the assistance of Harris Williams Inc. ("Harris Williams"), on June 14, 2012, the Canadian Vendors and Heligear entered into the Heligear Agreement for the sale of substantially all of Northstar's assets (the "Heligear Transaction").

31 The assets to be purchased by Heligear do not include the Cambridge Facility and related assets. It is apparent that during the Sales Process, no bidder that expressed an interest in the assets of Northstar was willing to purchase or expressed any interest in purchasing the nonoperating Cambridge Facility, either on its own or together with the other assets of Northstar.

32 Two significant credit facilities have security over the property of the CCAA Entities.

33 In 2010, the CCAA Entities entered into a $66 million secured credit agreement (the "Credit Facility") between certain of the CCAA and Chapter 11 Entities and Fifth Third Bank ("Fifth Third") and other lenders (collectively, the "Lenders").

34 The Monitor has found the security related to the Credit Facility to be valid, perfected and enforceable.

35 In the Initial Order, the court approved a Debtor-in-Possession Facility (the "DIP Facility") under which Fifth Third, as the DIP Agent, and other lenders (together, the "DIP Lenders"), agreed to provide up to a principal amount of $3 million to finance the CCAA Entities' working capital requirements and other general corporate purposes and capital expenditures. A court-ordered charge over the CCAA Entities' property in favour of the DIP Lenders (the "DIP Lenders' Charge") was also granted and was given super priority status by court order dated June 27, 2012.

36 As of August 3, 2012, the proposed closing date for the proposed Heligear Transaction, the aggregate amount owing under the DIP Facility, the U.S. Dip Facilities (to which the CCAA Entities are guarantors) and the Credit Facility will be approximately $75 million. Net proceeds from the Heligear Transaction are expected to be less than $65 million after transaction costs, payment of outstanding post-filing obligations and prior ranking claims. As a result, if the Transaction is approved, Northstar's secured creditors are expected to realize a shortfall.

37 Notwithstanding this shortfall, the secured creditors support approval of the Heligear Transaction.

38 The DIP Lenders have advised Northstar that they will not fund the continued voluntary remediation efforts after closing of the proposed Heligear Transaction, which is scheduled for August 3, 2012.

Analysis

39 The MOE takes the position and has served a motion for a declaration that the March 15 Order is a "regulatory order" pursuant to s. 11.1(2) of the CCAA and is not subject to the stay of proceedings provided by the Initial Order; or, in the alternative, the MOE seeks an order lifting the stay.

40 The MOE also seeks an order that the Heligear Transaction not be approved.

41 Alternatively, if the Heligear Transaction is approved, the MOE seeks an order that no proceeds be distributed pending the release of the decision on this motion and the hearing of further submissions on the allocation of proceeds.

42 The issues on this motion, from the standpoint of the MOE, are:

(a) is the March 15 Order subject to the stay of proceedings granted in the Initial Order?

(b) should the court declare, pursuant to s. 11.1(4) of the CCAA that the MOE is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed?

43 In addition, the MOE takes the position that the court should not approve the sale where the effect of such an order would so seriously prejudice the public interest.

44 The MOE also takes the position that:

(i) the March 15 Order is regulatory in nature and not subject to the stay;

(ii) the Order is not a "claim" within the meaning of ss. 11.8(8) and 11.8(9) of the CCAA; and

(iii) any other interpretation of these provisions upsets the balance between the federal power over bankruptcy and insolvency in s. 91(21) of the *Constitution Act, 1867* and provincial regulatory authority over the environment, founded on s. 92(13) and s. 92(16).

45 Alternatively, the MOE requests an order lifting the stay of the March 15 Order in order to permit continued enforcement of the March 15 Order as against Northstar.

46 Turning first to the constitutional argument, the MOE acknowledged that it was not until July 23, 2012, the day before the scheduled hearing, that notice of a constitutional question was provided to the Attorney General of Canada as required by s. 109 of the *Courts of Justice Act*.

47 Counsel to the MOE advised that the Attorney General of Canada was not in a position to respond on such a short time frame. Counsel to the MOE requested an adjournment of this aspect of the motion. This request was opposed by the CCAA Entities and those supporting the CCAA Entities.

48 After hearing argument on the adjournment request, I denied the request for several reasons: the environmental issue raised by the MOE has been known about since the outset of the CCAA Proceedings and, in fact, since before the issuance of the CCAA Proceedings; a similar issue was litigated in *Nortel Networks Corp., Re*, 2012 ONSC 1213 (Ont. S.C.J. [Commercial List]) ("*Nortel*"); and, the proposed Heligear Transaction is scheduled to close August 3, 2012 and it is not feasible to adjourn this aspect of the motion and still comply with commercial requirements. In addition, I also accept the arguments of both counsel to the CCAA Entities and Fifth Third that the MOE should not be permitted to bifurcate its case.

49 The first substantive issue raised by the submissions of the MOE is whether the March 15 Order is subject to the stay of proceedings granted in the Initial Order.

50 The Initial Order grants a broad stay of proceedings in favour of the CCAA Entities, subject to certain limitations, including investigations, acts, suits or proceedings by a regulatory body that are permitted by s. 11.1 of the CCAA.

51 Exceptions to the stay should be narrowly interpreted so as to accord with the objectives of the CCAA: *Nortel Networks Corp., Re*, 2009 ONCA 833 (Ont. C.A.) at para. 17; *Nortel*, *supra*, at para. 55.

52 Subsection 11.1(2) of the CCAA provides that, subject to subsection 11.1(3), a stay of proceedings shall not affect an action, suit or proceeding that is taken by a regulatory body, other than the enforcement of a payment ordered by the regulatory body.

53 I recently considered this issue in *Nortel*. Counsel to the CCAA Entities submits that the facts in this case are virtually identical to those in *Nortel*. He cites as an example the fact that the March 15 Order requires, among other things, the continued pumping and treatment of groundwater, the submission of an action plan to be reviewed and amended by the MOE, if necessary, and additional remediation work. Counsel submits that these requirements significantly overlap with the obligations set forth by the MOE in the orders at issue in *Nortel*.

54 In *Nortel*, at para. 104, I stated that: "[t]he Ministry has the discretion under the legislation and, if the Minister is solely acting in is regulatory capacity, it can do so unimpeded by the stay. This is the effect of section 11.1(2) of the CCAA".

55 However, at para. 105 I stated that:

> [w]hen the entity that is the subject of the MOE's attention is insolvent and not carrying on operations at the property in question, it is necessary to consider the substance of the MOE's actions. If the result of the issuance of the MOE Orders is that [the debtor] is required to react in a certain way, it follows, in the present circumstances, that [the debtor] will be required to incur a financial obligation to comply. It is not a question of altering its operational activities in order to comply with the EPA on a going forward basis. There is no going forward business. [The debtor] is in a position where it has no real option but to pay money to comply with any environmental issue. In my view, if the MOE moves from draft orders to issued orders, the result is clear. The MOE would be, in reality, enforcing a payment obligation, which step is prohibited by the Stay.

56 Counsel to the CCAA Entities pointed out one distinction between *Nortel* and the present scenario. In *Nortel*, the MOE had not issued draft orders against *Nortel* until after the CCAA proceedings had already commenced, whereas in this case, the March 15 Order was issued prefiling as a result of concern about the CCAA Entities' financial situation. As stated in the conclusion to the provincial officer's report issued in connection with the March 15 Order:

57 While Northstar has undertaken all needed investigation, mitigation and remediation programs on a voluntary basis without the need for a director's order, recent financial disclosures made by Northstar have revealed there is significant doubt regarding the corporation's ability to continue as a going concern which could impact on the environmental remediation programs.

58 The record in this case is clear. The CCAA Entities are insolvent. The Cambridge Facility was shut down in 2010 and no operations (other than environmental remediation activities) have been conducted there since that time. The CCAA Entities have conducted a court approved Sales Process. During the Sales Process, no bidder expressed any interest in purchasing the Cambridge Facility or was willing to assume the obligations associated with it.

59 I agree with the submission of counsel to the CCAA Entities that the purpose of the March 15 Order and the MOE's motion is to attempt to require the CCAA Entities to continue to comply with the March 15 Order and all of the financial obligations associated therewith in perpetuity and in conflict with the priorities enjoyed by other creditors.

60 At paragraph 127 in *Nortel*, I stated that, "the moment that [the debtor] is "required" to undertake such an activity, it is "required" to expend monies in response to actions being taken by the MOE. In my view, any financial activity that [the debtor] is required to undertake is stayed by the provisions of the Initial Order".

61 In this case, it seems to me quite clear that the March 15 Order seeks to enforce a payment obligation and it is therefore stayed by the Initial Order: see also *AbitibiBowater Inc., Re*, 2010 QCCS 1261 (C.S. Que.) ("*Abitibi*") at para. 160.

62 Counsel to the CCAA Entities submits that the MOE is attempting to create a priority claim through the issuance of the March 15 Order that does not exist at law and contrary to the priority scheme provided in the CCAA.

63 Counsel to the CCAA Entities cites *General Chemical Canada Ltd., Re*, 2007 ONCA 600 (Ont. C.A.) ("*General Chemical*") at para. 46, for the proposition that federal insolvency statutes were amended to delineate the priority for the MOE in insolvency scenarios and, thus, "giving effect to provincial environmental legislation in the face of these amendments... would impermissibly affect the scheme of priorities in the federal legislation".

64 The scope of the MOE's security is set out in the CCAA at s. 11.8(8) which provides:

> 11.8(8) Any claim by Her Majesty in right of Canada or a province against a debtor company in respect of which proceedings have been commenced under this Act for costs of remediating any environmental condition or environmental damage affecting real property of the company is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage, and the charge
>
> (a) is enforceable in accordance with the law of the jurisdiction in which the real property is located, in the same way as a mortgage, hypothec or other security on real property; and
>
> (b) ranks above any other claim, right or charge against the property, notwithstanding any other provision of this Act or anything in any other federal or provincial law.

65 Subsection 11.8(9) of the CCAA provides:

> 11.8(9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.

66 In my view, the MOE is entitled to file a claim against Northstar for any costs of remedying the environmental condition at the Cambridge Facility. However, the MOE is not entitled to attempt to use the March 15 Order to create a priority that it otherwise does not have access to under the legislation.

67 This conclusion is consistent with the views that I expressed in *Nortel* at paras. 107 and 116 and is in accordance with the reasoning of *AbitibiBowater* at paras. 132 and 148, as well as *General Chemical* at para. 46.

68 With respect to the Heligear Transaction, full details are contained in the affidavit filed in support of the motion.

69 I have considered the factors listed under s. 36(3) of the CCAA. I am satisfied that the record establishes that the Heligear Agreement was the result of a broad and comprehensive marketing process conducted with the assistance of Harris Williams. The Sales Process Order approved key elements of the Sales Process, including (a) the execution of the Heligear Agreement, *nunc pro tunc*, for the purpose of establishing a stalking horse bid and (b) the Bidding Procedures which governed the determination of the successful bid.

70 I am satisfied that the CCAA Entities complied with the terms of the Sales Process Order.

71 I am also satisfied that while Northstar conducted a broad and comprehensive marketing process prior to the commencement of these proceedings, the Monitor has reviewed and supported the approval of the execution of the Heligear Agreement *nunc pro tunc* and the approval of the Bidding Procedures as granted in the Sales Process Order.

72 The CCAA Entities take the position that the Heligear Transaction is in the best interests of Northstar's stakeholders, including its employees, suppliers and customers.

73 I am satisfied that the record establishes that the creditors were adequately consulted and the effects of the Heligear Transaction are positive. I am also satisfied that the consideration to be received for the Canadian Purchased Assets is reasonable and fair in the circumstances.

74 In making these statements, I do not in any way wish to diminish the arguments put forth by the MOE and supported by the Region of Waterloo, the City of Cambridge and GE Canada. The concerns raised by the MOE are real and serious. However, the reality of the situation is that during the Sales Process, no bidder was willing to purchase — or expressed any interest in purchasing — the Cambridge Facility, either alone or together with the other assets of Northstar.

75 The reality of the situation was also expressed by counsel to Fifth Third. Counsel submitted that the record is clear that, if the Heligear Transaction is not approved, Fifth Third will proceed to enforce its rights. As a result of ss. 11.8(8) and (9) of the CCAA, Fifth Third Bank has a superior priority position to the MOE and would be in a position to commence proceedings to enforce its rights as such.

76 The practical result at that point would be that Northstar would have no assets available and no ability to comply with the MOE Order.

77 The reality of the situation is that, regardless of whether the Heligear Transaction is approved, Northstar will not have the practical ability to comply with the MOE Order. In this respect, the sale of the Canadian Purchased Assets to the Canadian Purchaser has no real effect on the MOE or any other party with an interest in the Cambridge Facility.

78 The Heligear Transaction is supported by the Monitor, the CRO, Fifth Third Bank (both as DIP Agent and as Agent for the Lenders under Northstar's existing secured facility), Boeing, Boeing Capital and the CAW.

79 In addition to the factors set out in s. 36(3), discussed above, s. 36(7) of the CCAA sets out the following restrictions on the disposition of assets within CCAA proceedings:

> 36(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

80 The CCAA Entities have advised that they intend to make the payments of the amounts described in subsections 6(4)(*a*) and (5)(*a*) of the CCAA on their normal due dates from the proceeds of the Heligear Transaction.

81 Counsel to the CAW made reference to issues of successor liability. These issues are not directly before the court today and do not factor into this endorsement.

Disposition

82 In conclusion, I am satisfied that the Heligear Transaction is in the best interests of Northstar's stakeholders, including its employees, suppliers and customers. The proceeds of the Transaction will be available for distribution to the CCAA Entities' creditors in accordance with their legal priorities. The Lenders have asserted a claim against the proceeds of the Heligear Transaction. Independent counsel to the Monitor has reviewed the Lenders' security and concluded that the security granted under the Credit Facility is valid, perfected and enforceable.

83 In the result, I am satisfied that the Heligear Transaction should be approved.

84 An order is also made declaring that the MOE is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.

85 Further, MOE's request to lift the stay is denied on the basis that the MOE is seeking to create a super priority claim by way of the March 15 Order. Such a priority is not recognized at law and, consequently, it is appropriate that the MOE's enforcement of its rights as a creditor should be stayed.

86 An order is also granted vesting all of the Canadian Purchased Assets in the Canadian Purchaser free and clear of all restrictions.

87 Finally, the Monitor is authorized and directed, on closing of the Heligear Transaction, to make distributions to the DIP Agent for the DIP Lenders and to the Lenders in accordance with their legal priorities.

88 I thank counsel for their comprehensive submissions and argument in connection with this matter.

Debtor companies' motion granted; Ministry's motion dismissed.

2013 ONCA 600
Ontario Court of Appeal

Northstar Aerospace Inc., Re

2013 CarswellOnt 13653, 2013 ONCA 600, 234 A.C.W.S. (3d) 642, 8 C.B.R. (6th) 154

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

In the Matter of a Plan of Compromise or Arrangement of Northstar Aerospace Inc., Northstar Aerospace (Canada) Inc., 2007775 Ontario Inc. and 3024308 Nova Scotia Company

S.T. Goudge, J.C. MacPherson, R.G. Juriansz JJ.A.

Heard: June 19, 2013
Judgment: October 3, 2013
Docket: CA C56518

Proceedings: affirming *Northstar Aerospace Inc., Re* (2012), 91 C.B.R. (5th) 268, 2012 CarswellOnt 9607, 2012 ONSC 4423 (Ont. S.C.J. [Commercial List])

Counsel: Leonard F. Marsello, William R. MacLarkey, Jacqueline L. Wall for Appellant, Her Majesty the Queen in right of Ontario as represented by the Ministry of the Environment
Steven J. Weisz, Jenna Willis for Respondent, Fifth Third Bank
Paul D. Guy, Scott McGrath for Former Directors and Officers Group
Craig J. Hill for Monitor Ernst & Young Inc.

Subject: Insolvency

APPEAL by Ministry from judgment reported at, granting motion for approval of agreement.

***R.G. Juriansz J.A.*:**

1 The appellant, Her Majesty the Queen in right of Ontario as represented by the Ministry of the Environment (the "MOE"), appeals from the order of the CCAA judge dated July 24, 2012, with written reasons released on July 30, 2012.

2 In his decision, the CCAA judge granted the motion of the insolvent respondents, Northstar Aerospace Inc., Northstar Aerospace (Canada) Inc. ("Northstar Canada"), 2007775 Ontario Inc. and 3024308 Nova Scotia Company (collectively, "Northstar"), for approval of an agreement for the sale of Northstar's assets, and dismissed the MOE's motion for a declaration that a remediation order issued by the MOE under the *Environmental Protection Act*, R.S.O. 1990, c. E-19 ("EPA"), was not subject to the stay of proceedings previously ordered, or, in the alternative, an order lifting the stay in respect of that remediation order.

3 Leave to appeal the CCAA judge's order was granted only from the dismissal of the MOE's motion.

4 For the reasons that follow, I would dismiss the appeal.

A. Facts

5 Northstar Canada operated a manufacturing and processing facility in Cambridge, Ontario from around 1981 to 2009. The chemical trichloroethylene, a carcinogen, was used in these operations, and the operations produced waste

containing heavy metals. Since 2004, Northstar Canada has been actively involved in monitoring the contamination at the site and in the surrounding community, a part of which is residential, and subsequently began remediation activities. In 2012, the MOE, due to a concern that Northstar would be unable to continue its voluntary remediation because of financial problems, issued two remediation orders against it, dated March 15, 2012 and May 31, 2012 (the "MOE Orders").

6 On June 14, 2012, Northstar sought and obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA"). The usual initial order staying all rights and remedies against the insolvent company was issued that same date (the "Initial Order"). The Initial Order does not affect regulatory proceedings as contemplated by s.11.1(2) of the CCAA.

7 On July 24, 2012, the CCAA judge approved the agreement for the sale of substantially all of Northstar's assets. The contaminated site at Cambridge was not included in the sale. The debtor-in-possession lenders advised Northstar that they would not continue to fund its remediation efforts after the agreement for sale of assets closed on August 3, 2012. Northstar advised the MOE that if the sale of assets were approved, its intention was to abandon the site and terminate the remediation work. Also on July 24, 2012, the CCAA judge dismissed the MOE's motion. He found that the remediation orders were subject to the stay of proceedings granted in the Initial Order. Northstar has made no provision to continue its remediation activities after the close of the sale of assets transaction.

B. The Decision Under Appeal

8 In his reasons, the CCAA judge noted that the Initial Order excepted regulatory proceedings as permitted by s. 11.1 of the CCAA. He referred to his earlier decision in *Nortel Networks Corp., Re*, 2012 ONSC 1213, 88 C.B.R. (5th) 111 (Ont. S.C.J. [Commercial List]), quoting his remarks that if the insolvent company was not carrying on operations at the property, "it is necessary to consider the substance of the MOE's actions" (at para. 105). If the MOE orders require the debtor to act in a certain way, it is inevitable that the debtor would incur financial obligations to comply. Where there is no going-forward business, the debtor has no option but to pay money to comply. The clear result would be that "[t]he MOE would be, in reality, enforcing a payment obligation," which the Initial Order prohibited (at para. 105).

9 The CCAA judge noted that the Cambridge facility had been shut down in 2010 and only remediation activities have been carried on there since that time. In the court-supervised sales process, no bidder was willing to purchase (or expressed any interest in purchasing) the Cambridge facility, either alone or together with the other assets of Northstar.

10 The CCAA judge therefore adopted his reasoning in *Nortel Networks Corp., Re* and concluded that, in the circumstances of this case, any financial activity the debtor is required to undertake to comply with environmental orders is stayed by the Initial Order. He went on to remark that in this case it was "quite clear that the March 15 [MOE] Order seeks to enforce a payment obligation" (*Northstar Aerospace Inc., Re* [2012 CarswellOnt 9607 (Ont. S.C.J. [Commercial List])], at para. 61). He concluded that while the MOE was entitled to file a claim for any costs of remedying the environmental conditions at the Cambridge facility, it was not entitled to use the remediation order "to create a priority that it otherwise does not have access to under the legislation" (at para. 66).

11 On this reasoning, the CCAA judge dismissed the MOE's motion.

C. Analysis

12 On August 1, 2012, the MOE brought a motion for a partial stay of the CCAA judge's order permitting distribution of the sale's proceeds. The motion was dismissed and leave to appeal that denial was refused. Thus, this appeal may have some jurisprudential significance but will be of no practical consequence.

13 While the motion for leave to appeal was pending, the Supreme Court of Canada released its decision in *AbitibiBowater Inc., Re*, 2012 SCC 67, [2012] 3 S.C.R. 443 (S.C.C.). That the CCAA judge did not have the benefit of the

Supreme Court's decision must be kept in mind in reviewing his reasons. The same situation arose in *Nortel Networks Corp., Re*, 2013 ONCA 599 (Ont. C.A.), and the two appeals were heard together.

14 I adopt my review of the *AbitibiBowater Inc., Re* decision as set out in *Nortel Networks Corp., Re*. Briefly stated, the Supreme Court decided that ongoing environmental remediation obligations may be reduced to monetary claims that can be compromised in CCAA proceedings in two circumstances: (1) where the province has performed the remediation work and advances a claim for reimbursement, or (2) where the obligation may be considered a contingent or future claim because it is "sufficiently certain" that the province will do the work and then seek reimbursement.

15 This court, in reviewing a decision of a CCAA judge rendered before the Supreme Court's decision in *AbitibiBowater Inc., Re*, may attempt to glean from the reasons how he or she would have answered the question had the law been available; and it may consider the evidence in the record and answer the question in his or her stead.

16 It seems to me, the CCAA judge's reasons show that he was of the view the MOE had no realistic alternative but to remediate the property. The property had been contaminated during Northstar's operations while Northstar owned it, and there was no subsequent purchaser whom the MOE could order to undertake the remediation. The CCAA judge said that it seemed quite clear to him that the remediation order sought to enforce a payment obligation.

17 In my view, the CCAA judge implicitly found it was "sufficiently certain" the MOE would remediate the lands.

18 A review of the fresh evidence supports his conclusion.

19 Northstar went bankrupt and the trustee abandoned the Cambridge property. The MOE therefore commenced remediation activities at the site. The Minister's Direction permitting the MOE to perform work at the site provides: "[u]ntil such time as any other person assumes responsibility for the work required by the [MOE] Order..., it is in the public interest to cause some or all of the work required by the [MOE] Order to be done by the [MOE]".

20 The affidavit supporting the MOE's fresh evidence motion states that "[t]he MOE has undertaken the Preventive Work without prejudice to its position in this appeal." The MOE also filed a claim with the Monitor for the costs incurred, again on the basis that doing so was "without prejudice to the MOE's position that the two Director's Orders are not pre-filing claims..." The MOE is currently seeking to compel a group of former directors and officers of Northstar to continue remediating the property. The directors and officers appeared on the appeal to submit that they will be able to successfully resist the MOE's efforts.

21 The issues between the MOE and the directors will be decided elsewhere. As far as this proceeding is concerned, in my view, the fact that the MOE has undertaken remediation activities makes it "sufficiently certain" that it will do so. I am unsure what the MOE hoped to achieve by its unilateral assertion of having undertaken the work on a without prejudice basis.

22 It is certainly conceivable that the MOE, after commencing remediation work, is able to compel other responsible parties to take over the work and complete it. If the MOE is successful in doing so, the work will be done without the MOE expending funds. As far as the other responsible parties are concerned, the MOE will be acting in a purely regulatory capacity. However, as far as the MOE Orders against Northstar are concerned, its commencement of the work in the circumstances of this case establishes that the MOE Orders are in substance a claim provable in the insolvency.

D. Conclusion

23 For these reasons, I would dismiss the appeal.

24 Given the distribution order, the Fifth Third Bank had no stake in the outcome of this appeal and appeared to assist the court by addressing the creditors' perspective. The issues between the directors and officers and the MOE are being dealt with elsewhere. This is not a case for costs.

***S.T. Goudge J.A.*:**

I agree

***J.C. MacPherson J.A.*:**

I agree

Appeal dismissed.

End of Document

Tab 6

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

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S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

1 This is an appeal from the order of Rosenberg J. made on May 1, 1991. 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.

2 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.

3 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 million dollars. 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 million on the winding up of Soundair.

4 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.

5 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.

6 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.

7 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.

8 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, 1990. 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.

9 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."

10 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.

11 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.

12 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?

13 I will deal with the two issues separately.

1. Did the Receiver Act Properly in Agreeing to Sell to OEL?

14 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.

15 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.

16 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, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.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.

17 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?

18 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 do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 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.

20 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.

21 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 Co. v. Rosenberg* , supra, at p. 112 [O.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.]

22 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, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.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.]

23 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 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.

24 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 10 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.

25 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.

26 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 Co. v. Rosenberg* , supra, Anderson J., at p. 113 [O.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.

27 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. S.C.) , 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.

28 The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , 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.

29 In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) , 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.]

30 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.

31 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.

32 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.

33 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.

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-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.

35 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.

36 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.

37 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.

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

2. Consideration of the Interests of all Parties

39 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* , supra (Saunders J.). 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."

40 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), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), 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.

41 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

42 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.

43 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* , 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 considera tion 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 binding 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.

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at 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.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 124 [O.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.]

46 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.

47 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.]:

> 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.

48 It would be a futile and duplicitous exercise for this court to examine in minute detail all of 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?

49 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.

50 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 or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 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.

52 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.

53 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.

54 Moreover, I am not prepared to 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.

55 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 7 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, that it would have told the court that it needed more information before it would be able to make a bid.

56 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.

57 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.

58 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.]:

> 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.]:

> 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.

59 In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this:

> They created a situation as of March 8th, 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.

60 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.

61 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.

62 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.

63 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.

64 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 debtor's assets.

65 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 inter-lender 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 inter-lender 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 million 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.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1 million, and the Royal Bank would receive $5 million 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.

67 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 inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 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.

69 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.

70 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.

71 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-client scale. I would make no order as to the costs of any of the other parties or intervenors.

McKinlay J.A. **:**

72 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), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . 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.

73 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 therefore), 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):**

74 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.

75 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 OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by 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. 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.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at 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 have 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.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. 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:

> 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.

78 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 million to $4 million. 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 down payment on closing.

79 In *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.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.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 that 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.

80 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.

81 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.

82 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.

83 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. S.C.) , 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.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) , Saunders J. heard an application for court approval of 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:

> 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 commercial efficacy and integrity.

85 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, 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.]:

> 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.

86 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.

87 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.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

> 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 1st. 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.

89 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 his 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 "hardball," 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.

90 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.

91 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.

92 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.

93 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.

94 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 million. 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.

95 As a result of due negligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to $8.1 million conditional upon there being $4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 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.

97 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.

98 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 million and $12 million.

99 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 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 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.

101 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.

102 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.

103 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.

104 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.

105 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 that 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.

106 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.

107 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 inter-

lender 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.

108 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 3 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.

109 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.

110 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.

111 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 3 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.

112 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 3 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.

113 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:

> They created a situation as of March 8, where the receiver was faced with two offers, one of which was acceptable in 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* ."

114 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 inter-lender condition removed.

115 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 con stitutes proximately 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 million to $4 million.

116 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.

117 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.

118 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 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.

119 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.

120 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.

121 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.

122 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 that it knew that CCFl was interested in purchasing Air Toronto.

123 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.

124 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.

125 For the above reasons I would allow the appeal 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-client basis. I would make no order as to costs of any of the other parties or intervenors.

Appeal dismissed.

End of Document

Tab 7

2015 ONSC 2066
Ontario Superior Court of Justice [Commercial List]

Target Canada Co., Re

2015 CarswellOnt 5211, 2015 ONSC 2066, 251 A.C.W.S. (3d) 377, 30 C.B.R. (6th) 335

In the Matter of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC.

Morawetz R.S.J.

Heard: March 30, 2015
Judgment: April 2, 2015
Docket: CV-15-10832-00CL

Proceedings: full reasons to *Target Canada Co., Re* (2015), 2015 CarswellOnt 4745, Morawetz R.S.J. (Ont. S.C.J. [Commercial List])

Counsel: Shawn Irving, Robert Carson, for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC
Jay Swartz, for Target Corporation
Harvey Chaiton, for Directors and Officers
Alan Mark, Melaney Wagner, for Monitor, Alvarez & Marsal Inc.
Lad Kucis (Agent), for Pharmacy Franchisee Associaton Canada

Subject: Insolvency

FULL REASONS to judgment reported at *Target Canada Co., Re* (2015), 2015 CarswellOnt 4745 (Ont. S.C.J. [Commercial List]), concerning motion for approval of asset purchase agreement.

***Morawetz R.S.J.*:**

1 The Applicants bring this motion for approval of the Asset Purchase Agreement (the "APA") among Target Canada Co. ("TCC"), Target Brands, Inc. ("Target Brands") and Target Corporation, and vesting TCC's right, title and interest in and to the Purchased Assets (as defined in the APA) in Target Corporation.

2 The requested relief was not opposed.

3 The Purchased Assets consist of certain goods bearing the Target logos, trademarks and other proprietary elements. The Applicants take the position that the Purchased Assets cannot be sold by the Agent in the Inventory Liquidation Process unless expressly designated by TCC, because of the rights of Target Brands (a subsidiary of Target Corporation) to control the use of the intellectual property (the "Target IP").

4 The criteria for approval of the Purchased Assets to Target Corporation, a related party, is set out in sections 36(3) and (4) of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (CCAA).

36(3) Factors to be considered — In deciding whether to grant authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

36(4) Additional Factors — related persons — If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

5 All of the Purchased Assets represent various categories of Target Branded items, such as shopping carts, shopping baskets and the exterior signage on TCC stores. The Purchased Assets are unique in that they incorporate logos, trademarks or other indicia of TCC or its affiliates.

6 Target Brands views the Purchased Assets as using or displaying IP that is proprietary to Target Brands. Target Brands has not agreed to allow the Purchased Assets to be sold by the Agent. The Applicants are of the view that Target Brands would also likely contest any sale of the Purchased Assets to a third party purchaser.

7 The record establishes that the Applicants requested bids for the Purchased Assets from the liquidation firms which applied to be selected as agent. By following this process, the Applicants submit they sought good faith offers by which TCC could sell the assets to an unrelated third party. Only one bidder included some of the items in its bid.

8 Separately from the auction process, Target Corporation submitted an offer to purchase a number of the assets.

9 The Applicants and the Monitor formed the view that if a third party purchaser for the items could be found, such purchaser would likely discount its price to take into account the impact of the IP. That impact included the cost to remove brand or other IP elements and/or the litigation risks associated with a potential challenge by Target Brands to any unauthorized use of its IP.

10 The Applicants and the Monitor submit that it would not be beneficial to stakeholders as a whole to incur additional costs in seeking to market these unique assets. Instead, the Applicants and the Monitor sought to establish objective benchmarks to ensure that the price offered by Target Corporation was reasonable and fair, and exceeded any third party offer that might be made.

11 The Applicants have established that the price offered by Target Corporation, viewed in isolation, exceeds all three independent valuations of the Purchased Assets obtained by the Applicants and the Monitor. In addition, Target Corporation will assume the substantial costs associated with removing the exterior signage on TCC stores.

12 TCC, Target Brands and Target Corporation entered into the APA as of March 23, 2015. Under the Agreement, Target Corporation has agreed to purchase the Purchased Assets for U.S. $2,215,020.

13 The Applicants are of the view that Target Corporation is effectively the only logical purchaser for the Purchased Assets due to their unique nature.

14 The Applicants submit that, taking into account the factors listed in section 36(3) of the CCAA, the test set out in section 36(4) of the CCAA, and the general interpretative principles underlying the CCAA, the Court should grant the approval and vesting order. Further, the Applicants submit that in the absence of any indication that the Applicants have acted improvidently, the informed business judgment of the Applicants — which is supported by the advice and the consent of the Monitor, that the APA is in the best interests of the Applicants and their stakeholders and is entitled to deference by the Court.

15 I note that the factors listed in section 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check-list that must be followed in every sale transaction under the CCAA. Further, I also note that the factors overlap, to a certain degree, with the factors set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) ("*Soundair*"). The *Soundair* factors were applied in approving sale transactions under pre-amendment CCAA case law. Under section 36(4) of the CCAA, the Court must be satisfied, overall, that sufficient safeguards were adopted to ensure that a related party transaction is in the best interests of the stakeholders of the Applicants and that the risk to the estate associated with a related party transaction have been mitigated.

16 I am satisfied that the risk theoretically associated with a related party transaction has been satisfactorily addressed through the efforts of the Applicants and the Monitor to evaluate the salability of the Purchased Assets to an unrelated party.

17 I am also satisfied that the process was reasonable in light of the unique assets involved. Whether or not a legal challenge by Target Brands would ultimately be successful, the litigation risks would, in my view, be expected to materially affect the value of the Purchased Assets to an unrelated third party. Further, the uniqueness of the Purchased Assets makes Target Corporation the only realistic purchaser. Only Hilco Global ("Hilco") submitted a bid with respect to some, but not all, of the assets included in the Initial Offer. None of the remaining bidders elected to submit an offer. Given that only one of the liquidation firms submitted a bid, the Applicants and the Monitor considered whether the proposed sale to Target Corporation was fair and reasonable. They came to the conclusion that the likely price to be obtained by an unrelated third party did not support the sale of the Purchased Assets to an unrelated third party.

18 As required by section 36 of the CCAA, the Monitor has been involved throughout the proposed transaction. The Monitor's Seventh Report comments at length on the transaction, and specifically whether it would be fair and reasonable to accept the offer from Target Corporation. The Monitor supports the conclusion that the purchase price offered by Target Corporation far exceeds the estimated liquidation values obtained. The Monitor is of the opinion that the APA benefits the creditors of the Applicants. The Monitor supports the motion for approval of the APA.

19 I am satisfied that the transaction is in the best interests of stakeholders. The transaction does provide some enhanced economic value to the estate. Further, the APA Agreement allows the Monitor, TCC and Target Corporation to agree upon the timetable for delivery of the Purchased Assets. This flexibility is of assistance to TCC and its Inventory Liquidation Process. In addition, there are no fees or commission payable on the transaction and the Agreement does provide certain guaranteed value to TCC.

20 The Applicants submit that all of the other statutory requirements for obtaining relief under section 36 have been satisfied. In particular, no parties have registered security interests against the Purchased Assets.

21 I am also satisfied that the requirements of section 36(7) have been satisfied. This section provides a degree of protection to employees and former employees for unpaid wages the employees would have been entitled to receive under the *Bankruptcy and Insolvency Act*, in addition to amounts that are owing for post-filing services to a debtor company. I also accept the Applicants' submissions that because they have been paying employees for all post-filing services and the Employee Trust will satisfy claims arising from any early termination of eligible employees, the requirements of section 36(7) have been satisfied.

22 For the foregoing reasons, the Asset Purchase Agreement is approved and the Approval and Vesting Order is granted.

Order accordingly.

End of Document

Tab 8

2012 ONSC 4247
Ontario Superior Court of Justice [Commercial List]

Terrace Bay Pulp Inc., Re

2012 CarswellOnt 9470, 2012 ONSC 4247, [2012] O.J. No. 3628, 218 A.C.W.S. (3d) 488, 92 C.B.R. (5th) 40

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, C. C-36, as Amended

In the Matter of a Plan of Compromise or Arrangement of Terrace Bay Pulp Inc. (Applicant)

Morawetz J.

Heard: July 16, 2012
Judgment: July 19, 2012
Docket: CV-12-9566-00CL

Counsel: Pamela Huff, Marc Flynn, Kristina Desimini for Applicant, Terrace Bay Pulp Inc.
Alec Zimmerman, James Szumski for Birchwood Trading, Inc.
M. Starnino for United Steelworkers
Alan Merksey for Tangshan Sanyu Group Xingda Chemical Fiberco Limited
Alex Ilchenko for Monitor, Ernst & Young Inc
Jacqueline L. Wall for Her Majesty The Queen in Right of Ontario as represented by the Ministry of Northern Development and Mines
Janice Quigg for Skyway Canada Ltd.
Fred Myers for Township of Terrace Bay
Peter Forestell, Q.C. for Aditya Birla Group and AV Terrace Bay Inc.

Subject: Insolvency; Public; Property

MOTION by T Inc. for approval of sales transaction and other relief.

***Morawetz J.*:**

1 Terrace Bay Pulp Inc. (the "Applicant") brought this motion for, among other things, approval of the Sales Transaction (the "Transaction") contemplated by an asset purchase agreement dated as of July 5, 2012 (the "Purchase Agreement") between the Applicant, as seller, and AV Terrace Bay Inc., as purchaser (the "Purchaser").

2 The Applicant also seeks authorization to take additional steps and to execute such additional documents as may be necessary to give effect to the Purchase Agreement.

3 Further, the Applicant seeks a Vesting Order, approval of the Fifth Report of the Monitor dated June 12, 2012 and a declaration that the subdivision control provisions contained in the *Planning Act*, R.S.O. 1990, c. P.13 (the "*Planning Act*") do not apply to the vesting of title to the Real Property (as defined in the Purchase Agreement) in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer.

4 Finally, the Applicant sought an amendment to the Initial Order to extend the Stay of Proceedings to October 31, 2012.

5 Argument on this matter was heard on July 16, 2012. At the conclusion of argument, on an unopposed basis, I extended the Stay of Proceedings to October 31, 2012. This decision was made after a review of the record which, in my

view, established that the Applicant has been and continues to work in good faith and with due diligence such that the requested extension was appropriate in the circumstances.

6 On July 19, 2012, I released my decision approving the Transaction, with reasons to follow. These are the reasons.

7 With respect to the motion to approve the Transaction, the Applicant's position was supported by the United Steelworkers and the Township of Terrace Bay. Counsel to Her Majesty The Queen in Right of Ontario, as Represented by the Ministry of Northern Development and Mines, consented to the Transaction and also supported the motion.

8 The motion was opposed by Birchwood Trading, Inc. ("Birchwood") and by Tangshan Sanyu Group Xingda Chemical Fiberco Limited ("Tangshan").

9 Counsel to the Applicant challenged the standing of Tangshan on the basis that it was "bitter bidder". Argument was heard on this issue and I reserved my decision, indicating that it would be addressed in this endorsement. For the purposes of the disposition of this motion, it is not necessary to address this issue.

10 The Applicant seeks approval of the Transaction in which the Purchaser will purchase all or substantially all of the mill assets of the Applicant for a price of $2 million plus a $25 million concession from the Province of Ontario. The Monitor has recommended that this Transaction be approved.

11 Birchwood submits that the Applicant and the Monitor have taken the position that a competing offer from Tangshan for a purchase price of $35 million should not be considered, notwithstanding that the Tangshan offer (i) is subject to terms and conditions which are as good or better than the Transaction; (ii) would provide dramatically greater recovery to the creditors of the Applicant, and (iii) offers significant benefits to other stakeholders, including the employees of the Applicant's mill.

12 Birchwood is a creditor of the Applicant. It holds a beneficial interest in the Subordinated Secured Plan Notes (the "Notes") in the face amount of approximately $138,000 and is also the fourth largest trade creditor of the Applicant. If the Transaction is approved, Birchwood submits that it expects to receive less than 6% recovery on its holdings under the Notes and no recovery on its trade debt. In contrast, if the Tangshan offer were accepted, Birchwood expects that it would receive full recovery under the Notes, and that it may also receive a distribution with respect to its trade debt.

13 Birchwood also submits that the Tangshan offer provides substantial benefits to the creditors and other stakeholders of the Applicant which would not be realized under the Transaction. These include:

> (a) an increase in the purchase price for the mill assets, from an effective purchase price of $27 million to a cash purchase price of $35 million;
>
> (b) the potential for the Province of Ontario to be repaid in full or, if the Province is prepared to offer the same debt forgiveness concession under the Tangshan offer that it is providing to the Purchaser, the potential to increase the "effective" purchase price of the Tangshan offer to $60 million;
>
> (c) as a consequence of (a) and (b), additional proceeds available for distribution to creditors subordinate to the Province of Ontario of between $8 million and $33 million;
>
> (d) employment of approximately 75 additional employees, plus the existing management of the mill;
>
> (e) conversion of the mill into a dissolving pulp mill in 18 months, rather than 4 years, with a higher expected yield once the conversion is complete and a business plan which calls for the production of a more lucrative interim product during the conversion process.

14 Counsel to Birchwood submits that the substantial increase in the consideration offered by the Tangshan offer, which is a binding offer with terms and conditions that are at least as favourable as the Transaction, is sufficient to call

into question the integrity and efficacy of the Sales Process (defined below). Counsel suggests that the market for the mill assets was not sufficiently canvassed, and provides evidence to support a finding that the criteria for approval of the sale as set out in s. 36 (3) of the CCAA and *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) has not been met.

15 Birchwood requests an adjournment of the Applicant's request for approval of the Transaction, or a refusal to approve the Transaction and a varying of the Sales Process to allow the Tangshan offer to be considered and, if appropriate, accepted by the Applicant. Tangshan supports the position of Birchwood.

16 For the following reasons, I decline Birchwood's request and grant approval of the Transaction.

Facts

17 The Applicant filed the affidavit of Wolfgang Gericke in support of this motion. In addition, there is considerable detail provided in the Sixth Report of the Monitor and in the Supplemental Sixth Report of the Monitor.

18 On January 25, 2012, the Initial Order was granted in the CCAA proceedings. The Initial Order authorized the Applicant to conduct, with the assistance of the Monitor and in consultation with the Province of Ontario, a sales process to solicit offers for all or substantially all of the assets and properties of the Applicant used in connection with its pulp mill operations (the "Sales Process").

19 The Applicant and the Monitor conducted a number of activities in furtherance of the Sales Process, as outlined in detail in the Sixth Report.

20 The Monitor received 13 non-binding Letters of Intent by the initial deadline of February 15, 2012. All of the parties that submitted Letters of Intent were invited to do further due diligence and submit binding offers by the March 16, 2012 deadline provided for in the Sales Process Terms (the "Bid Deadline").

21 The Monitor received eight binding offers by the Bid Deadline and, based on the analysis of the offers received, the Monitor and the Applicant, in consultation with the Province, determined that the offer of AV Terrace Bay Inc. was the best offer. The ultimate parent of the Purchaser is Aditya Birla Management Corporation Private Ltd. ("Aditya"), one of the largest conglomerates in India.

22 After identifying the Purchaser's offer as the superior offer in the Sales Process, and after extensive negotiations, the Applicant entered into the Purchase Agreement; executed July 5, 2012 for an effective purchase price in excess of $27 million.

23 Counsel to the Applicant submits that in assessing the various bids, the Applicant and the Monitor, in consultation with the Province, considered the following factors:

(a) the value of the consideration proposed in the Transaction;

(b) the level of due diligence required to be completed prior to closing;

(c) the conditions precedent to closing of a sale transaction;

(d) the impact on the Corporation of the Township of Terrace Bay (the "Township"), the community and other stakeholders;

(e) the bidder's intended use for the mill site including any future capital investment into the mill; and

(f) the ability to close the Transaction as soon as possible, given the company's limited cash flow.

24 Four parties expressed an interest in Terrace Bay after the Bid Deadline.

25 The unchallenged evidence is that the Monitor informed each of the late bidders that they could conduct due diligence, but their interest would only be entertained if the Applicant could not complete a Transaction with the parties that submitted their offers in accordance with the Sales Process Terms (*i.e.* prior to the Bid Deadline).

26 The Monitor states in its Sixth Report that it reviewed materials submitted by each late bidder. Tangshan, as one of the late bidders, submitted a non-binding offer on July 5, 2012 (the "Late Offer"). The terms of the Late Offer were subject to change, and Tangshan required final approval from regulatory authorities in China before entering into a transaction.

27 It is also unchallenged that, before submission of the Late Offer, the Monitor had advised Recovery Partners Ltd., which submitted the Late Offer on Tangshan's behalf, that the Bid Deadline passed months before and that the Applicant was far advanced in negotiating and settling a purchase agreement with a prospective purchaser who submitted an offer in accordance with the Sales Process Terms.

28 As indicated above, the Applicant executed the Purchase Agreement on July 5, 2012.

29 The Monitor received a second non-binding offer from Recovery Partners Ltd., on behalf of Tangshan, on July 10, 2012 and a binding offer on July 12, 2012 (the "July Tangshan Offer") for a purchase price of $35 million.

30 In its Sixth Report, the Monitor stated that it was of the view that it is not appropriate to vary the Sales Process Terms or to recommend the July Tangshan Offer for a number of reasons:

> (a) the Applicant, in consultation with the Province, had entered into a binding purchase agreement with the Purchaser, which does not permit termination by Terrace Bay to entertain a new offer;
>
> (b) the fairness and integrity of the Sales Process is paramount to these proceedings and to alter the terms of the court-approved Sales Process Terms at this point would be unfair to the Purchaser and all of the other parties who participated in the Sales Process in compliance with the Sales Process Terms;
>
> (c) the Sales Process terms have been widely known by all bidders and interested parties since the outset of the Sales Process in January 2012;
>
> (d) the Sales Process Terms provide no bid protections for the potential Purchaser;
>
> (e) the Purchaser had incurred, and continues to incur, significant expenses in negotiating and fulfilling conditions under the Purchase Agreement. The Applicant has advised the Monitor that there is a significant risk that the Purchaser would drop out of the Sales Process if there were an attempt to amend the Sales Process Terms to pursue an open auction at this stage;
>
> (f) to consider any new bids might result in a delay in the timing of the sale of the assets of the mill which, in the view of the Monitor, poses a risk due to the Applicant's minimal cash position;
>
> (g) the Province, with whom the Applicant is required to consult, and which has entered into an agreement with the Purchaser, supports the completion of the Transaction;
>
> (h) the Purchaser has made progress satisfying the conditions to closing, including meeting with the Applicant's employees and negotiating collective bargaining agreements with the unions.

31 As set out in the affidavit of Mr. Gericke, the Purchaser is an affiliate of Aditya, a Fortune 500 company that intends to make a significant investment to restart the mill by October 2012 and invest more than $250 million to convert the mill to produce dissolving grade pulp.

32 The purchase price payable is the aggregate of: (i) $2 million, plus or minus adjustments on closing, and (ii) the amount of the assumed liabilities.

33 The obligation of the Applicant to complete the Transaction is conditional upon, among other things, all amounts owing by the Applicant to the Province pursuant to a Loan agreement dated September 15, 2010 (the "Province Loan Agreement") being forgiven by the Province and all related security being discharged (the "Province Loan Forgiveness").

34 The Province is the first secured creditor of the Applicant, and is owed in excess of $24 million. The Province Loan Forgiveness is an integral part of the Transaction.

35 The Applicant submits that as the net sale proceeds, subject to any super-priority claims, flow to the Province in priority to other creditors upon completion, the effective consideration for the Transaction is in excess of $27 million, namely the cash portion of the purchase price plus the Province Loan Forgiveness, plus the value of the assumed liabilities.

36 The Monitor recommends approval of the Transaction for the following reasons:

(a) the market was broadly canvassed by the Applicant, with the assistance of the Monitor;

(b) the Purchase Agreement will result in a cash purchase price of $2 million, and will see the forgiveness of amounts outstanding, plus accrued interest and costs, under the Province Loan Agreement;

(c) the Transaction contemplated by the Purchase Agreement will result in significant employment in the region, as well as a substantial capital investment;

(d) the Transaction will also see a major multi-national corporation acquiring the mill, which will greatly improve the stability of the mill operations;

(e) the Transaction involves the expected re-opening of the mill in October 2012 and the Applicant will be rehiring the employees of the mill;

(f) the Monitor is aware of the late bids, including the July Tangshan Offer and has consulted the company and the Province in relation to same. The Monitor maintains that the Sales Process was conducted in accordance with the Sales Process Terms and provided an adequate opportunity for interested parties to participate, conduct due diligence, and submit binding purchase agreements and deposits within court-approved deadlines; and

(g) several further factors have been considered by the Monitor including, without limitation: the importance of maintaining the fairness and integrity of the Sales Process in relation to all parties, including the Purchaser; the terms of the Purchase Agreement; the fact that it has taken many weeks to negotiate various issues, and; the importance of certainty in relation to closing and the closing date.

37 In its Supplement to the Sixth Report, the Monitor commented on the efforts that were made to canvass international markets. This Supplemental Report was prepared after the Monitor reviewed the affidavit of Yu Hanjiang (the "Yu Affidavit"), filed by Birchwood. The Yu Affidavit raised issues with the efficacy of the Sales Process. The Monitor stated, in response, that it is satisfied that the Sales Process was properly conducted and that international markets were canvassed for prospective purchasers. Specifically, one of the channels used by the Monitor to market the assets was a program managed by the Ministry of Economic Development in Innovation ("MEDI") for the Province of Ontario which had established an "international business development representative program" ("IBDR"). The IBDR program operates a network of contacts and agents throughout the world, including China, to enable the MEDI to disseminate information about investment opportunities in Ontario to a worldwide investment audience. The Monitor further advised that IBDR representatives provided the Sales Process documents to a global network of agents for worldwide dissemination, including in China.

38 The Monitor restated that it was satisfied that the Sales Process adequately canvassed the market, and continues to support the approval of the Transaction.

39 The Monitor also provided in the Supplemental Report an update with respect to the position of the Purchaser.

40 The Purchaser advised the Monitor that it has negotiated an agreement in principle with executives of the Terrace Bay union locals regarding the terms of revised collective bargaining agreements. The Purchaser further advised that it is confident that the revised collective bargaining agreements will be ratified. Ratification of the collective agreements will remove one of the last conditions to closing, exclusive of court approval. It is noted that s. 9.2(e) of the Purchase Agreement specifically provides that a condition precedent to performance by the Purchaser is that on or before July 24, 2012, the Purchaser shall have obtained a five (5) year extension of the existing collective bargaining agreements on terms acceptable to the Purchaser acting reasonably.

41 The Purchaser has further advised the Monitor that it is critical to complete the Transaction by the end of July 2012 in order that the mill can be restarted by October, prior to the onset of winter, to avoid increased carrying costs.

42 The Purchaser also advised the Monitor directly that, if the Sales Process and the Sales Process Terms were varied, it would terminate its interest in Terrace Bay.

Law and Analysis

43 Section 36 of the CCAA provides the authority to approve a sale transaction. Section 36(3) sets out a non-exhaustive list of factors for the court to consider in determining whether to approve a sale transaction. It provides as follows:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the Monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than the 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.

44 I agree with the submission of counsel on behalf of the Applicant that the list of factors set out in s. 36(3) largely overlaps with the criteria established in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) [*Soundair*]. *Soundair* summarized the factors the court should consider when assessing whether to approve a transaction to sell assets:

> (a) whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which offers are obtained; and
>
> (d) whether there has been unfairness in the working out of the process.

45 In considering the first issue, namely, whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently, it is important to note that Galligan J. A. in *Soundair* stated, at para. 21, as follows:

> 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. 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 Trustco v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 112 [*Crown Trustco*]:
>
> > 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.

46 In this case, the offer was accepted on July 5, 2012. At that point in time, the offer from Tangshan was of a non-binding nature. The consideration proposed to be offered by Tangshan appears to be in excess of the amount of the Purchaser's offer. The Tangshan offer is for $35 million, compared with the Purchaser's offer of $27 million.

47 The record establishes that the Monitor did engage in an extensive marketing program. It took steps to ensure that the information was disseminated in international markets. The record also establishes that a number of parties expressed interest and a number of parties did put forth binding offers.

48 Tangshan takes the position, through Birchwood, that it was not aware of the opportunity to participate in the Sales Process. This statement was not challenged. However, it seems to me that this cannot be the test that a court officer has to meet in order to establish that it has made sufficient effort to get the best price and has not acted improvidently. In my view, what can be reasonably expected of a court officer is that it undertake reasonable steps to ensure that the opportunity comes to the attention of prospective purchasers. In this respect, I accept that reasonable attempts were made through IBDR to market the opportunity in international markets, including China.

49 I now turn to consider whether the Monitor acted providently in accepting the price contained in the Purchaser's offer.

50 It is important to note that the offer was accepted after a period of negotiation and in consultation with the Province. The Monitor concluded that the Purchaser's offer "was the superior offer, and provided the best opportunity to position the mill, once restarted, as a viable going concern operation for the long term".

51 Again, it is useful to review what the Court of Appeal stated in *Soundair*. After reviewing other cases, Galligan J.A. stated at 30 and 31:

> 30. 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.
>
> 31. 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.

52 In my view, based on the information available at the time the Purchaser's offer was accepted, including the risks associated with a Tangshan non-binding offer at that point in time, the consideration in the Transaction is not so unreasonably low so as to warrant the court entering into the Sales Process by considering competitive bids.

53 It is noteworthy that, even after a further review of the Tangshan proposal as commented on in the Supplemental Report, the Monitor continued to recommend that the Transaction be approved.

54 I am satisfied that the Tangshan offer does not lead to an inference that the strategy employed by the Monitor was inadequate, unsuccessful, or improvident, nor that the price was unreasonable.

55 I am also satisfied that the Receiver made a sufficient effort to get the best price, and did not act improvidently.

56 The second point in the *Soundair* analysis is to consider the interests of all parties.

57 On this issue, I am satisfied that, in arriving at the recommendation to seek approval of the Transaction, the Applicant and the Monitor considered the interests of all parties, including the Province, the impact on the Township and the employees.

58 The third point from *Soundair* is the consideration of the efficacy and integrity of the process by which the offer was obtained.

59 I have already commented on this issue in my review of the Sales Process. Again, it is useful to review the statements of Galligan J.A. in *Soundair*. At paragraph 46, he states:

> 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 the receiver and entering into an agreement with it, a court will not likely interfere with the commercial judgment of the receiver to sell the asset to them.

60 At paragraph 47, Galligan J.A. referenced the comments of Anderson J. in *Crown Trust Co. v. Rosenberg* [1986 CarswellOnt 235 (Ont. H.C.)], at p. 109:

> 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.

61 In my view, the process, having been properly conducted, should be respected in the circumstances of this case.

62 The fourth point arising out of *Soundair* is to consider whether there was unfairness in the working out of the process.

63 There have been no allegations that the Monitor proceeded in bad faith. Rather, the complaint is that the consideration in the offer by Tangshan is superior to that being offered by the Purchaser so as to call into question the integrity and efficacy of the Sales Process.

64 I have already concluded that the actions of the Receiver in marketing the assets was reasonable in the circumstances. I have considered the situation facing the Monitor at the time that it accepted the offer of the Purchaser and I have also taken into account the terms of the Late Offer. Although it is higher than the Purchaser's offer, the increase is not such that I would consider the accepted Transaction to be improvident in the circumstances.

65 In all respects, I am satisfied that there has been no unfairness in the working out of the process.

66 In my opinion, the principles and guidelines set out forth in *Soundair* have been adhered to by the Applicant and the Monitor and, accordingly, it is appropriate that the Transaction be approved.

67 In light of my conclusion, it is not necessary to consider the issue of whether Tangshan has standing. The arguments put forth by Tangshan were incorporated into the arguments put forth by Birchwood.

68 I have concluded that the Approval and Vesting Order should be granted.

69 I do wish to comment with respect to the request of the Applicant to obtain a declaration that the subdivision control provisions contained in the *Planning Act* do not apply to a vesting of title to real property in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act* a conveyance by way of deed or transfer.

70 The Purchase Agreement contemplates the vesting of title in the Purchaser of the real property. Some of the real property abuts excluded real property (as defined in the Purchase Agreement), which excluded real property is subsequently to be realized for the benefit of stakeholders of Terrace Bay.

71 The authorities cited, *Lama v. Coltsman* (1978), 20 O.R. (2d) 98 (Ont. Co. Ct.) [*Lama*] and *724597 Ontario Inc. v. Merol Power Corp.*, [2005] O.J. No. 4832 (Ont. S.C.J.) are helpful. In *Lama*, the court found that the vesting of land by court order does not constitute a "conveyance" by way of "deed or transfer" and, therefore, "a vesting order comes outside the purview of the *Planning Act*".

72 For the purposes of this motion, I accept the reasoning of *Lama* and conclude that the granting of a vesting order is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer. However, I do not think that it is necessary to comment on or to issue a specific declaration that the subdivision control provisions contained in the *Planning Act* do not apply to the vesting of title.

73 The Applicants also requested a sealing order. I have considered the *Sierra Club* principle and have determined that disclosure of the confidential information could be harmful to stakeholders such that it is both necessary and appropriate to grant the requested sealing order.

Disposition

74 In the result, the motion is granted subject to the adjustment with respect to aforementioned *Planning Act* declaration and an order shall issue approving the Transaction.

Motion granted.

End of Document

Tab 9

2010 QCCS 4915
Cour supérieure du Québec

White Birch Paper Holding Co., Re

2010 CarswellQue 10954, 2010 QCCS 4915, [2010] Q.J. No. 10469, 193
A.C.W.S. (3d) 1067, 72 C.B.R. (5th) 49, J.E. 2010-2002, EYB 2010-180748

In the Matter of the Plan of Arrangement and Compromise of : White Birch Paper Holding Company, White Birch Paper Company, Stadacona General Partner Inc., Black Spruce Paper Inc., F. F. Soucy General Partner Inc., 3120772 Nova Scotia Company, Arrimage de gros Cacouna inc. and Papier Masson ltée (Petitioners) v. Ernst & Young Inc. (Monitor) and Stadacona Limited Partnership, F. F. Soucy Limited Partnership and F. F. Soucy Inc. & Partners, Limited Partnership (Mises en cause) and Service d'impartition Industriel Inc., KSH Solutions Inc. and BD White Birch Investement LLC (Intervenant) and Sixth Avenue Investment Co. LLC, Dune Capital LLC and Dune Capital International Ltd. (Opposing parties)

Robert Mongeon, J.C.S.

Heard: 24 september 2010
Oral reasons: 24 september 2010 *
Written reasons: 15 october 2010
Docket: C.S. Montréal 500-11-038474-108

Proceedings: refused leave to appeal *White Birch Paper Holding Co., Re* (2010), 2010 QCCA 1950 (C.A. Que.)

Counsel: None given.

Subject: Insolvency; Corporate and Commercial

MOTION by corporation seeking court's approval of sale.

***Robert Mongeon, J.C.S.*:**

BACKGROUND

1 On 24 February 2010, I issued an Initial Order under the CCAA protecting the assets of the Debtors and Mis-en-cause (the WB Group). Ernst & Young was appointed Monitor.

2 On the same date, Bear Island Paper Company LLC (Bear Island) filed for protection of Chapter 11 of the US Bankruptcy code before the US Bankruptcy Court for the Eastern District of Virginia.

3 On April 28, 2010, the US Bankruptcy Court issued an order approving a Sale and Investor Solicitation Process (« SISP ») for the sale of substantially all of the WB Group's assets. I issued a similar order on April 29, 2010. No one objected to the issuance of the April 29, 2010 order. No appeal was lodged in either jurisdiction.

4 The SISP caused several third parties to show some interest in the assets of the WG Group and led to the execution of an Asset Sale Agreement (ASA) between the WB Group and BD White Birch Investment LLC (« BDWB »). The ASA is dated August 10, 2010. Under the ASA, BDWB would acquire all of the assets of the Group and would:

a) assume from the Sellers and become obligated to pay the Assumed Liabilities (as defined in the ASA);

b) pay US$90 million in cash;

c) pay the Reserve Payment Amount (as defined);

d) pay all fees and disbursements necessary or incidental for the closing of the transaction; and

e) deliver the Wind Down Amount (as defined).

the whole for a consideration estimated between $150 and $178 million dollars.

5 BDWB was to acquire the Assets through a Stalking Horse Bid process. Accordingly, Motions were brought before the US Bankruptcy Court and before this Court for orders approving:

a) the ASA

b) BDWB as the stalking horse bidder

c) The Bidding Procedures

6 On September 1, 2010, the US Bankruptcy Court issued an order approving the foregoing without modifications.

7 On September 10, 2010, I issued an order approving the foregoing with some modifications (mainly reducing the Break-Up Fee and Expense Reimbursement clauses from an aggregate total sought of US$5 million, down to an aggregate total not to exceed US$3 million).

8 My order also modified the various key dates of implementation of the above. The date of September 17 was set as the limit to submit a qualified bid under stalking horse bidding procedures, approved by both Courts and the date of September 21 st was set as the auction date. Finally, the approval of the outcome of the process was set for September 24, 2010 [1].

9 No appeal was lodged with respect to my decision of September 10, 2010.

10 On September 17, 2010, Sixth Avenue Investment Co. LLC (« Sixth Avenue ») submitted a qualified bid.

11 On September 21, 2010, the WB Group and the Monitor commenced the auction for the sale of the assets of the group. The winning bid was the bid of BDWB at US$236,052,825.00.

12 BDWB's bid consists of:

i) US$90 million in cash allocated to the current assets of the WB Group;

ii) $4.5 million of cash allocated to the fixed assets;

iii) $78 million in the form of a credit bid under the First Lien Credit Agreement allocated to the WB Group's Canadian fixed assets which are collateral to the First Lien Debt affecting the WB Group;

iv) miscellaneous additional charges to be assumed by the purchaser.

13 Sixth Avenue's bid was equivalent to the BDWB winning bid less US$500,000.00, that is to say US$235,552,825.00. The major difference between the two bids being that BDWB used credit bidding to the extent of $78 million whilst Sixth Avenue offered an additional $78 million in cash. For a full description of the components of each bid, see the Monitor's Report of September 23, 2010.

14 The Sixth Avenue bidder and the BDWB bidder are both former lenders of the WB Group regrouped in new entities.

15 On April 8, 2005, the WB Group entered into a First Lien Credit Agreement with Credit Suisse AG Cayman Islands and Credit Suisse AG Toronto acting as agents for a number of lenders.

16 As of February 24, 2010, the WB Group was indebted towards the First Lien Lenders under the First Lien Credit Agreement in the approximate amount of $438 million (including interest). This amount was secured by all of the Sellers' fixed assets. The contemplated sale following the auction includes the WB Group's fixed assets and unencumbered assets.

17 BDWB is comprised of a group of lenders under the First Lien Credit Agreement and hold, in aggregate approximately 65% of the First Lien Debt. They are also « Majority Lenders » under the First Lien Credit Agreement and, as such, are entitled to make certain decisions with respect to t he First Lien Debt including the right to use the security under the First Lien Credit Agreement as tool for credit bidding.

18 Sixth Avenue is comprised of a group of First Lien Lenders holding a minority position in the First Lien Debt (approximately 10%). They are not « Majority Lenders » and accordingly, they do not benefit from the same advantages as the BDWB group of First Lien Lenders, with respect to the use of the security on the fixed assets of the WB Group, in a credit bidding process [2].

19 The bidding process took place in New York on September 21, 2010. Only two bidders were involved: the winning bidder (BDWB) and the losing bidder [3] (Sixth Avenue).

20 In its Intervention, BDWB has analysed all of the rather complex mechanics allowing it to use the system of credit bidding as well as developing reasons why Sixth Avenue could not benefit from the same privilege. In addition to certain arguments developed in the reasons which follow, I also accept as my own BDWB's submissions developed in section (e), paragraphs [40] to [53] of its Intervention as well as the arguments brought forward in paragraphs [54] to [60] validating BDWB's specific right to credit bid in the present circumstances.

21 Essentially, BDWB establishes its right to credit bid by referring not only to the September 10 Court Order but also by referring to the debt and security documents themselves, namely the First Lien Credit Agreement, the US First Lien Credit Agreement and under the Canadian Security Agreements whereby the « Majority Lender » may direct the « Agents » to support such credit bid in favour of such « Majority Lenders ». Conversely, this position is not available to the « Minority Lenders ». This reasoning has not been seriously challenged before me.

22 The Debtors and Mis-en-cause are now asking me to approve the sale of all and/or substantially all the assets of the WB Group to BDWB. The disgruntled bidder asks me to not only dismiss this application but also to declare it the winning bidder or, alternatively, to order a new auction.

23 On September 24, 2010, I delivered oral reasons in support of the Debtors' Motion to approve the sale. Here is a transcript of these reasons.

REASONS (delivered orally on September 24, 2010)

24 I am asked by the Petitioners to approve the sale of substantially all the WB Group's assets following a bid process in the form of a « Stalking Horse » bid process which was not only announced in the originating proceedings in this file, I believe back in early 2010, but more specifically as from May/June 2010 when I was asked to authorise the Sale and Investors Solicitation Process (SISP). The SISP order led to the canvassing of proposed bidders, qualified bidders and the eventual submission of a « Stalking Horse » bidder. In this context, a Motion to approve the « Stalking Horse » Bid process to approve the assets sale agreement and to approve a bidding procedure for the sale of substantially all of the assets of the WB Group was submitted and sanctioned by my decision of September 10, 2010.

25 I note that throughout the implementation of this sale process, all of its various preliminary steps were put in place and approved without any contestation whatsoever by any of the interested stakeholders except for the two construction

lien holders KSH [4] and SIII [5] who, for very specific reasons, took a strong position towards the process itself (not that much with the bidding process but with the consequences of this process upon their respective claims.

26 The various arguments of KSH and SIII against the entire Stalking Horse bid process have now become moot, considering that both BDWB and Sixth Avenue have agreed to honour the construction liens and to assume the value of same (to be later determined).

27 Today, the Motion of the Debtors is principally contested by a group which was identified as the « Sixth Avenue » bidders and more particularly, identified in paragraph 20 of the Motion now before me. The « Stalking Horse » bidder, of course, is the Black Diamond group identified as « BD White Birch Investment LLC ». The Dune Group of companies who are also secured creditors of the WB Group are joining in, supporting the position of Sixth Avenue. Their contestation rests on the argument that the best and highest bid at the auction, which took place in New York on September 21, should not have been identified as the Black Diamond bid. To the contrary, the winning bid should have been, according to the contestants, the « Sixth Avenue » bid which was for a lesser dollar amount ($500,000.00), for a larger cash amount (approximately $78,000,000.00 more cash) and for a different allocation of the purchase price.

28 Notwithstanding the foregoing, the Monitor, in its report of August 23, supports the « Black Diamond » winning bid and the Monitor recommends to the Court that the sale of the assets of the WB Group be made on that basis.

29 The main argument of « Sixth Avenue » as averred, sometimes referred to as the « bitter bidder », comes from the fact that the winning bid relied upon the tool of credit bidding to the extent of $78,000,000.00 in arriving at its total offer of $236,052,825.00.

30 If I take the comments of « Sixth Avenue », the use of credit bidding was not only a surprise, but a rather bad surprise, in that they did not really expect that this would be the way the « Black Diamond » bid would be ultimately constructed. However, the possibility of reverting to credit bidding was something which was always part of the process. I quote from paragraph 7 of the Motion to Approve the Sale of the Assets, which itself quotes paragraph 24 of the SISP Order, stating that:

> 24. Notwithstanding anything herein to the contrary, including without limitation, the bidding requirements herein, the agent under the White Birch DIP Facility (the « DIP Agent ») and the agent to the WB Group's first lien term loan lenders (the First Lien Term Agent »), on behalf of the lenders under White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be deemed Qualified Bidders and any bid submitted by such agent on behalf of the respective lenders in respect of all or a portion of the Assets shall be deemed both Phase 1 Qualified Bids and Phase 2 Qualified Bids. The DIP Agent and First Lien Term Agent, on behalf of the lenders under the White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be permitted in their sole discretion, to credit bid up to the full amount of any allowed secure claims under the White Birch DIP Facility and the first lien term loan agreement, respectively, to the extent permitted under Section 363(k) of the Bankruptcy Code and other applicable law.

31 The words « and other applicable law » could, in my view, tolerate the inclusion of similar rules of procedure in the province of Quebec. [6]

32 The possibility of reverting to credit bidding was also mentioned in the bidding procedure sanctioned by my decision of September 10, 2010 as follows and I now quote from paragraph 13 of the Debtors' Motion:

> 13. « Notwithstanding anything herein to the contrary, the applicable agent under the DIP Credit Agreement and the application agent under the First Lien Credit Agreement shall each be entitled to credit bid pursuant to Section 363(k) of the Bankruptcy Code and other applicable law.

33 I draw from these excerpts that when the « Stalking Horse » bid process was put in place, those bidders able to benefit from a credit bidding situation could very well revert to the use of this lever or tool in order to arrive at a better bid [7]

34 Furthermore, many comments were made today with respect to the dollar value of a credit bid versus the dollar value of a cash bid. I think that it is appropriate to conclude that if credit bidding is to take place, it goes without saying that the amount of the credit bid should not exceed, but should be allowed to go as, high as the face value amount of the credit instrument upon which the credit bidder is allowed to rely. The credit bid should not be limited to the fair market value of the corresponding encumbered assets. It would then be just impossible to function otherwise because it would require an evaluation of such encumbered assets, a difficult, complex and costly exercise.

35 Our Courts have always accepted the dollar value appearing on the face of the instrument as the basis for credit bidding. Rightly or wrongly, this is the situation which prevails.

36 Many arguments were brought forward, for and against the respective position of the two opposing bidders. At the end of the day, it is my considered opinion that the « Black Diamond » winning bid should prevail and the « Sixth Avenue » bid, the bitter bidder, should fail.

37 I have dealt briefly with the process. I don't wish to go through every single step of the process but I reiterate that this process was put in place without any opposition whatsoever. It is not enough to appear before a Court and say: « Well, we've got nothing to say now. We may have something to say later » and then, use this argument to reopen the entire process once the result is known and the result turns out to be not as satisfactory as it may have been expected. In other words, silence sometimes may be equivalent to acquiescence. All stakeholders knew what to expect before walking into the auction room.

38 Once the process is put in place, once the various stakeholders accept the rules, and once the accepted rules call for the possibility of credit bidding, I do not think that, at the end of the day, the fact that credit bidding was used as a tool, may be raised as an argument to set aside a valid bidding and auction process.

39 Today, the process is completed and to allow "Sixth Avenue" to come before the Court and say: "My bid is essentially better than the other bid and Court ratify my bid as the highest and best bid as opposed to the winning bid" is the equivalent to a complete eradication of all proceedings and judgments rendered to this date with respect to the Sale of Assets authorized in this file since May/June 2010 and I am not prepared to accept this as a valid argument. Sixth Avenue should have expected that BDWB would want to revert to credit bidding and should have sought a modification of the bidding procedure in due time.

40 The parties have agreed to go through the bidding process. Once the bidding process is started, then there is no coming back. Or if there is coming back, it is because the process is vitiated by an illegality or non-compliance of proper procedures and not because a bidder has decided to credit bid in accordance with the bidding procedures previously adopted by the Court.

41 The Court cannot take position today which would have the effect of annihilating the auction which took place last week. The Court has to take the result of this auction and then apply the necessary test to approve or not to approve that result. But this is not what the contestants before me ask me to do. They are asking me to make them win a bid which they have lost.

42 It should be remembered that "Sixth Avenue" agreed to continue to bid even after the credit bidding tool was used in the bidding process during the auction. If that process was improper, then "Sixth Avenue" should have withdrawn or should have addressed the Court for directions but nothing of the sort was done. The process was allowed to continue and it appears evident that it is only because of the end result which is not satisfactory that we now have a contestation of the results.

43 The arguments which were put before me with a view to setting aside the winning bid (leaving aside those under Section 36 of the CCAA to which I will come to a minute) have not convinced me to set it aside. The winning bid certainly satisfies a great number of interested parties in this file, including the winning bidders, including the Monitor and several other creditors.

44 I have adverse representations from two specific groups of creditors who are secured creditors of the White Birch Group prior to the issue of the Initial Order which have, from the beginning, taken strong exceptions to the whole process but nevertheless, they constitute a limited group of stakeholders. I cannot say that they speak for more interests than those of their own. I do not think that these creditors speak necessarily for the mass of unsecured creditors which they allege to be speaking for. I see no benefit to the mass of creditors in accepting their submissions, other than the fact that the Monitor will dispose of US$500,000.00 less than it will if the winning bid is allowed to stand.

45 I now wish to address the question of Section 36 CCAA.

46 In order to approve the sale, the Court must take into account the provisions of Section 36 CCAA and in my respectful view, these conditions are respected.

47 Section 36 CCAA reads as follows:

> 36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> (2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> (4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.
>
> (5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (*a*) or (*b*).

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

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

2005, c. 47, s. 131; 2007, c. 36, s. 78.

(added underlining)

48 The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.

49 The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.

50 Nevertheless, I was given two authorities as to what should guide the Court in similar circumstances, I refer firstly to the comments of Madame Justice Sarah Peppall in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 CarswellOnt 3509 (Ont. S.C.J. [Commercial List]), and she writes at paragraph 13:

> The proposed disposition of assets meets the Section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.* decision. Indeed, to a large degree, the criteria overlap. The process was reasonable as the Monitor was content with it (and this is the case here). Sufficient efforts were made to attract the best possible bid (this was done here through the process, I don't have to review this in detail); the SISP was widely publicized (I am given to understand that, in this present instance, the SISP was publicized enough to generate the interest of many interested bidders and then a smaller group of Qualified Bidders which ended up in the choice of one « Stalking Horse » bidder); ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy (this was all done in the present case.) The logical extension of that conclusion is that the AHC Transaction is as well (and, of course, understand that the words « preferable to a bankruptcy » must be added to this last sentence). The effect of the proposed sale on other interested parties is very positive. (It doesn't mean by saying that, that it is positive upon all the creditors and that no creditor will not suffer from the process but given the representations made before me, I have to conclude that the proposed sale is the better solution for the creditors taken as a whole and not taken specifically one by one) Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors.

51 Here, we may have an argument that the sale will not provide significant recoveries for unsecured creditors but the question which needs to be asked is the following: "Is it absolutely necessary to provide interest for all classes of creditors in order to approve or to set aside a "Stalking Horse bid process"?

52 In my respectful view, it is not necessary. It is, of course, always better to expect that it will happen but unfortunately, in any restructuring venture, some creditors do better than others and sometimes, some creditors do very badly. That is quite unfortunate but it is also true in the bankruptcy alternative. In any event, in similar circumstances, the Court must rely upon the final recommendation of the Monitor which, in the present instance, supports the position of the winning bidder.

53 In *Nortel Networks Corp., Re*, Mister Justice Morawetz, in the context of a Motion for the Approval of an Assets Sale Agreement, Vesting Order of approval of an intellectual Property Licence Agreement, etc. basically took a similar position (2009 CarswellOnt 4838 (Ont. S.C.J. [Commercial List]), at paragraph 35):

> The duties of the Court in reviewing a proposed sale of assets are as follows:
>
> 1) It should consider whether sufficient effort has been made to obtain the best price and that the debtor 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 have been obtained;
>
> 4) and it should consider whether there has been unfairness in the working out of the process.

54 I agree with this statement and it is my belief that the process applied to the present case meets these criteria.

55 I will make no comment as to the standing of the « bitter bidder ». Sixth Avenue mayo have standing as a stakeholder while it may not have any, as a disgruntled bidder.

56 I am, however, impressed by the comments of my colleague Clément Gascon, j.s.c. in *Abitibi Bowater*, in his decision of May 3rd, 2010 where, in no unclear terms he did not think that as such, a bitter bidder should be allowed a second strike at the proverbial can.

57 There may be other arguments that could need to be addressed in order to give satisfaction to all the arguments provided to me by counsel. Again, this has been a long day, this has been a very important and very interesting debate but at the end of the whole process, I am satisfied that the integrity of the « Stalking Horse » bid process in this file, as it was put forth and as it was conducted, meets the criteria of the case law and the CCAA. I do not think that it would be in the interest of any of the parties before me today to conclude otherwise. If I were to conclude otherwise, I would certainly not be able to grant the suggestion of « Sixth Avenue », to qualify its bid as the winning bid; I would have to eradicate the entire process and cause a new auction to be held. I am not prepared to do that.

58 I believe that the price which will be paid by the winning bidder is satisfactory given the whole circumstances of this file. The terms and conditions of the winning bid are also acceptable so as a result, I am prepared to grant the Motion. I do not know whether the Order which you would like me to sign is available and I know that some wording was to be reviewed by some of the parties and attorneys in this room. I don't know if this has been done. Has it been done? Are KSH and SIII satisfied or content with the wording?

Attorney:

I believe, Mister Justice, that KSH and SIII have.....their satisfaction with the wording. I believe also that Dow Jones, who's present, ...their satisfaction. However, AT&T has communicated that they wish to have some minor adjustments.

The Court:

Are you prepared to deal with this now or do you wish to deal with it during the week-end and submit an Order for signature once you will have ironed out the difficulties, unless there is a major difficulty that will require further hearing?

Attorney:

I think that the second option you suggested is probably the better one. So, we'd be happy to reach an agreement and then submit it to you and we'll recirculate everyone the wording.

The Court:

Very well.

The Motion to Approve the Sale of substantially all of the WB Group assets (no. 87) is *granted,* in accordance with the terms of an Order which will be completed and circulated and which will be submitted to me for signature as of Monday, next at the convenience of the parties;

The Motion of Dow Jones Company Inc. (no. 79) will be continued sine die;

The Amended Contestation of the Motion to Approve the Sale (no. 84) on behalf of « Sixth Avenue » is *dismissed* without costs (I believe that the debate was worth the effort and it will serve no purpose to impose any cost upon the contestant);

Also for the position taken by Dunes, there is no formal Motion before me but Mr. Ferland's position was important to the whole debate but I don't think that costs should be imposed upon his client as well;

The Motion to Stay the Assignment of a Contract from AT&T (no. 86) will be continued sine die;

The Intervention and Memorandum of arguments of BD White Birch Investment LLC is *granted*, without costs.

Motion granted.

Footnotes

* Leave to appeal refused at *White Birch Paper Holding Co., Re* (2010), 2010 CarswellQue 11534, 2010 QCCA 1950 (C.A. Que.).

1 See my Order of September 10, 2010.

2 For a more comprehensive analysis of the relationship of BDWB members and Sixth Avenue members as lenders under the original First Lien Credit Agreement of April 8, 2005, see paragraphs 15 to 19 of BDWB's Intervention.

3 Sometimes referred to as the « bitter bidder » or « disgruntled bidder » See *AbitibiBowater inc., Re*, 2010 QCCS 1742 (C.S. Que.) (Gascon J.)

4 KSH Solutions Inc.

5 Service d'Impartition Industriel Inc.

6 The concept of credit bidding is not foreign to Quebec civil law and procedure. See for example articles 689 and 730 of the Quebec code of Civil Procedure which read as follows:
689. The purchase price must be paid within five days, at the expiry of which time interest begins to run.

Nevertheless, when the immovable is adjudged to the seizing creditor or any hypothecary creditor who has filed an opposition or whose claim is mentioned in the statement certified by the registrar, he may retain the purchase-money to the extent of the claim until the judgment of distribution is served upon him.

730. A purchaser who has not paid the purchase price must, within ten days after the judgment of homologation is transmitted to him, pay the sheriff the amounts necessary to satisfy the claims which have priority over his own; if he fails to do so, any interested party may demand the resale of the immovable upon him for false bidding.

When the purchaser has fulfilled his obligation, the sheriff must give him a certificate that the purchase price has been paid in full.

See also Denis Ferland and Benoit Emery, 4ème edition, volume 2 (Éditions Yvon Blais (2003)):

La loi prévoit donc que, lorsque l'immeuble est adjugé au saisissant ou à un créancier hypothécaire qui a fait opposition, ou dont la créance est portée à l'état certifié par l'officier de la publicité des droits, l'adjudicataire peut retenir le prix, y compris le prix minimum annoncé dans l'avis de vente (art. 670, al. 1, e), 688.1 C.p.c.), jusqu'à concurrence de sa créance et tant que ne lui a pas été signifié le jugement de distribution prévu à l'article 730 C.p.c. (art. 689, al 2 C.p.c.). Il n'aura alors à payer, dans les cinq jours suivant la signification de ce jugement, que la différence entre le prix d'adjudication et le montant de sa créance pour satisfaire aux créances préférées à la sienne (art. 730, al. 1 C.p.c.). La Cour d'appel a déclaré, à ce sujet, que puisque le deuxième alinéa de l'article 689 C.p.c. est une exception à la règle du paiement lors de la vente par l'adjudicataire du prix minimal d'adjudication (art. 688.1, al. 1 C.p.c.) et à celle du paiement du solde du prix d'adjudication dans les cinq jours suivants (art. 689, al. 1 C.p.c.), il doit être interprété de façon restrictive. Le sens du mot « créance », contenu dans cet article, ne permet alors à l'adjudicataire de retenir que la partie de sa créance qui est colloquée ou susceptible de l'être, tout en tenant compte des priorités établies par la loi.

See, finally, *Cie Montréal Trust c. Jori Investments Inc.*, J.E. 80-220 (C.S. Que.) [1980 CarswellQue 85 (C.S. Que.)], *Eugène Marcoux Inc. c. Côté*, [1990] R.J.Q. 1221 (C.A. Que.)

7 The SISP, the bidding procedure and corresponding orders recognize the principle of credit bidding at the auction and these orders were not the subject of any appeal procedure.

See paragraphs 24, 25 and 26 of BDWB's Intervention.

As for the right to credit bid in a sale by auction under the CCAA, see *Maax Corporation, Re* (July 10, 2008), Doc. 500-11-033561-081 (C.S. Que.) (Buffoni J.)

See also Re: *Brainhunter* (OSC Commercial List, no.09-8482-00CL, January 22, 2010)

End of Document

2010 QCCA 1950
Cour d'appel du Québec

White Birch Paper Holding Co., Re

2010 CarswellQue 11534, 2010 QCCA 1950, 195 A.C.W.S. (3d) 618, 72 C.B.R. (5th) 74, J.E. 2010-2047, EYB 2010-181272

In the Matter of the Plan of Compromise and Arrangement Proposed by: White Birch Paper Holding Company, its subsidiaries and affilitated companies (Debtors) c. Bluemountain Long/Short Credit Master Fund L.P., Bluemountain Credit Alternatives Master Fund L.P., Bluemountain Timberline Ltd., Bluemountain Distressed Master Fund L.P., Lombard General Insurance Company of Canada, MacQuarie Americas Corp., MFP Partners L.P. and Steelhead Navigators Master L.P. (Applicants-Interveners) et White Birch Paper Holding Company, White Birch Paper Company, Stadacona General Partner Inc., Black Spruce Paper Inc., F.F. Soucy General Partner Inc., 3120772 Nova Scotia Company, Arrimage de Gros Cacouna Inc. and Papier Masson Ltée (Respondents-debtors) et Ernst & Young Inc. (Impleaded party-Monitor) et BD White Birch Investment LLC and Sixth Ave. Investments Co. LLC (Impleaded Parties-Interveners) et Stadacona Limited Partnership, F.F. Soucy Limited Partnership and F.F. Soucy Inc. & Partners Limited Partnership (Impleaded parties-Impleaded parties)

Pierre J. Dalphond, J.C.A.

Audience: 25 octobre 2010
Motifs oraux: 25 octobre 2010
Motifs écrits: 1 novembre 2010
Dossier: C.A. Montréal 500-09-021082-102

Avocat: Mtre Alain Riendeau, Mtre Luc Morin for Applicants
Mtre Jean Fontaine, Mtre Matthew Liben for Respondents
Mtre Louis Joseph Gouin, Mtre Philippe -Gérard Giraldeau, Mtre Jean-Yves Simard, Mtre Jonathan Warin, Me Joe Latham for Impleaded Parties

Sujet: Insolvency; Corporate and Commercial

MOTION by group of lenders seeking leave to appeal from decision reported at *White Birch Paper Holding Co., Re* (2010), 2010 CarswellQue 10954, 2010 QCCS 4915 (C.S. Que.), approving sale of debtor's assets to another group of lenders following stalking horse bidding process allowing credit bidding.

***Pierre J. Dalphond, J.C.A.*:**

1 On October 25, 2010, at the conclusion of a long hearing, I dismissed from the bench the Applicants' motion for leave to appeal of a judgment rendered by the Honourable Robert Mongeon of the Quebec Superior Court, Commercial Division, 2010 QCCS 4915 (C.S. Que.), approving the sale of substantially all of the Debtors' assets to BDWhite Birch Investment Co., LLC (BDWBI). I provided orally only the essence of my reasons. What follows is my formal judgment.

CONTEXT

2 Both the Canadian and American bankruptcy courts have approved a Sale and Investor Solicitation Process (SISP) for the sale of the Debtors' assets.

3 After a thorough canvass of the market, a Stalking Horse Bid process was initiated through BDWBI, a corporation organized by members of a syndicated loan holding about 65% of the US$480,000,000.00 debt secured by a first ranking security on the fixed assets of the Debtors (First Lien Loan). Current assets (inventories and account receivables) are free of liens. However a DIP financing lender, to be repaid shortly, has security over all assets of the Debtors.

4 The applicants are minority members of this syndicate holding about 10% of the First Lien Loan (US$48 million). For the purpose of participating in the sale by auction of the Debtors' assets, they incorporated Sixth Ave. Investment Co., LLC. (Sixth Ave) which submitted a qualifying offer and became a qualified bidder.

5 The auction was held on September 21, 2010 in New York City. Only BDWBI and Sixth Ave were entitled to participate. Under the terms of the bidding procedures approved by the Superior Court and the US Bankruptcy Court, a secured creditor could bid up to the full amount of the secured debt for the purchase of property secured in its favour. In the case of a syndicated loan, such as the First Lien Loan, the bidder must act as an agent of the syndicate to be entitled to use such credit.

6 BDWBI won with a bid of US$236,052,825.00, exceeding by US$500,000 Sixth Ave's bid. Its bid included an amount of US$78,000,000.00 credit for the purchase of the fixed assets, following an authorization from the agent of the syndicate. Sixth Ave's bid was in cash only.

7 Despite the applicants' opposition, the Quebec Superior Court approved the sale of the assets to BDWBI on September 24, 2010 and the US Bankruptcy Court recently did the same. Closing of the transaction is scheduled on November 29, 2010.

ARGUMENTS OF THE APPLICANTS

8 The applicants argued that the bids were asymmetrical and should not have been compared by looking at the nominal aggregate price indicted in each. Instead, the Superior Court should have considered the benefits arising from each bid for each class of creditors, especially for the unsecured creditors, a class of which the lenders are a part for the unsecured portion of the syndicated loan. The applicants contend that the trial judge, while paying lip service to s. 36 of the *Companies' Creditors Arrangement Act*, R.S., 1985, ch. C-36, (*CCAA*), erred in law by omitting to take into account the fact that the fixed assets are worthless and that the BDWBI's bid allows it to use a worthless claim as currency to acquire current assets (inventories and account receivables) at a reduced price, all to the detriment of the unsecured creditors.

9 According to the applicants, the trial judge also erred in law in his application of ss. 36(3)(e) *CCAA*. He failed to exercise his discretion properly by ignoring the fact that BDWBI had blatantly placed themselves in a position to prefer their own interests to those of the other First Lien Lenders for which they were mandataries. By receiving the U.S. fixed assets for their exclusive benefit and to the prejudice of the other First Lien Lenders, BDWBI breached their fiduciary duties as sub-agent for the agent of all the First Lien Lenders.

10 The applicants explained that if the appeal is authorized and later is allowed, they want the Court to declare that Sixth Ave's bid is the winning one.

DECISION

11 As correctly stated by the trial judge, the factors that he had to consider in deciding whether to approve the sale to BDWBI are found at ss. 36(3) *CCAA*:

> (3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

12 As far as I am concerned, the four factors to be considered when deciding to grant leave to appeal are well known:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point raised of is of significance to the action itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal will unduly hinder the progress of the action.

13 For the reasons that follow, I am of the view that this appeal is not *prima facie* meritorious and will unduly hinder the progress of the reorganization of the debtors as a going concern.

14 Firstly, the use of credit was part of the process approved by the parties, the monitor and the courts; it cannot be described now as unreasonable in the circumstances (ss. 36(3)(a)). To hold that before approving a winning bid the Superior Court should have considered the impact of the use of credit on the value of the bids is tantamount to changing the rules of the game once it has been played. The approved process allowed for the use of credit by a bidder duly authorized and at no time was it said or hinted that a credit bid should be considered differently from a cash bid.

15 Secondly, to assert that the fixed assets are worthless is rather surprising considering that Sixth Ave offered US $35,300,000.00 in cash for them. There is no indication in the file that this amount corresponds to the real value of the fixed assets as part of an ongoing business or that the US$82,500,000 BDWBI attributed to them is unreasonable (US $78,000,000 in credit and US$4,500,000 in cash). The use of credit entails an allocation of value to the fixed assets. Unless such allocation is proven to be unreasonable and unfair taking into account their market value (ss. 36(3)(f)), it should not be disturbed when the monitor's report states that in their opinion the winning bid represents the highest and best offer when gauged against total overall value returned to the Debtors.

16 Thirdly, the applicants are not the class of unsecured creditors the interest of which Parliament wanted to protect at ss. 33(3)(e) *CCAA*. Their belonging to that class is largely dependant upon the amount of credit used as authorized by the agent of the syndicate; if the whole amount of the loan had been used as credit, the applicants would not qualify as unsecured creditors for the excess part of the loan. In the case at bar, no ordinary unsecured creditor has opposed the proposed sale to BDWBI.

17 Fourthly, to refuse to approve BDWBI's bid would mean that a new bid process or at least a new auction would need to be held since I do not see how Sixth Ave's bid could be declared the winning one. If the rules are changed, a new process under the new rules must decide the winner and the closing date will most likely be missed. Would the Stalking Horse accept to participate again? What kind of delay would this mean? Overall, this may well compromise the reorganization of the Debtors (ss. 36(3)(e)).

18 Fifthly, with regard to the allegation that BDWBI breached its fiduciary duties as sub-agent of the lenders by bidding the claim against only the Canadian assets, it is a matter that should be decided by the forum designated under the lenders' agreement. In my opinion this is not a bankruptcy issue to be dealt with under the *CCAA*.

19 Sixthly, the applicants' opposition to the sale of the assets to BDWBI can be summarized as a desire to receive a bit more cash upfront, as unsecured creditors, rather than a minority equity interest (shares) (I understand that First Lien lenders will end up being equity holders). They may be right but they hold a minority view amongst the group of lenders and according to the lenders' agreement, majority shall prevail. Moreover, the fact that they may end with equity can hardly be considered a serious problem for them since they were quite willing to get the whole equity if their bid had won.

20 For these reasons, the petition was dismissed with costs.

Motion dismissed.

Tab 10

Court File No. 31-2084381

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE	)	MONDAY THE 7TH
MR. JUSTICE NEWBOULD	)	
	)	DAY OF MARCH, 2016

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF DANIER LEATHER INC., a corporation incorporated pursuant to the laws of the Province of Ontario, with a head office in the City of Toronto, in the Province of Ontario

APPROVAL ORDER

THIS MOTION made by Danier Leather Inc. (the "**Company**") pursuant to the *Bankruptcy and Insolvency Act* (Canada) (the "**BIA**") was heard this day at 330 University Avenue, Toronto, Ontario for an order, among other things, (a) approving the agency agreement entered into between the Company and the contractual joint venture comprised of Merchant Retail Solutions, ULC and Gordon Brothers Canada ULC (collectively, the "**Agent**") made as of February 29, 2016 (the "**Agency Agreement**") and the transactions contemplated thereby, and (b) the granting of the Agent's Charge (as defined below), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Brent Houlden sworn March 2, 2016 and exhibits thereto, the supplemental affidavit of Brent Houlden sworn March 3, 2016, the third report (the "**Third Report**") of KSV Kofman Inc. in its capacity as proposal trustee (the "**Trustee**") and the first supplement to the Third Report of the Trustee, filed, and on hearing the submissions of Davies Ward Phillips & Vineberg LLP, counsel for the Company, Bennett Jones LLP, counsel for the Trustee, Osler Hoskin & Harcourt LLP, counsel for the Agent, and on being advised that all persons on the service list were served with the materials filed in connection with this motion as appears from the affidavits of service, filed;

statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, reservation of ownership or right of a third party of any nature or kind whatsoever, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (a) any encumbrances or charges created by the Order of the Honourable Justice Penny dated February 8, 2016 (the "**February 8th Order**") and any other charges hereinafter granted by this Court in these proceedings; (b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system; and (c) those Claims listed on Schedule B hereto (all of which are collectively referred to as the "**Encumbrances**"), which Encumbrances will attach instead to the Guaranteed Amount, the Merchant's Sharing Recovery Amount, if any, the FF&E Guaranteed Amount, and all other amounts due to the Company under the Agency Agreement, in the same order and priority as they existed on the Sale Commencement Date.

6. **THIS COURT ORDERS** that subject to the terms of this Order, the Agency Agreement and the Sale Guidelines, the Agent shall have the right to use the Closing Stores and all related store services, all furniture, trade fixtures and equipment, including the Owned FF&E, located at the Closing Stores, and other assets of the Company as designated under the Agency Agreement for the purpose of conducting the Sale, and for such purposes, the Agent shall be entitled to the benefit of the Company's stay of proceedings provided under section 69 or section 69.1 of the BIA, as applicable.

7. **THIS COURT ORDERS** that until the applicable Vacate Date for each Closing Store (which shall be no later than the Sale Termination Date), the Agent shall have access to the Closing Stores in accordance with the applicable leases and the Sales Guidelines on the basis that the Agent is an agent of the Company and the Company has granted the right of access to the Closing Stores to the Agent.

8. **THIS COURT ORDERS** that nothing in this Order shall amend or vary, or be deemed to amend or vary the terms of the leases for the Closing Stores. Nothing contained in this Order or the Sale Guidelines shall be construed to create or impose

any legislation governing employment or labour standards or pension benefits or health and safety or other statute, regulation or rule of law or equity for any purpose whatsoever, and shall not incur any successorship liabilities whatsoever; and

(c) the Company shall bear all responsibility for liability claims of customers, employees and any other persons arising from events occurring at the Closing Stores during and after the Sale Term, except to the extent that any such claim arises from the acts or omissions of the Agent or its supervisors, agents, independent contractors or employees. To the extent the Landlords (as defined in the Sale Guidelines) (or any of them) have claims against the Company arising solely out of the conduct of the Agent in conducting the Sale for which the Company has claims against the Agent under the Agency Agreement, the Company hereby assigns free and clear such claims to the applicable Landlord; provided that each such Landlord shall only be permitted to advance each such claim against the Agent if written notice, including the reasonable details of such claim, is provided by such Landlord to the Agent and the Company during the period from the Sale Commencement Date to the date that is 30 days following the Sale Termination Date (the "**Assigned Landlord Rights**").

AGENT AS UNAFFECTED CREDITOR

12. **THIS COURT ORDERS** that the claims of the Agent pursuant to the Agency Agreement (collectively, the "**Agent's Claims**") shall not be compromised or arranged pursuant to any proposal to be filed by the Company pursuant to the BIA, that the Agent shall be treated, with respect to such Agent's Claims, as an unaffected creditor in the context of the present proceedings and in any such proposal and that, in accordance with section 69.4 of the BIA, the Agent shall not be affected by the stay of proceedings in respect of the Company and shall be entitled to exercise its remedies under the Agency Agreement.

13. **THIS COURT ORDERS** that notwithstanding the terms of any order issued by this Court in the context of the present proceedings or the terms of the BIA, the

17. **THIS COURT ORDERS** that the priorities of the Consensus Charge, the Administration Charge, the D&O Charge and the KERP Charge (each as defined in the February 8th Order) and the Agent's Charge, as among them, shall be as follows:

First – subject to paragraph 16 hereof, the Agent's Charge (to the maximum amount of the Company's Obligations);

Second – the Consensus Charge (to the maximum amount of US$500,000) and the Administration Charge (to the maximum amount of $600,000), *pari passu*;

Third – D&O Charge (to the maximum amount of $4.9 million); and

Fourth – KERP Charge (to the maximum amount of $524,000).

18. **THIS COURT ORDERS** that the filing, registration, recording or perfection of the Agent's Charge shall not be required; and upon payment of the Initial Guaranty Payment and the FF&E Guaranteed Amount, the Agent's Charge shall be valid and enforceable against all persons, including, without limitation, any receiver, receiver and manager or interim receiver of the Company (each, a "**Receiver**") or trustee in bankruptcy, for all purposes, including as against any right, title or interest filed, registered or perfected prior or subsequent to the Agent's Charge coming into existence, notwithstanding any failure to file, register or perfect.

19. **THIS COURT ORDERS** that notwithstanding (a) the pendency of these proceedings; (b) the bankruptcy of the Company; (c) the provisions of any federal or provincial statute; or (d) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other document or agreement (collectively "**Agreement**") which binds the Company or any Receiver, trustee in bankruptcy, or agent of the Company, and notwithstanding anything to the contrary in any Agreement:

(i) the Agency Agreement and the transactions and actions provided for and contemplated therein, and any other ancillary or related

24. **THIS COURT HEREBY REQUESTS** the aid and recognition of any Court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effects to this Order and to assist the Company, the Trustee and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Company and to the Trustee, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Trustee in any foreign proceeding, or to assist the Company and the Trustee and their respective agents in carrying out the terms of this Order.

Tab 11

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 4TH
	)	
REGIONAL SENIOR JUSTICE	)	DAY OF FEBRUARY, 2015
	)	
MORAWETZ	)	

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the "**Applicants**")

APPROVAL ORDER – AGENCY AGREEMENT

THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "**CCAA**") for an order, *inter alia*, approving: (i) the transactions contemplated under the *Agency Agreement* entered into between Target Canada Co., Target Canada Pharmacy Corp. and Target Canada Pharmacy (Ontario) Corp. (collectively, "**Target Canada**") and a contractual joint venture composed of Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and GA Retail Canada, ULC (collectively, the "**Agent**") on January 29, 2015 (the "**Agency Agreement**") and certain related relief; and (ii) the granting of the Agent's Charge and Security Interest (as defined below), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion of the Applicants, the Affidavit of Mark Wong sworn on January 29, 2015 including the exhibits thereto (the "**Wong Affidavit**"), and the First

THE SALE

4. THIS COURT ORDERS that subject to receipt of the Agent L/C by Target Canada, the Agent is authorized to conduct the Sale in accordance with this Order, the Agency Agreement and the Sales Guidelines and to advertise and promote the Sale within the Stores in accordance with the Sales Guidelines. If there is a conflict between this Order, the Agency Agreement and the Sales Guidelines, the order of priority of documents to resolve such conflicts is as follows: (1) the Order; (2) the Sales Guidelines; and (3) the Agency Agreement.

5. THIS COURT ORDERS that, the Agent, in its capacity as agent of Target Canada, is authorized to market and sell the Merchandise, Designated Company Consignment Goods and FF&E, free and clear of all liens, claims, encumbrances, security interests, mortgages, charges, trusts, deemed trusts, executions, levies, financial, monetary or other claims, whether or not such claims have attached or been perfected, registered or filed and whether secured, unsecured, quantified or unquantified, contingent or otherwise, whensoever and howsoever arising, and whether such claims arose or came into existence prior to the date of this Order or came into existence following the date of this Order, (in each case, whether contractual, statutory, arising by operation of law, in equity or otherwise) (all of the foregoing, collectively "**Claims**"), including, without limitation the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge, and the DIP Lender's Charge, as such terms are defined in the Initial Order, and any other charges hereafter granted by this Court in these proceedings (collectively, the "**CCAA Charges**"), and (ii) all Claims, charges, security interests or liens evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal or removable property registration system (all of such Claims, charges (including the CCAA Charges), security interests and liens collectively referred to herein as "**Encumbrances**"), which Encumbrances, subject to this Order, will attach instead to the Guaranteed Amount and any other amounts received or to be received by Target Canada under the Agency Agreement, in the same order and priority as they existed on the Sale Commencement Date.

6. THIS COURT ORDERS that subject to the terms of this Order, the Initial Order and the Sales Guidelines, or any greater restrictions in the Agency Agreement, the Agent shall have the right to enter and use the Locations and all related store services and all facilities and all

subject to payment in full by the Agent to Target Canada of the Guaranteed Amount, the Expenses, any Company Sharing Recovery Amount, and all other amounts due to Target Canada under the Agency Agreement, all of Target Canada's right, title and interest in and to any Remaining Merchandise and Remaining FF&E, shall vest absolutely in the Agent, free and clear of and from any and all Claims, including without limiting the generality of the foregoing, the Encumbrances, and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Remaining Merchandise or the Remaining FF&E shall be expunged and discharged as against the Remaining Merchandise or the Remaining FF&E upon the delivery of the Monitor's Certificate to the Agent; provided however that nothing herein shall discharge the obligations of the Agent pursuant to the Agency Agreement, or the rights or claims of Target Canada in respect thereof, including without limitation, the obligations of the Agent to account for and remit the proceeds of sale of the Remaining Merchandise and the Remaining FF&E (less the FF&E Commission) to the Designated Deposit Accounts. The Agent shall comply with paragraph 14 of the Initial Order and the Sales Guidelines regarding the removal and/or sale of any FF&E or any Remaining FF&E.

12. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

AGENT LIABILITY

13. THIS COURT ORDERS that the Agent shall act solely as an agent to Target Canada and that it shall not be liable for any claims against Target Canada other than as expressly provided in the Agency Agreement (including the Agent's indemnity obligations thereunder) or the Sales Guidelines. More specifically:

(a) the Agent shall not be deemed to be an owner or in possession, care, control or management of the Stores, of the assets located therein or associated therewith or of Target Canada's employees (including the Retained Employees) located at the Stores or any other property of Target Canada;

(b) the Agent shall not be deemed to be an employer, or a joint or successor employer or a related or common employer or payor within the meaning of any legislation governing employment or labour standards or pension benefits or health and

DESIGNATED DEPOSIT ACCOUNTS

17. THIS COURT ORDERS that no Person shall take any action, including any collection or enforcement steps, with respect to amounts deposited into the Designated Deposit Accounts pursuant to the Agency Agreement, including any collection or enforcement steps, in relation to any Proceeds or FF&E Proceeds, that are payable to the Agent or in relation to which the Agent has a right of reimbursement or payment under the Agency Agreement.

18. THIS COURT ORDERS that amounts deposited in the Designated Deposit Accounts by or on behalf of the Agent or Target Canada pursuant to the Agency Agreement including Proceeds and FF&E Proceeds shall be and be deemed to be held in trust for Target Canada and the Agent, as the case may be, and, for clarity, no Person shall have any claim, ownership interest or other entitlement in or against such amounts, including, without limitation, by reason of any claims, disputes, rights of offset, set-off, or claims for contribution or indemnity that it may have against or relating to Target Canada.

AGENT'S CHARGE AND SECURITY INTEREST

19. THIS COURT ORDERS that subject to the receipt by Target Canada of the Agent L/C, the Agent be and is hereby granted a charge (the "**Agent's Charge and Security Interest**") on all of the Merchandise, Proceeds, the FF&E Proceeds (to the extent of the FF&E Commission) and, if any, the proceeds of the Designated Company Consignment Goods (to the extent of the commission payable to Agent with respect thereto) (and, for greater certainty, the Agent's Charge and Security Interest shall not extend to other Property of the Target Canada Entities as defined in paragraph 5 of the Initial Order) as security for all of the obligations of Target Canada to the Agent under the Agency Agreement, including, without limitation, all amounts owing or payable to the Agent from time to time under or in connection with the Agency Agreement, which charge shall rank in priority to all Encumbrances; provided, however, that the Agent's Charge and Security Interest shall be junior and subordinate to all Encumbrances, but solely to the extent of any unpaid portion of the Unpaid Company's Entitlements due to Target Canada under the Agency Agreement (the "**Subordinated Amount**").

pari passu with the Agent's Charge and Security Interest. For clarity, no Encumbrances shall attach to the Agent Additional Goods or proceeds relating thereto (net of the Additional Agent Goods Fee).

22. THIS COURT ORDERS that the Agent's Charge and Security Interest shall constitute a mortgage, hypothec, security interest, assignment by way of security and charge over the Merchandise, the Proceeds, the FF&E Proceeds (to the extent of the FF&E Commission) and the proceeds of the Designated Company Consignment Goods (to the extent of the commission payable to the Agent with respect thereto) and, if any, other than in relation to the Subordinated Amount, shall rank in priority to all other Encumbrances of or in favour of any Person.

23. THIS COURT ORDERS that notwithstanding (a) the pendency of these proceedings; (b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* ("**BIA**") in respect of Target Canada or any of the Applicants, or any bankruptcy order made pursuant to any such applications; (c) any assignment in bankruptcy made in respect of Target Canada or any of the Applicants; (d) the provisions of any federal or provincial statute; or (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances, contained in any existing loan documents, lease, mortgage, security agreement, debenture, sublease, offer to lease or other document or agreement (collectively "**Agreement**") which binds Target Canada:

(i) the Agency Agreement and the transactions and actions provided for and contemplated therein, including without limitation, the payment of amounts due to the Agent thereunder and any transfer of Remaining Merchandise and Remaining FF&E,

(ii) the Agent's Charge and Security Interest, and

(iii) Assigned Landlord Rights,

shall be binding on any trustee in bankruptcy that may be appointed in respect to Target Canada or any of the Applicants and shall not be void or voidable by any Person, including any creditor of Target Canada or any of the Applicants, nor shall they, or any of them, constitute or be deemed to be a preference, fraudulent conveyance, transfer at undervalue or other challengeable reviewable transaction,

Tab 12

Court File No. CV-13-10018-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR.	)	WEDNESDAY, THE 27TH
	)	
JUSTICE BROWN	)	DAY OF MARCH, 2013

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TBS ACQUIRECO INC., THE BARGAIN! SHOP HOLDINGS INC. AND TBS STORES INC. (collectively, the "Applicants")

APPROVAL ORDER

THIS MOTION, made by the Applicants for an order, inter alia, approving:

(a) that the time for service of the Notice of Motion, the Motion Record and the Third Report of the Monitor, Ernst & Young Inc. (the "**Monitor**") dated March 25, 2013 (the "**Third Monitor Report**") is abridged and validated so that this Motion is property returnable today and dispensing with further service thereof:

(b) the agency sale transaction (the "**Transaction**") contemplated by the agency agreement among The Bargain! Shop Holdings Inc. and TBS Stores Inc. (together the "**Companies**") and a Contractual Joint Venture comprised of Merchant Trading Services ULC and GBRP, Inc. (collectively, the "**Agent**") made as of March 22, 2013 (the "**Agency Agreement**") a copy of which is attached as Exhibit "A" hereto; and

(c) the Third Monitor Report of the Monitor dated March 25, 2013; and

ON READING the Affidavit of Clinton Wolff sworn March 22, 2013 and the Exhibits thereto, the Third Monitor Report, and on hearing the submissions of counsel

documents as may be necessary or desirable for the completion of the Transaction. Capitalized terms used herein and not otherwise defined shall have the meaning ascribed thereto in the Agency Agreement, or, as applicable, the Initial Order.

4. THIS COURT ORDERS that the Monitor be and is hereby authorized to assist the Companies with the implementation and the administration of the Agency Agreement and the Transaction, and is hereby directed to open and maintain the Agency Account and to administer disbursements therefrom from time to time in accordance with the Agency Agreement.

5. THIS COURT ORDERS AND DECLARES that subject to payment of the First Instalment and delivery of the Letter of Credit, the Agent is authorized to conduct the Liquidation Sale in accordance with this Order, the Agency Agreement and the Sale Guidelines, including (without limitation) to sell all Merchandise, FF&E other than Excluded FF&E, Company Consignment Goods and Additional Agent Merchandise. If there is a conflict between this Order, and the Agency Agreement and the Sale Guidelines, the order of priority of documents to resolve any such conflicts is as follows: (1) this Order; (2) the Sales Guidelines; and (3) the Agency Agreement. .

6. THIS COURT ORDERS AND DECLARES that any amounts paid by the Agent in respect of the Net Minimum Guaranteed Amount shall be deposited in the Company's Account. The Applicants' shall include all amounts received pursuant to the Agency Agreement in the cash-management system outlined in paragraph 39 of the Affidavit of Clinton Wolff dated February 25, 2013, attached as Exhibit "C" hereto (the "**Cash-Management System**") to be administered in accordance therewith.

7. THIS COURT ORDERS AND DECLARES that all amounts paid to the Applicants as disbursements or otherwise from the Agency Account pursuant to the Agency Agreement shall be deposited in the Company's Account and included in the Cash-Management System.

8. THIS COURT ORDERS AND DECLARES that the Companies and the Monitor are hereby authorized and directed, in accordance with the Agency Agreement, to remit all amounts that become due to the Agent.

Companies shall not grant any Encumbrance over any Merchandise or proceeds thereof that rank in priority to, or *pari passu* with, the Agent's Charge

12. THIS COURT ORDERS that except as otherwise indicated in accordance with the Sale Guidelines and this Order nothing in this Order shall amend or vary, or be deemed to amend or vary the terms of a real property lease.

13. THIS COURT ORDERS that (i) all Merchandise, FF&E and Company Consignment Goods, once sold by the Agent, shall be deemed sold free and clear of all Encumbrances and (ii) for the purposes of determining the nature and priority of the Encumbrances, the Net Minimum Guarantee Amount and the Companies' other net proceeds or reimbursements from the Transaction (the "**Companies Proceeds**"), if any, shall stand in the place and stead of the respective Merchandise, FF&E and Company Consignment Goods which generated them and all Claims shall attach to the Companies' Proceeds (including, for greater certainty, any amounts held in the Agency Account) with the same priority as they had immediately prior to the sale, as if the Merchandise, FF&E and Company Consignment Goods had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

14. THIS COURT ORDERS that subject to the Sale Guidelines the Agent is entitled, at its expense and discretion, to include in the Liquidation Sale at the Locations additional goods procured by the Agent of like kind, and of no lesser quality to the Merchandise located in the Locations ("**Additional Agent Merchandise**"). At all times and for all purposes, the Additional Agent Merchandise and its proceeds shall be the exclusive property of Agent. The transactions relating to the Additional Agent Merchandise are, and shall be construed as, a true consignment from Agent to the Companies.

15. THIS COURT ORDERS that upon delivery of a Monitor's certificate to the Agent substantially in the form attached as Exhibit "D" hereto, (the "**Monitor's Certificate**") and subject to payment in full by the Agent to the Companies of the Net Minimum Guaranteed Amount, all of the Companies' right, title and interest in and to any unsold Merchandise at the end of the Liquidation Period (the "**Remaining Merchandise**"), shall vest absolutely in the Agent, free and clear of and from any and all Claims, including

Companies and any bankruptcy order issued pursuant to any such applications;

(c) any assignment in bankruptcy made in respect of the Companies;

(d) the provisions of any federal or provincial statute; or

(e) any negative covenants, prohibitions, or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances contained in any existing loan documents, lease, sublease, offer to lease or other agreement to which the Companies are a counterparty

the Transaction, the Agency Agreement, the Agent's Charge, the payment of amounts due to the Agent under the Agency Agreement, and any transfer of Remaining Merchandise shall be binding on any trustee in bankruptcy that may be appointed in respect of the Companies and shall not be void or voidable by creditors of the Companies, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

20. THIS COURT ORDERS that the Agency Agreement shall not be repudiated or disclaimed by the Companies or compromised in any plan of compromise or arrangement filed by the Companies. For greater certainty, the parties acknowledge and agree that the termination rights included in the Agency Agreement approved herein are not affected by this paragraph.

21. THIS COURT ORDERS AND DECLARES that the Transaction and any transfer of Remaining Merchandise is exempt from the application of the *Bulk Sales Act* (Ontario) and any equivalent or applicable legislation under any other province or territory in Canada.

22. THIS COURT ORDERS that, during the Liquidation Period, the Agent is hereby authorized to conduct the Liquidation Sale in accordance with the Agency Agreement but subject to the terms of the Sale Guidelines and shall have access to and the right to use and occupy the Locations and all related services, FF&E, and other assets and

governmental, municipal and regulatory authorities against whom it may otherwise be enforceable.

28. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance as may be necessary or desirable to give effect to this Order.

ENTERED AT / INSCRIT À TORONTO
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Tab 13

expanded, and eventually, the monitor was appointed as interim receiver to replace management. In the *Air Canada* proceedings, where management did not have the confidence of the parties, the monitor was transformed into a type of "super-monitor" with extensive responsibilities.

4. Deference to the Monitor

The courts accord a high level of deference to decisions of the monitor. For example, in *Re Tiger Brand Knitting Co.*, the Ontario Superior Court of Justice held that a monitor should not be enjoined from proceeding with an offer submitted as part of a court-approved sale process, even where a new offer arising following the bid deadline may preserve jobs, since it would amount to an unfairness in the working out of the sale process to the detriment of the current purchaser and the secured creditors; interfere with the efficacy and integrity of the sale process; and prefer the interests of one party, the new prospective purchaser or the union representing the employees, over others.[41]

The British Columbia Supreme Court held that, in determining the validity and quantum of a claim in a *CCAA* proceeding, the opinion of the monitor should be considered, but the monitor is not entitled to deference in the sense that it would alter the burden of proof ordinarily imposed on the claimant.[42] Here, the *CCAA* application did not disclose an inter-company debt; all financial reporting was done on a consolidated basis and only when the monitor requested unconsolidated statements was the inter-company debt revealed.[43] The Court held that the function of the monitor was to determine the validity and amount of a claim on the basis of the evidence submitted. However, the creditor has the burden of proving its claims.[44] In supplementary reasons, the British Columbia Supreme Court also discussed the question of the admissibility of a monitor's report.[45] In this case, the report was found to be admissible for the purposes of the trial, but the conclusion as to the characterization of the payments as debts or equity were not admissible as expert opinion.[46] The Court held that it would be guided by the following principles: 1) presumptively, a monitor's report is admissible in evidence at a hearing concerning the subject matter of the report; 2) in unusual circumstances, an officer of the court, such as the monitor, may be cross-examined on its report; 3) the monitor must remain neutral as between the various stakeholders

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41 *Re Tiger Brand Knitting Co.*, 2005 CarswellOnt 1240 (Ont. S.C.J.), leave to appeal refused (2005), 19 C.B.R. (5th) 53 (Ont. C.A.).

42 *Re Pine Valley Mining Corp.*, 2008 CarswellBC 579 (B.C.S.C.), additional reasons 2008 CarswellBC 712 (B.C.S.C.).

43 *Ibid.* at para. 4.

44 *Ibid.* at para. 13.

45 *Re Pine Valley Mining Corp.*, 2008 CarswellBC 712 (B.C.S.C.).

46 *Ibid.* at para. 17.

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BEN MOSS JEWELLERS WESTERN CANADA LTD.

Court File No: CV-16-11397-00CL

Applicant

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANT

(Sale Approval and Stay Extension, Returnable July 29, 2016)

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