Court File No. CV-13-10353-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

COMERICA BANK

Applicant

– and –

ARXX BUILDING PRODUCTS INC., ARXX CORPORATION, ARXX BUILDING PRODUCTS U.S.A. INC., ECB HOLDINGS, LLC, APS HOLDINGS, LLC, UNISAS HOLDINGS, LLC, AND ECO-BLOCK INTERNATIONAL, LLC

Respondents

APPLICATION UNDER SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, C. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. C.43, AS AMENDED

BRIEF OF AUTHORITIES
(RETURNABLE DECEMBER 27, 2013)

Torys LLP
79 Wellington Street West, Suite 3000
Box 270, TD Centre
Toronto, Ontario M5K 1N2
Fax: 416.865.7380

David Bish (LSUC#: 41629A)
Tel: 416.865.7353

Lily Coodin (LSUC#: 62143S)
Tel: 416.865.7541

Lawyers for Duff & Phelps Canada Restructuring, Inc., in its capacity as the receiver for ARXX Building Products Inc., ARXX Corporation, ARXX Building Products U.S.A. Inc., ECB Holdings, LLC, APS Holdings, LLC, UNISAS Holdings, LLC, and Eco-Block International, LLC

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TAB 1

C

2012 CarswellOnt 3158, 2012 ONSC 1750, 213 A.C.W.S. (3d) 12, 90 C.B.R. (5th) 74

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.

CCM Master Qualified Fund, Ltd. (Applicant) and blutip Power Technologies Ltd. (Respondent)

Ontario Superior Court of Justice [Commercial List]

D.M. Brown J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: CV-12-9622-00CL

Counsel: L. Rogers, C. Burr for Receiver, Duff & Phelps Canada Restructuring Inc.

A. Cobb, A. Lockhart for Applicant

Subject: Insolvency; Civil Practice and Procedure

Bankruptcy and insolvency --- Receivers — Miscellaneous

Receiver was appointed over debtor company — Debtor was in development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate — Receiver brought motion for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in Receiver's First Report — Motion granted — Receiver lacked access to sufficient funding to support debtor's operations during lengthy sales process — Quick sales process was required — Marketing, bid solicitation and bidding procedures proposed by Receiver would result in fair, transparent and commercially efficacious process, and were approved — Stalking horse agreement was approved for purposes requested by Receiver — Receiver was granted priority over existing perfected security interests and statutory encumbrances — Debtor did not maintain any pension plans — Activities in Receiver's First Report were approved.

Cases considered by *D.M. Brown J.*:

Brainhunter Inc., Re (2009), 62 C.B.R. (5th) 41, 2009 CarswellOnt 8207 (Ont. S.C.J. [Commercial List]) — referred to

First Leaside Wealth Management Inc., Re (2012), 2012 CarswellOnt 2559, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) — followed

Graceway Canada Co., Re (2011), 2011 ONSC 6403, 2011 CarswellOnt 11687, 85 C.B.R. (5th) 252 (Ont. S.C.J. [Commercial List]) — referred to

Indalex Ltd., Re (2009), 2009 CarswellOnt 4262, 79 C.C.P.B. 101 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2009), 56 C.B.R. (5th) 74, 2009 CarswellOnt 4839 (Ont. S.C.J. [Commercial List]) — referred to

Parlay Entertainment Inc., Re (2011), 81 C.B.R. (5th) 58, 2011 ONSC 3492, 2011 CarswellOnt 5929 (Ont. S.C.J.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

White Birch Paper Holding Co., Re (2010), 2010 QCCS 4382, 2010 CarswellQue 9720 (Que. S.C.) — referred to

White Birch Paper Holding Co., Re (2010), 2010 CarswellQue 10954, 2010 QCCS 4915, 72 C.B.R. (5th) 49 (Que. S.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 243(6) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Personal Property Security Act, R.S.O. 1990, c. P.10

Generally — referred to

MOTION by receiver for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in its First Report.

D.M. Brown J.:

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

1 By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

2 D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

3 The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

4 At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

5 As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

6 Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.* : (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties.[FN1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

> (i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7 The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings,[FN2] *BIA* proposals,[FN3] and *CCAA* proceedings.[FN4]

8 Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.[FN5]

B. The proposed bidding process

B.1 The bid solicitation/auction process

9 The bidding process proposed by the Receiver would use a Stalking Horse Offer submitted by CCM to the Receiver, and subsequently amended pursuant to negotiations, as a baseline offer and a qualified bid in an auction process. D&P intends to distribute to prospective purchasers an interest solicitation letter, make available a confidential information memorandum to those who sign a confidentiality agreement, allow due diligence, and provide interested parties with a copy of the Stalking Horse Offer.

10 Bids filed by the April 16, 2012 deadline which meet certain qualifications stipulated by the Receiver may participate in an auction scheduled for April 20, 2012. One qualification is that the minimum consideration in a bid must be an overbid of $100,000 as compared to the Stalking Horse Offer. The proposed auction process is a standard, multi-round one designed to result in a Successful Bid and a Back-Up Bid. The rounds will be conducted using minimum incremental overbids of $100,000, subject to reduction at the discretion of the Receiver.

B.2 Stalking horse credit bid

11 The CCM Stalking Horse Offer, or Agreement, negotiated with the Receiver contemplates the acquisition of substantially all the company's business and assets on an "as is where is" basis. The purchase price is equal to: (i) Assumed Liabilities, as defined in the Stalking Horse Offer, plus (ii) a credit bid of CCM's secured debt outstanding under the two Notes, the Appointment Costs and the advance under the Receiver's Certificate.

The purchase price is estimated to be approximately $3.744 million before the value of Assumed Liabilities which will include the continuation of the employment of employees, if the offer is accepted.

12 The Receiver reviewed at length, in its Report and in counsel's factum, the calculation of the value of the credit bid. Interest under both Notes was fixed at 15% per annum and was prepaid in full. The Receiver reported that if both Notes were repaid on May 3, 2012, the anticipated closing date, the effective annual rate of interest (taking into account all costs which could be categorized as "interest") would be significantly higher than 15% per annum - 57.6% on the October Note and 97.4% on the December Note. In order that the interest on the Notes considered for purposes of calculating the value of the credit bid complied with the interest rate provisions of the *Criminal Code*, the Receiver informed CCM that the amount of the secured indebtedness under the Notes eligible for the credit bid would have to be $103,500 less than the face value of the Notes. As explained in detail in paragraphs 32 through to 39 of its factum, the Receiver is of the view that such a reduction would result in a permissible effective annual interest rate under the December Note. The resulting Stalking Horse Agreement reflected such a reduction.

13 The Stalking Horse Offer does not contain a break-fee, but it does contain a term that in the event the credit bid is not the Successful Bid, then CCM will be entitled to reimbursement of its expenses up to a maximum of $75,000, or approximately 2% of the value of the estimated purchase price. Such an amount, according to the Receiver, would fall within the range of reasonable break fees and expense reimbursements approved in other cases, which have ranged from 1.8% to 5% of the value of the bid.[FN6]

C. Analysis

14 Given the financial circumstances of Blutip and the lack of funding available to the Receiver to support the company's operations during a lengthy sales process, I accept the Receiver's recommendation that a quick sales process is required in order to optimize the prospects of securing the best price for the assets. Accordingly, the timeframe proposed by the Receiver for the submission of qualifying bids and the conduct of the auction is reasonable. The marketing, bid solicitation and bidding procedures proposed by the Receiver are likely to result in a fair, transparent and commercially efficacious process in the circumstances.

15 In light of the reduction in the face value of the Notes required by the Receiver for the purposes of calculating the value of the credit bid and the reasonable amount of the Expense Reimbursement, I approved the Stalking Horse Agreement for the purposes requested by the Receiver. I accept the Receiver's assessment that in the circumstances the terms of the Stalking Horse Offer, including the Expense Reimbursement, will not discourage a third party from submitting an offer superior to the Stalking Horse Offer.

16 Also, as made clear in paragraphs 7 and 8 of the Bidding Procedures Order, the Stalking Horse Agreement is deemed to be a Qualified Bid and is accepted solely for the purposes of CCM's right to participate in the auction. My order did not approve the sale of Blutip's assets on the terms set out in the Stalking Horse Agreement. As the Receiver indicated, the approval of the sale of Blutip's assets, whether to CCM or some other successful bidder, will be the subject of a future motion to this Court. Such an approach is consistent with the practice of this Court.[FN7]

17 For those reasons I approved the bidding procedures recommended by the Receiver.

IV. Priority of receiver's charges

18 Paragraphs 17 and 20 of the Appointment Order granted some priority for the Receiver's Charge and Receiver's Borrowings Charge. However, as noted by the Receiver in section 3.1 of its First Report, because that hearing was brought on an urgent, *ex parte* basis, priority over existing perfected security interests and statutory encumbrances was not sought at that time. The Receiver now seeks such priority.

19 As previously noted, the Receiver reported that Blutip does not maintain any pension plans. In section 3.1 of its Report the Receiver identified the persons served with notice of this motion: (i) parties with registered security interests pursuant to the *PPSA*; (ii) those who have commenced legal proceedings against the Company; (iii) those who have asserted claims in respect of intellectual property against the Company; (iv) the Company's landlord, and (v) standard government agencies. Proof of such service was filed with the motion record. No person appeared on the return of the motion to oppose the priority sought by the Receiver for its charges.

20 Although the Receiver gave notice to affected parties six days in advance of this motion, not seven days as specified in paragraph 31 of the Appointment Order, I was satisfied that secured creditors who would be materially affected by the order had been given reasonable notice and an opportunity to make representations, as required by section 243(6) of the *BIA*, that abridging the notice period by one day, as permitted by paragraph 31 of the Appointment Order, was appropriate and fair in the circumstances, and I granted the priority charges sought by the Receiver.

21 I should note that the Appointment Order contains a standard "come-back clause" (para. 31). Recently, in *First Leaside Wealth Management Inc., Re*, a proceeding under the *CCAA*, I wrote:

> [49] In his recent decision in *Timminco Limited (Re)* ("Timminco I") Morawetz J. described the commercial reality underpinning requests for Administration and D&O Charges in *CCAA* proceedings:
>
> > In my view, in the absence of the court granting the requested super priority and protection, the objectives of the CCAA would be frustrated. It is not reasonable to expect that professionals will take the risk of not being paid for their services, and that directors and officers will remain if placed in a compromised position should the Timminco Entities continue *CCAA* proceedings without the requested protection. The outcome of the failure to provide these respective groups with the requested protection would, in my view, result in the overwhelming likelihood that the *CCAA* proceedings would come to an abrupt halt, followed, in all likelihood, by bankruptcy proceedings.
>
> . . .
>
> [51] In my view, absent an express order to the contrary by the initial order applications judge, the issue of the priorities enjoyed by administration, D&O and DIP lending charges should be finalized at the commencement of a *CCAA* proceeding. Professional services are provided, and DIP funding is advanced, in reliance on super-priorities contained in initial orders. To ensure the integrity, predictability and fairness of the *CCAA* process, certainty must accompany the granting of such super-priority charges. When those important objectives of the *CCAA* process are coupled with the Court of Appeal's holding that parties affected by such priority orders be given an opportunity to raise any paramountcy issue, it strikes me that a judge hearing an initial order application should directly raise with the parties the issue of the priority of the charges sought, including any possible issue of paramountcy in respect of competing claims on the debtor's property based on provincial legislation.[FN8]

22 In my view those comments regarding the need for certainty about the priority of charges for profession-

al fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* or the proposal provisions of the *BIA*.

23 In the present case the issues of the priority of the Receiver's Charge and Receiver's Borrowings Charge were deferred from the return of the initial application until notice could be given to affected parties. I have noted that Blutip did not maintain pension plans. I have found that reasonable notice now has been given and no affected person appeared to oppose the granting of the priority charges. Consequently, it is my intention that the Bidding Procedures Order constitutes a final disposition of the issue of the priority of those charges (subject, of course, to any rights to appeal the Bidding Procedures Order). I do not regard the presence of a "come-back clause" in the Appointment Order as leaving the door open a crack for some subsequent challenge to the priorities granted by this order.

V. Approval of the Receiver's activities

24 The activities described by the Receiver in its First Report were reasonable and fell within its mandate, so I approved them.

25 May I conclude by thanking Receiver's counsel for a most helpful factum.

Motion granted.

FN1 (1991), 7 C.B.R. (3d) 1 (Ont. C.A.).

FN2 *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 2.

FN3 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 15.

FN4 *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), para. 13; *White Birch Paper Holding Co., Re*, 2010 QCCS 4382 (Que. S.C.), para. 3; *Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), para. 2, and *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]); *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]).

FN5 Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding — Recent Canadian and U.S. Themes", in Janis P. Sarra (ed.), *2010 Annual Review of Insolvency Law* (Toronto: Carswell, 2011), p. 16.

FN6 *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 12; *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (Que. S.C.), paras. 4 to 7; *Nortel Networks Corp., Re* (2009), 56 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]), para. 12.

FN7 *Indalex Ltd., Re*, 2009 CarswellOnt 4262 (Ont. S.C.J. [Commercial List]), para. 7; *Graceway Canada Co., Re*, 2011 ONSC 6403 (Ont. S.C.J. [Commercial List]), para. 5; *Parlay Entertainment Inc., Re*, 2011 ONSC 3492 (Ont. S.C.J.), para. 58.

FN8 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) (CanLII).

END OF DOCUMENT

TAB 2

C

2009 CarswellOnt 4838, 56 C.B.R. (5th) 224

Nortel Networks Corp., Re

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended (Applicants)

And In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: July 28, 2009
Judgment: July 28, 2009
Docket: Toronto 09-CL-7950

Counsel: Mr. D. Tay, Ms J. Stam for Nortel Networks Corporation et al.

Mr. J.A. Carfagnini, Mr. C.G. Armstrong for Monitor, Ernst and Young Incorporated

Mr. Arthur O. Jacques for Felske, Sylvain

S.R. Orzy for Noteholders

Ms S. Grundy, Mr. J. Galway for Telefonaktiebolaget LM Ericsson

Ms L. Williams, Ms K. Mahar for Flextronics

Mr. M. Zigler for Former Employees

Mr. L. Barnes for Board of the Directors of Nortel Networks Corporation, Nortel Networks Limited

Mr. A. MacFarlane for Official Committee of Unsecured Creditors

Ms T. Lie for Superintendent of Financial Services of Ontario

Mr. B. Wadsworth for CAW Canada

Mr. S. Bomhof for Nokia Siemens

Mr. R.B. Schwill for Nortel Networks UK Limited

Subject: Insolvency; Estates and Trusts; Civil Practice and Procedure

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Sale by tender — Miscellaneous

Telecommunication company entered protection under Companies' Creditors Arrangement Act — Court order was granted approving bidding procedures for sale of certain of Code Division Multiple Access business and Long-Term Evolution Access — Three qualified bids were received by bid deadline — Highest offer was selected as starting bid — Auction was held — Bid submitted by buyer was determined to be successful bid — Company brought motion for order approving and authorizing execution of asset sale agreement — Motion granted — Sale process was conducted in accordance with bidding procedures and with principles set out in jurisprudence — Consideration provided by buyer constituted reasonably equivalent value and fair consideration for assets.

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Telecommunication company entered protection under Companies' Creditors Arrangement Act — Company brought motion for order approving and authorizing execution of asset sale agreement and order sealing confidential appendixes to seventh report — Motion granted — Sealing order granted — Appendixes contained sensitive commercial information release of which could have been prejudicial to stakeholders.

Cases considered by *Morawetz J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — considered

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

MOTION by telecommunications company for approval of asset sale agreement, vesting order, approval of intellectual property licence agreement, order declaring that ancillary agreements were binding and sealing order.

Morawetz J.:

1 Nortel Networks Corporation ("NNC), Nortel Networks Limited (NNL), Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation, (collectively the "Applicants"), bring this motion for an Order approving and authorizing the execution of the Asset Sale Agreement dated as of July 24, 2009, ("the Sale Agreement"), among Telefonaktiebolaget LM Ericsson (PUBL) (the "Purchaser"), as buyer, and NNL, NNC, Nortel Networks, Inc.) ("NNI) or ("Ericsson"), and certain of their affiliates as vendors, (collectively, the "Sellers"), in the form attached and as an Appendix to the Seventeenth Report of Ernst and Young Inc. in its capacity as Monitor in the CCAA proceedings.

2 The Applicants also request, among other things, a Vesting Order, an Order approving and authorizing the execution and compliance with the Intellectual Property Licence Agreement substantially in the form attached to the confidential appendix to the Seventeenth Report and the Trademark Licence Agreements substantially in the form attached to the appendix and an Order declaring that the Ancillary Agreements, (as defined in the Sale Agreement), including the IP Licences, shall be binding on the Applicants that are party thereto, and shall not be repudiated disclaimed or otherwise compromised in these proceedings, and that the intellectual property subject to the IP Licences shall not be sold, transferred, conveyed or assigned by any of the Applicants unless the buyer or assignee of such intellectual property assumes all of the obligations of NNL under the IP Licences and executes an assumption agreement in favour of the Purchaser in a form satisfactory to the Purchaser.

3 Finally, the Applicants seek an order sealing the Confidential Appendixes to the Seventeenth Report pending further order of this court.

4 This joint hearing is being conducted by way of video conference. His Honor Judge Gross is presiding over the hearing in the U.S. Court. This joint hearing is being conducted in accordance with the provisions of the Cross-Border Protocol, which has previously been approved by both the U.S. Court and this court.

5 The Applicants have filed two affidavits in support of the motion. The first is that of Mr. George Riedel, sworn July 25, 2009. Mr. Riedel is the Chief Strategy Officer of NNC and NNL. Mr. Riedel also swore an affidavit on June 23, 2009 in support of the motion to approve the Bidding Procedures. The second affidavit is that of Mr. Michael Kotrly which relates to an issue involving Flextronics which was resolved prior to this hearing.

6 The Monitor has also filed its Seventeenth Report with respect to this motion. The Monitor recommends that the requested relief be granted.

7 The Applicants' position is also enthusiastically supported by the Unsecured Creditors' Committee in the Chapter 11 proceedings and the Noteholders.

8 No party is opposed to the requested relief.

9 On June 29, 2009 this court granted an Order approving the Bidding Procedures for a sale process for certain of Nortel's Code Division Multiple Access ("CMDA") business, and Long Term Evolution ("LTE") Access. The procedures were attached to the Order.

10 The Court also approved the Stalking Horse Agreement dated as of June 19, 2009 among Nokia Siemens Networks B.V. ("Nokia Siemens") and the Sellers (also referred to as the "Nokia Agreement") and accepted agreement for the purposes of conducting the Stalking Horse bidding process in accordance with the Bidding

Procedures, including the Break-Up-Fee and Expense Reimbursement as both terms are defined in the Stalking Horse Agreement.

11 The order of this court was granted immediately after His Honor, Judge Gross, of the United States Bankruptcy Court for the District of Delaware, approved the Bidding Procedures in the Chapter 11 proceedings.

12 The Bidding Procedures contemplated a bid deadline of 4 p.m. on July 21, 2009. This gave interested parties 22 days to conduct due diligence and submit a bid.

13 By the Bid Deadline, three bids were acknowledged as "Qualified Bids" as contemplated by the Bidding Procedures. Qualified Bids were received from MPAM Wireless Inc., otherwise known as Matlin Patterson and Ericsson.

14 The Monitor also reports that on July 15, 2009 one additional party submitted a non-binding letter of intent and requested that it be deemed a Qualified Bidder. The Monitor further reports that upon receiving this request, the Applicants' provided such party with a form of Non-Disclosure Agreement substantially in the form as that previously executed by Nokia Siemens. This party declined to execute the Non Disclosure Agreement and was not deemed a Qualified Bidder. The Monitor further reports that it, the UCC and the Bondholder Group were all consulted in connection with the request of such party to be considered a Qualified Bidder.

15 The Monitor also reports that it is of the view that any party that wanted to bid for the business and complied with the Bidding Procedures was permitted to do so.

16 In the period up to July 21, 2009, the Monitor reports that it was kept apprised of all activity conducted between Nortel and the potential buyers. In addition, the Monitor participated in conference calls and meetings with the potential buyers, both with Nortel and independently. The Monitor further reports that it conducted its own independent review and analysis of materials submitted by the potential buyers.

17 On July 22, 2009, in accordance with the Bidding Procedures, copies of both the MPAM bid and the Ericsson bid were provided to Nokia Siemens, MPAM and Ericsson were both notified that three Qualified Bids had been received.

18 After consultation with the Monitor and representatives of the UCC and the Bondholder Group, the Sellers determined that the highest offer amongst the three bids was submitted by Ericsson and accordingly on July 22, 2009, the three Qualified Bidders were informed that the Ericsson bid had been selected as the starting bid pursuant to the Bidding Procedures. Copies of the Ericsson bid were distributed to Nokia Siemens and MPAM.

19 The Monitor reports that the auction was held in New York on July 24, 2009.

20 Pursuant to the Bidding Procedures the auction went through several rounds of bidding. The Sellers finally determined that the Ericsson bid submitted in the sixth round should be declared the Successful Bid and that the Nokia Siemens bid submitted in the fifth round should be an Alternate Bid. The Monitor reports that these determinations were made in accordance with consultations with the Monitor and representatives of UCC and the Bondholder group held during the seventh round adjournment.

21 The Monitor reports that the terms and conditions of the Successful Bid are substantially the same as the Nokia Agreement described in the Fourteenth Report with the significant differences being as follows:

1) The purchase price has been increased from U.S. $650 million to U.S. $1.13 billion plus the obligation of the Purchaser to pay, perform and discharge the assumed liabilities. The Purchaser made a good faith deposit of U.S. $36.5 million.

2) The Termination Date has been extended to September 30, 2009 or in the event that closing has not occurred solely because regulatory approvals have not yet been obtained, October 31, 2009 as opposed to August 31 and September 30, respectively, for the Nokia Agreement.

3) The provisions in the Nokia Agreement with respect to the Break-Up Fee and Expense Reimbursement have been deleted.

22 Further, I note that the Nokia Agreement provided for a commitment to take at least 2,500 Nortel employees worldwide. Under the Sale Agreement, the Purchaser has also committed to make employment offers to at least 2,500 Nortel employees worldwide.

23 The Nokia Agreement provided for a payment of a Break-Up Fee of $19.5 million and the Expense Reimbursement to a maximum of $3 million, upon termination of the Nokia Agreement. The Monitor reports that if both this court and the U.S. Court approve the Successful Bid, the Applicants are of the view that the Break-Up Fee and the Expense Reimbursement will be payable and in accordance with the order of June 29, 2009, the company intends to make such a payment. The Monitor reports that it is currently contemplated that 50% of the amount will be funded by NNL and 50% by NNI.

24 The assets to be transferred by the Applicants and the U.S. Debtors pursuant to the successful bid are to be transferred free and clear of all liens of any kind. The Monitor is of the understanding that no leased assets are being conveyed as part of this transaction.

25 The Monitor also reports that at the request of the Purchaser, the proposed Approval and Vesting Orders specifically approves Intellectual Property Licence Agreement and Trademark Licence Agreement, collectively, (the "IP Licences"), entered into between NNL and the Purchaser in connection with the Successful Bid.

26 The Monitor also reports that subject to court approval, closing is anticipated to occur in September 2009.

27 The Bidding Procedures provide that the Seller may seek approval of the next highest or otherwise best offer as the Alternate Bid. If the closing of the transaction contemplated fails to occur the Sellers would then be authorized, but not directed, to proceed to effect a Sale Pursuant to the terms of the Alternate Bid without further court approval. The Sellers, in consultation with the Monitor, the UCC and the Bondholders, determined that the bids submitted by Nokia Siemens in the fifth round with a purchase price of $1,032,500,000 is the next highest and best offer and has been deemed to be the Alternative Bid. Accordingly, the company is seeking court approval of the alternative bid pursuant to the Bidding Procedures.

28 The Monitor reports that, as noted in its Fourteenth Report, the CMDA division and the LTE business are not operated through a dedicated legal entity or stand alone division. The Applicants have an interest in intellectual property of the CMDA business and the LTE business which is subject to various inter-company licensing agreements with other Nortel legal entities around the world, in some cases on an exclusive basis and in other cases, on a non-exclusive basis. The Monitor is of the view that the task of allocating sale proceeds stemming from the Successful Bid amongst the various Nortel entities and the various jurisdictions is complex. Fur-

ther, as set out in the Fifteenth Report, the Applicants, the U.S. Debtors, and certain of the Europe, Middle East, Asia entities, ("EMEA") through their U.K. Administrators entered into the Interim Funding and Settlement Agreement, the IFSA, which was approved by this court on June 29, 2009. Pursuant to the IFSA, each of the Applicants, U.S. Debtors and EMEA Debtors agreed that the execution of definitive documentation with a purchaser of any material Nortel assets was not conditional upon reaching an agreement regarding the allocation of sale proceeds or binding procedures for the allocation of the sale proceeds. The Monitor reports that the parties agreed to negotiate in good faith and attempt to reach an agreement on a protocol for resolving disputes concerning the allocation of sale proceeds but, as of the current date, no agreement has been reached regarding the allocation of any sales proceeds. Accordingly, the Selling Debtors have determined that the proceeds are to be deposited in an escrow account. The issue of allocation of sale proceeds will be addressed at a later date.

29 The Monitor expects that the Company will return to court prior to the closing of the transaction to seek approval of the escrow agreement and a protocol for resolving disputes regarding the allocation of sale proceeds.

30 In his affidavit, Mr. Riedel concludes that the sale process was conducted by Nortel with consultation from its financial advisor, the Monitor and several of its significant stakeholders in accordance with the Bidding Procedures and that the auction resulted in a significantly increased purchase price on terms that are the same or better than those contained in the Stalking Horse Agreement. He is of the view that the proposed transaction, as set out in the Sale Agreement, is the best offer available for the assets and that the Alternate Bid represents the second best offer available for the Assets.

31 The Monitor concludes that the company's efforts to market the CMDA Business and the LTE Business were comprehensive and conducted in accordance with the Bidding Procedures and is further of the view that the Section 363 type auction process provided a mechanism to fully determine the market value of these assets. The Monitor is satisfied that the purchased priced constitutes fair consideration for such assets and, as a result, the Monitor is of the view that the Successful Bid represents the best transaction for the sale of these assets and the Monitor therefore recommends that the court approve the Applicants' motion.

32 A number of objections have been considered by the U.S. Court and they have been either resolved or overruled. I am satisfied that no useful purpose would be served by adding additional comment on this issue.

33 Turning now to whether it is appropriate to approve the transaction, I refer back to my Endorsement on the Bidding Procedures motion. At that time, I indicated that counsel to the Applicants had emphasized that Nortel would aim to satisfy the elements established by the court for approval as set out in the decision of *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), which, in turn, accepts certain standards as set out by this court in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.).

34 Although the *Soundair* and *Crown Trust* tests were established for the sale of assets by a receiver, the principles have been considered to be appropriate for sale of assets as part of a court supervised sales process in a CCAA proceeding. For authority see *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.) .

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 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; and

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

36 I am satisfied that the unchallenged record clearly establishes that the sale process has been conducted in accordance with the Bidding Procedures and with the principles set out in both *Soundair*, and *Crown Trust*. All parties are of the view that the purchase price represents fair consideration for the assets included in the Sale Agreement. I accept these submissions. The consideration provided by Ericsson pursuant to the Sale Agreement, in my view, constitutes reasonably equivalent value and fair consideration for the assets.

37 In my view, it is appropriate to approve the Sale Agreement as between the Sellers and Purchaser. I am also satisfied that it is appropriate to grant the relief relating to the Vesting Order, the IP Licences, the Ancillary Agreement and the Alternate Bid, all of which are approved.

38 The Applicants also requested an order sealing the Confidential Appendixes to the Seventeenth Report pending further order. In considering this request I referred to the decision of the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), which addresses the issue of a sealing order. The Supreme Court of Canada held that such orders should only be granted when:

1) An order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk;

2) The salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

39 I have reviewed the Confidential Appendixes to the Seventeenth Report. I am satisfied that the Appendixes contain sensitive commercial information, the release of which could be prejudicial to the stakeholders. I am satisfied that the request for a sealing order is appropriate and it is so granted.

40 Other than with respect to the payment and reimbursement of amounts in respect of the Bid Protections nothing in this endorsement or the formal order is meant to modify or vary any of the Selling Debtors' (as such term is defined in the ISFA) rights and obligations under the ISFA. It is further acknowledged that Nortel has advised that the Interim Sales Protocol shall be subject to approval by the court.

41 An order shall issue in the form presented, as amended, to give effect to the foregoing reasons.

Motion granted.

END OF DOCUMENT

TAB 3

2005 CarswellOnt 1240, 9 C.B.R. (5th) 315, 138 A.C.W.S. (3d) 221

Tiger Brand Knitting Co., Re

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: TIGER BRAND KNITTING COMPANY LIMITED (Applicants)

Ontario Superior Court of Justice

C. Campbell J.

Heard: April 1, 2005
Judgment: April 5, 2005
Docket: 04-CL-5532

Counsel: Scott A. Bomhof for Monitor RSM Richter Inc.

Orestes Pasparakis for GMAC Commercial Finance Corporation-Canada

Sean Dewart for USWA

Renée B. Brosseau for Tiger Brand Knitting Company Limited

Steven L. Gaff for Geetext Global Sourcing Inc.

Christopher Besant for Joan Fisk

Fred Myers for Prospective Purchaser

Hugh Mackenzie for Andrew Warnock, James Warnock

Leonard Alksnis for Majority of the Members of the board

Subject: Insolvency; Estates and Trusts

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous issues

Applicant applied for and received protection from its creditors under Companies' Creditors Arrangement Act —

Court ordered sale of assets rather than restructuring as asset sale was most likely result of ongoing efforts to maximize stakeholder returns — G made offer to purchase applicant's assets, subject to deadline for receipt of superior offers — Both trade union representing applicant's employees and major creditor believed superior offers were available and "break fee" was negotiated with G — When deadline for other offers passed G took position its offer should be accepted or it should be paid "break fee" — Monitor applied for extension of time to negotiate with potential purchasers — Trade union applied for order that monitor be directed not to close deal with prospective purchaser and to negotiate with company which might preserve jobs of some of applicant's employees — Application to extend time was granted; application by trade union was dismissed — Court had jurisdiction to make order sought by trade union but it was not appropriate — There was no suggestion that monitor had acted inappropriately or breached any of its obligations — To allow offering process to be reopened by enjoining monitor from completing proposed transaction would amount to unfairness to prospective purchaser, to G, and to secured creditor.

Cases considered by *C. Campbell J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note), 1986 CarswellOnt 235 (Ont. H.C.) — followed

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed

Stelco Inc., Re (2005), 2005 CarswellOnt 1188 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — referred to

APPLICATION by monitor for extension of time in which to negotiate with prospective purchaser; Application by trade union for order enjoining monitor from closing sale.

C. Campbell J.:

1 Tiger Brand Knitting Company Limited ("the Applicant") and RSM Richter Inc. ("the Monitor") seek an extension of the time within which to present an offer to the Court for the sale of the business and assets of the Applicant.

2 The extension of up to 15 days is not opposed. Counsel on behalf of the United Steel Workers of America ("USWA") urges the Court to add a condition to the granting of any extension, namely, that the Monitor be directed not to accept a bid offer that it has received and to negotiate with another party that may make an offer.

3 USWA seeks to add the condition with the prospect that a new offer, if it comes forward, would provide

the opportunity of some or all of the 200 jobs now occupied by its members at the Applicant's facility in Cambridge.

4 Very simply, it is urged that the broad considerations available to the Court to provide remedy under *The Companies' Creditors Arrangement Act* ("CCAA") permit the Court to take into account and balance the interests of all stakeholders, not just those of a purchaser who would provide the greatest immediate monetary recovery to a secured creditor.

Background Facts

5 On August 30, 2004, the Applicant filed for, and obtained, protection from its creditors under the CCAA pursuant to the "Initial Order." The stay of proceedings was initially for a period of 30 days and since September 29, 2004, has been extended on a number of occasions, the last being March 15, 2005.

6 Tiger Brand, which is in the business of design and manufacture of casual clothing, has been subject to the impact of globalization, which has seen cheaper goods manufactured abroad displace domestic production. This, together with the rise of the Canadian dollar relative to the United States dollar, has resulted in a deterioration of financial performance.

7 The impact will particularly felt by the employees in head office and manufacturing facilities in Cambridge, Ontario, but as well by the Company's three retail outlets.

8 From the commencement of its involvement, the Monitor has recognized that a so-called multi-track process provided the only realistic opportunity to maximize stakeholder returns. As set out in the Monitor's First Report, these included (a) soliciting offers for the business and assets; (b) considering shareholders' restructuring plans; (c) the liquidation value of assets; and (d) assisting in identification of potential investors.

9 Subject to comments below, none of the interested parties has taken the position that the Monitor has not reasonably or appropriately carried out its duties in accordance with Court Orders.

10 By this Court's Order of September 13, 2004, a Sale Process was approved, as it was recognized that a sale of assets rather than a restructuring of the Company was the more likely result of the ongoing effort.

11 The marketing process was extended and by Order of November 3, 2004, amended as set out in that Order with the explanation and rationale for it contained in the Monitor's Fifth Report to the Court dated January 11, 2005:

> • The Monitor originally identified a sale transaction with Geetex which, at the time, provided the highest value to the stakeholders and had the greatest probability of closing. Importantly, the Geetex offer was premised on an asset acquisition which would likely result in Geetex carrying on an importing operation; and, as such, an orderly wind-down and termination of the Company's manufacturing and possibly other operations in Cambridge, Ontario;
>
> • Geetex agreed that its offer would be a "stalking horse" in the amended sale process. Parties interested in purchasing the Assets for an amount greater than the Geetex stalking horse bid had to submit offers by a November 12, 2004 deadline;

12 A deadline of November 12, 2004 was set for the receipt of offers pursuant to the Amended Sale Process, the short time period being considered necessary due to a belief by, among others, Geetex that, "if a transaction was not consummated in short order, the assets and the business of Tiger Brand generally would deteriorate significantly and rapidly in value."

13 Apparently, both the major secured creditor GMAC and the Union were of the view that superior offers were available, the process was extended and in early January 2005, a "stay fee" was negotiated between the Monitor and Geetex, whereby Geetex kept its offer open to February 15, 2005.

14 Geetex takes the position that there has not been until most recently an offer superior to its and that either the new offer from a new purchaser of assets should be accepted and closed, or Geetex's offer accepted and completed, or it be paid the break fee plus costs.

15 As of the time of its Sixth Report, the Monitor had executed non-binding non-exclusive memoranda of understanding with two prospective purchasers and looked forward to one or both of the parties presenting a final form of asset purchase agreement for consideration.

16 Since that time, the Monitor has been negotiating an agreement with one prospective purchaser, which is expected to be finalized and executed shortly. Hence the request for an extension to April 15, 2005.

17 The affidavit material filed on behalf of USWA identifies a potential bidder, which, if successful, would provide the opportunity for preservation of some employment in Cambridge.

18 In effect, USWA complains that the Monitor will not now consider and negotiate an offer from this bidder, which effectively eliminates the possibility of saving employment in Cambridge.

19 The Monitor reports in its Seventh Report that efforts to identify going-concern purchasers that would preserve employment at Cambridge have been unsuccessful.

20 The position of the Monitor, supported by the major secured creditor, Geetex and the prospective purchaser, is that to add a condition to the grant of extension would undermine and violate the process that has been followed to date.

Analysis & Law

21 Two principles involving the Court's jurisdiction and discretion are urged, one by USWA and another by those who oppose an extension of the time to complete a plan on terms.

22 USWA submits that the broad discretion given to the Court to take into account the interests of all stakeholders not just secured creditors, directs that in these circumstances, every reasonable consideration be given to the saving of jobs and of the Company to operate as an entity.

23 Mr. Dewart submits that the broad and flexible discretion given to the Court under the CCAA favours any reasonable effort to preserve the business under a restructuring as opposed to a liquidation, which is more properly achieved under the BIA.

24 The balancing effort, it is suggested, should allow those stakeholders who wish to achieve continuance of the enterprise every reasonable opportunity to do so and in this case, the only way to do so is to require the

Monitor to not accept an offer to purchase assets until it at least considers a bid from an entity that might allow continuance of at least some of the business.

25 The Court of Appeal for Ontario rendered a decision on March 31, 2005 dealing with the issue of removal of directors in the context of a CCAA proceeding.

26 In *Stelco Inc., Re* [2005 CarswellOnt 1188 (Ont. C.A.)], the reasons of Blair J. for the Court considered the extent to which the Court's "inherent jurisdiction" and "discretion" under the CCAA might be involved to provide the remedy sought.

27 After adopting the observation from I.H. Jacob's "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems at p. 2, that there is a vital distinction between jurisdiction and discretion that must be observed, he went on to say at paragraph 38:

> [38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however -difficult as it may be to draw — between the *court's* process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the *company's* process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose." Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. [Footnote omitted]

28 At paragraph 39, in commenting on the discretion of a judge under s. 11 of the CCAA to, among other things, stay, restrain further proceedings or prohibit actions against the Company acting in good faith and with due diligence, Blair J.A. went on to say:

> In my view, the s. 11 discretion — in spite of its considerable breadth and flexibility — does not permit the exercise of such a power in and of itself.

29 Paragraph 44 reads:

> [44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff, supra*, at para 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. ...

30 This leads to the principle relied on by those who oppose the extension on conditions that would favour a new offer.

31 The principle is that process that has been put in place for receiving offers in respect of either the busi-

ness as a going concern or of its assets, should be honoured. The process is integral to the administration of statutes such as the BIA and the CCAA.

32 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) is a decision of the Court of Appeal for Ontario. At issue was the power of the Court to review a decision of a receiver to approve one offer over another for the sale of an airline as a going concern.

33 At paragraph 42, Galligan J.A. for the majority (himself and McKinlay J.A.) said:

> 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.

34 At paragraph 16, the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at p. 92 was adopted and the duties of the Court summarized 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.

35 To my mind, those same duties of the Court are implicit in a marketing and sale process pursuant to Court Order under the CCAA.

36 There is nothing in the material before me or in the submissions of Mr. Dewart that suggest that any of those duties have to date been breached by the Monitor in the negotiation or offer process.

37 At this point in time, I am of the view that to allow the offering process to in effect be reopened by enjoining the Monitor from completing a proposed transaction would amount to an unfairness in the working out of the process to the prospective purchaser, to Geetex and to GMAC the secured creditor. As well, it would interfere with the efficacy and integrity of the process and prefer the interests of one party (the USWA, albeit an important one) over others. As noted at paragraph 46 of *Soundair*

> [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.

38 This is not to suggest that the interests urged by the USWA would be without remedy in appropriate circumstances.

39 The dissent of Goodman J.A. in *Soundair* was really on the factual side, as he concluded that in his view, the conditional offer accepted by the Receiver in that case was "...an improvident one..." [at paragraph 118.]

40 In this case, there is no accepted offer before the Court for approval. When there is, should there be an-

other offer that would meet the test of rendering the accepted offer improvident, the Court can and perhaps should intervene.

41 Until that occurs, I do not conclude on the facts before me, that the Monitor has acted improvidently in failing to negotiate with a party who did not bring forward an offer capable of acceptance within the process set out in the previous Order of the Court. The actions of the Monitor appear entirely appropriate.

42 For the above reasons, the motion to extend the time within which to present an offer for sale of the business and assets of the Applicant is extended to April 15, 2005 or such earlier date as may be appropriate without the condition as sought by the USWA.

43 If it is necessary to deal with any issue of costs, they may be spoken to at a 9:30 appointment.

Application by monitor granted; application by trade union dismissed.

END OF DOCUMENT

TAB 4

Unofficial Transcript of the Endorsement of Justice Morawetz – heard March 9, 2012

Court File No. CV-12-9539-00CL

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 TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

A. Taylor, M. Konyukhova for Applicant
D. Bish for QSI
A. Lockhart for Wacker Chemie
D. Wray for CEP
L. Rogers for FTI, Monitor
C. Sinclair for USW
A. Kaufman, G. Phoenix for IQ
M. Bailey for Superintendent of Financial Services
A. Hatnay for Mercer – Administrator of Timminco Haley Pension Plan
K. McElheran for Dow Corning
K. Peters for AMG Advanced

March 9, 2012

The motion was not opposed.

I am satisfied that it is appropriate to postpone the AGM during the Stay period. The factual basis for the request is set out in the factum and the legal basis for authorizing the postponement is set out at 22-25 of the factum.

With respect to the request to approve the Stalking Horse Bid Process I am satisfied that it is appropriate in these circumstances, to approve the request. In doing so, however, it is noted that counsel to CEP has noted, for the record, that CEP does have concerns about the process and specifically has reserved its rights to challenge certain provisions specifically 2.5(a) which addresses Excluded Obligations and in particular certain claims related to employees and pensioners. Counsel to CEP raised the issue as to the legality of the provision and whether it was contrary to law. Counsel also references section 9.14 – Severability. In addition counsel made reference to s.32 and 33 of the CCAA and certain

provisions of s.45 of the Quebec Labour Code. The position of CEP is noted. It is recognized that those points may be raised on a future motion.

Having reviewed the record and hearing submissions, I am satisfied that it is appropriate to approve the Stalking Horse agreement and the bidding procedures. Although the time lines are short, the Applicant is of the view that it will lead to a reasonable outcome. The Monitor is of the view that the bidding procedures are reasonable and appropriate in the circumstances.

I am also satisfied that the payment and priority of the Expense Reimbursement in the amount of $500,000 is reasonable in the circumstances and it is approved. The DIP Amendment is also approved. Ancillary relief is also appropriate. The motion is granted and an Order has been signed in the form presented.

Morawetz, J.

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 TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Court File No. CV-12-9539-00CL

March 9/12

A. Taylor M. Konyukhova for Applicant — March 9, 2012
D. Bish for Q1
A. Lockhart for Walker Chanin.
D. Wray for ~~CEP~~ CEP
L. Rogers for ~~CEP~~ FTI, Monitor.
C. Sinclair for USW
A. Kauffman for 10
C. Thomas
M. Bailey for Superintendent of Financial Services
A. Hatnay for Mercer - Aon / Towers Watson Pension Plan
K. N'Ekedem for Dow Corning
K. Peters for AMG Advanced

The motion was not opposed.
I am satisfied that it is appropriate to postpone the A-G77 during the stay period. The basis for the request is set out in the Fourth and the legal basis for extending the postponement

5933862 v1

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

MOTION RECORD
(RETURNABLE MARCH 9, 2012)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Kathryn Esaw LSUC#: 58264F
Tel: (416) 869-6820
Fax: (416) 947-0866

is set out at 22-25 of the factum.
With respect to the request to appoint
the Stelling three Bird Panel
I am satisfied that CEP is appropriate
in these circumstances, to approve the request.
In doing so, however, it is noted that counsel
to CEP has noted, for the record,
that CEP does have concerns about
the process and specifically has reserved
its rights to challenge certain provisions
specifically 2.5(a) which addresses
excluded Rights and in particular certain
claims related to employees and
pensions. Counsel to CEP raised
the issue as to the legality of the
provision and whether it was contrary
to law. Counsel also referenced
section 9.14 of Generation. The applicant
counsel made reference to s 32+33
of the CCAA and certain provisions of
s 45 of the Ontario Labour Code.
The position of CEP is noted. It
is recognized that these points
may be raised on a future

note.

Having review the record + heard submissions, I am satisfied that it is appropriate to approve the stalking horse agreement and the bidding procedures. Although the time lines are short the Applicant is of the view that it will lead to a reasonable outcome. The Monitor is of the view that the bidding procedures are reasonable and appropriate in the circumstances. I am also satisfied that the payment and provision of the Expense Reimbursement in the amount of $500,000 is reasonable in the circumstances and it is approved. The DIP Amendment is also approved. Amending relief is also appropriate. The motion is granted and an Order to that effect signed in the form presented.

TAB 5

Journal of the Insolvency Institute of Canada

Volume 2

CARSWELL®

An Analysis of Stalking Horse Processes in Canadian Insolvency Proceedings

Ashley Taylor and Yannick Katirai[*]

Stalking horse processes have been part of the Canadian insolvency toolkit for nearly a decade. Since Justice Farley approved a stalking horse process in *Stelco Inc., Re*,[1] stalking horse processes have become an increasingly "important feature" of *Companies' Creditors Arrangement Act* proceedings.[2] It is now possible to discern some trends and patterns in the use and approval of such processes.

This paper will review current market practices relating to stalking horse processes and the protections offered to stalking horse bidders. The paper will begin with a brief conceptual overview of stalking horse bids and will discuss some of the benefits and drawbacks associated with them. The paper will then consider the judicial treatment of stalking horse processes in *CCAA* proceedings. Next, the paper will discuss common features of stalking horse processes used in *CCAA* proceedings, including break fees, expense reimbursements and overbid requirements. Finally, the paper will draw conclusions about current practices and will identify potential emerging trends.

1. OVERVIEW OF STALKING HORSE PROCESSES

a) What is a Stalking Horse Process?

Stalking horse processes are a relatively recent phenomenon in Canada — one of the earliest uses of a stalking horse process in a Canadian insolvency proceeding was in *Stelco*, discussed below. Since then, as liquidating *CCAA* proceedings have grown in popularity, so too have stalking horse processes, aided in part by the interaction between Canadian *CCAA* proceedings and U.S. Chapter 11 proceedings.

Historically, sales of an insolvent debtor's assets were conducted by way of tender. A tender process typically begins with the debtor obtaining

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* Stikeman Elliott LLP.

1 2004 CarswellOnt 5076 (Ont. S.C.J. [Commercial List]) [*Stelco*].

2 *Eddie Bauer of Canada, Inc., Re*, 2009 CarswellOnt 5450, [2009] O.J. No. 3784 at para. 22 (Ont. S.C.J. [Commercial List]). Originally, a "stalking horse" was a screen — frequently an actual horse — behind which a hunter hid while stalking his/her prey. *See* Janis Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at 118.

court approval of the proposed sale process. With the approval in hand, the debtor and its financial advisors attempt to solicit interest in the company as a going concern for some or all of its assets.[3] Frequently, a "teaser" package containing high-level information about the business and assets is prepared and circulated to logical potential purchasers. Interested parties who execute a non-disclosure agreement are granted access to detailed information in order to conduct due diligence.

After a period of time for interested parties to complete their diligence, the debtor will establish a deadline for the submission of offers. The debtor, in conjunction with its financial advisors, will review the tendered bids and select the "best" bid. Following negotiation of an agreement of purchase and sale, the debtor will seek court approval of the agreement.[4] In such a process, there is generally an obligation on the bidders to "put their best foot forward" as the process does not provide for subsequent rounds of bidding.

In contrast, in a stalking horse process, the debtor's marketing efforts are divided into two distinct phases. First, the debtor will conduct a preliminary marketing effort in order to find a "stalking horse." This preliminary marketing can be conducted inside or outside of a formal insolvency process and will ideally involve competition between many potential purchasers. The preliminary process culminates in the negotiation of an agreement of purchase and sale (commonly called the stalking horse agreement) in respect of some or all of the debtor's assets.[5] Although it is contemplated (and hoped) that the stalking horse agreement will not constitute the final agreement of purchase and sale, the agreement must be one that the debtor can and is willing to close. If no superior bid is elicited during the second stage, the stalking horse agreement will become the definitive agreement.

Many stalking horse agreements (and the bid processes that accompany those agreements), include features intended to compensate the stalking horse bidder for the risk and expense it incurs and the time and effort it expends to participate in a process that is designed to benefit the debtor and its stakeholders. As described in our review of market practices below, certain features have become commonplace in stalking horse processes and have been regularly approved by courts, including a break fee and expense

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3 Alex Macfarlane & Alexandra North, "Show me the Money! Stalking Horse Auctions in Cross-Border Insolvencies: Value Maximization and an Increase in Transparency" (2010) 27 Nat'l Insolv. Rev. 70 at 70.

4 It is not uncommon to provide a form of agreement to all of the bidders in advance of the bid deadline. *See* Joe Pasquariello & Chris Armstrong, "The Nortel Stalking Horse Sales: Maximizing Value via CCAA Flexibility" (2012) IIC-ART 2012-8 at 4.

5 For convenience, this paper will refer to sales of the debtor's assets, but it should be noted that stalking horse sale processes are just as often used to sell businesses or business units as going concerns.

reimbursements payable to the stalking horse bidder if it is not ultimately successful in closing the proposed transaction. In some cases, the stalking horse bidder may attempt to negotiate additional protections for itself that could potentially stifle an open, competitive and value-maximizing auction.

Once the stalking horse agreement has been negotiated and finalized, the debtor typically seeks court approval of the agreement and a set of bid procedures that establish the rules for marketing the assets covered by the stalking horse agreement and for any resulting auction. This initial scrutiny provides the court, the debtor's stakeholders, and prospective bidders the opportunity to review and potentially challenge both provisions in the stalking horse agreement, as well as any bid procedures that they believe are unduly onerous or will stifle a fair auction.

Once the stalking horse agreement has been approved by the court, the debtor and its advisors will broadly market the assets. Potentially interested bidders who execute the appropriate non-disclosure agreement, will be given access to detailed financial and other information (often through the use of an electronic data room, meetings with management and site visits) in order to conduct their due diligence. As discussed above, the stalking horse agreement acts as a starting point from which other bidders will draft their offers by adding, removing, or revising terms.

If a superior offer is received for the assets covered by the stalking horse agreement, the debtor will conduct an auction of the assets involving the stalking horse bidder and any other party who submitted a superior bid. Following one or more rounds of bidding, the debtor will select the "highest and/or best" bid and take that offer to court for approval. If no other bidder submits a superior offer then no auction will be conducted and the debtor will seek final approval of the stalking horse agreement.

b) Advantages and Disadvantages of Stalking Horse Processes

i) A Brief Aside on Court Approval of Sales Generally

Sales in formal insolvency proceedings are by their nature subject to judicial oversight.[6] As described below, court approval of a sale process engages different considerations than approval of the sale itself. Even so, because the process is a means to an end, the factors that a court will consider in approving the sale should guide and inform the choices made by the debtor in structuring the sale process. It follows that when evaluating a pro-

6 While Canadian courts are reluctant to interfere with business decisions made during the conduct of a sales process, as discussed below, they scrutinize each proposed sale to ensure that it was properly conducted in a manner that is consistent with the goals of the *CCAA*. *Royal Bank of Canada v. Soundair Corp.*, 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 at paras. 15-16 (Ont. C.A.) [*Soundair*].

posed stalking horse process, a court should also consider the factors relating to approval of the final sale.

The principles governing the approval of a court-supervised sale process are well-established. Before the 2009 amendments to the *CCAA*, courts in Ontario and elsewhere in Canada have focused on the four principles set out in the Ontario Court of Appeal's decision in *Soundair* as incorporated into the *CCAA* by *Canadian Red Cross Society, Re.*[7] These factors, which generally overlap with the factors set out at section 36(3) of the *CCAA*,[8] are 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.[9]

The factors set out in section 36(3) of the *CCAA* are as follows:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
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> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
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> (b) whether the monitor approved the process leading to the proposed sale or disposition;
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> (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;
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> (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
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> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Significantly, these factors emphasize the integrity of the sale process rather than whether the process resulted in the highest possible purchase

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7 *Canadian Red Cross Society, Re*, 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, [1998] O.J. No. 3306, 72 O.T.C. 99, 81 A.C.W.S. (3d) 932 (Ont. Gen. Div. [Commercial List]); additional reasons 1998 CarswellOnt 3347 (Ont. Gen. Div. [Commercial List]); additional reasons 1998 CarswellOnt 3345 (Ont. Gen. Div. [Commercial List]); leave to appeal refused 1998 CarswellOnt 5967 (Ont. C.A.).

8 *Terrace Bay Pulp Inc., Re*, 2012 ONSC 4247, 2012 CarswellOnt 9470, 92 C.B.R. (5th) 40, 218 A.C.W.S. (3d) 488 at para. 44 (Ont. S.C.J. [Commercial List]).

9 *Soundair*, *supra* note 6 at para. 16.

price being obtained for the assets.[10] Indeed, the first factor in each set of factors directly calls for an evaluation of the process that resulted in the ultimate sale.

ii) Stalking Horse Processes and Court Approval of Sales

One of the primary arguments in support of stalking horse processes is that they maximize the value obtained for the assets being sold, thereby improving recoveries by stakeholders.[11] These processes maximize value in a number of ways. Among other things, they provide a "price floor" for the assets being sold, which not only requires higher bids from other bidders but also provides an "endorsement" of the value of the assets being sold. In this way, they increased the likelihood that other potential bidders will submit a superior bid and possibly reduce the amount of time required for due diligence.[12] In addition, the process can create a competitive environment within which interested bidders can engage in an open auction.

Similarly, the greater transparency and certainty offered by a court-approved procedure and the fact that bids may be compared on an "apples-to-apples" basis may further encourage prospective bidders to participate.[13] Unlike tender processes, where any tender that complies with the call for tender may be considered, prospective bidders in stalking horse processes are required to submit bids that can be compared with the form of the stalking horse agreement which encourages the submission of bids that are similar in form to the stalking horse agreement. Due to this, differences in economic terms and changes in the conditionality of the agreement are more easily assessed by the debtor and its advisors than in a tender, and all participants know what target they are aiming at (even if that target may move during the auction).

Arguments that stalking horse processes maximize value — though persuasive and relevant to the approval of the sale process and the resultant sale — are arguably secondary to whether a stalking horse process protects the integrity of the sale process and promotes its fairness and reasonableness.

Some of the other advantages of negotiating a stalking horse agreement include: (a) its existence can provide comfort to stakeholders by demonstrating to the debtor's stakeholders, including customers, suppliers, and

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10 Clifton Prophet *et al.*, "Canadian Perspective on the Chapter 11 Stalking Horse Bid Process" (Paper delivered at the Canadian Institute's Advanced Insolvency Law and Practice conference, Calgary, 12-13 October 2006) [unpublished] at 3.

11 Janis Sarra, "Financing Insolvency Restructurings in the Wake of the Financial Crisis: Stalking Horses, Rogue White Knights and Circling Vultures" (2010-2011) 29 Penn St. Int'l L. Rev. 581 at 594 [*Financing Insolvency*].

12 *Ibid.*

13 Pasquariello & Armstrong, *supra* note 4 at 5.

employees, that the business will be continuing in the longer term; (b) it establishes the broad structure and parameters of an agreement that will be followed by other bidders; and (c) it justifies the granting of additional time to conduct a full marketing of its assets by demonstrating to stakeholders and the court that the debtor is acting with due diligence to implement the sale process.[14]

The bid procedures set out the parameters of the second stage of the sale process, including the timelines for the conduct of the sale, the requirements for eligibility to participate, and the necessary features of a valid bid. Pre-approval of the bid procedures prior to the secondary marketing fosters transparency and openness, and should establish a level playing field where no contestant has an unfair advantage and neither the debtor nor the prospective purchasers are unduly privileged.[15]

Courts in Canada have emphasized the paramountcy of fairness and openness in the conduct of a sale process:

> There was, however, a lack of sufficient transparency and open disclosure, which resulted in a process lacking the degree of integrity and fairness necessary when the court is involved in a public sale of assets under the CCAA. The CCAA insulates a debtor from its creditors for a period of time to allow it to attempt to resolve its financial problems through an acceptable plan of arrangement. It allows the debtor to carry on business during that period of time and to exercise a degree of normal business judgment under the supervision of the court and a Monitor. What may be commercially reasonable and even advantageous when undertaken by parties outside the litigation process, however, may be restricted by the requirement that fairness be done, and be seen to be done, when the process is supervised by the court. While a more open process may not lead to greater value, and may, as in this case, give rise to the possibility that an existing bidder may exit the process, the nature of a court-supervised process demands a process that meets at least minimal requirements of fairness and openness. The process undertaken to the point of the hearing . . . particularly with its emphasis on control of information and confidentiality for the primary benefit of the Fund, did not pass the test.[16]

Stalking horse processes promote these goals through public disclosure of the economic terms of the baseline bid, the use of established bid procedures, the opportunity to submit a superior bid, and an open auction.

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14 *Ibid.*

15 *Ibid.*

16 *Calpine Canada Energy Ltd., Re*, 2007 ABQB 49, 2007 CarswellAlta 156, [2007] A.W.L.D. 1172, 28 C.B.R. (5th) 185 at para. 31 (Alta. Q.B.).

c) Bid Protections and Other Issues

Typically, the stalking horse agreement and the bidding procedures contain a package of protections and incentives intended to compensate stalking horse bidders for participating in the sale process and creating a competitive market. Bid procedures will set out the amount by which another bid must exceed the stalking horse bid (often called the overbid) and the amount by which each subsequent bid must exceed the prior bid (the bid increment). These packages are justified on pragmatic grounds: few commercially minded bidders will act as a stalking horse without being compensated for the time, money, and effort they expend, and for the risk they incur as a result of their participation in a process that could ultimately benefit someone else (the debtor, its stakeholders, or another bidder).

A stalking horse bidder may attempt to exert pressure on the debtor to tailor the bid protections in order to decrease the likelihood of a superior bid being submitted or to give the stalking horse bidder an unfair edge in the ensuing auction. Some commentators have argued that stalking horse processes are more susceptible to manipulation than traditional tender processes because of the role played by the stalking horse bidder in establishing the parameters of the sale process.[17]

A stalking horse bidder may attempt to tilt the playing field in its favour by negotiating terms in the stalking horse agreement and the accompanying bid procedures that raise hurdles which deter participation by prospective bidders or that make such participation prohibitively expensive. For example, a stalking horse bidder may restrict its competition by insisting on a more restrictive definition of a "qualified bidder." In addition to imposing restrictions on what constitutes a valid bid, a stalking horse bidder can potentially restrict flexibility and make superior offers uneconomical by including terms in the stalking horse agreement that are inconsistent with market norms or are unworkable for some or most competing bidders.

Furthermore, stalking horse bidders may attempt to influence the timelines for completion of the sale process. Stalking horse bidders are understandably eager to conclude the sale process as quickly as possible so as to minimize risk and uncertainty for themselves. However, some stalking horse bidders may seek abbreviated timelines in order to achieve a competitive advantage over prospective bidders. By reducing the amount of time available for such bidders to conduct due diligence and to consider whether and how much to bid in the auction, stalking horse bidders may hope to leverage their head start in conducting due diligence. If the debtor-in-possession (DIP) lender is selected to serve as stalking horse bidder — as in the *PCAS* case, discussed below — the potential for such interference is en-

17 Daniel R Dowdall & Jane O Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies?" (2005) Ann. Rev. Insolv. 1 at 3.

hanced because the DIP lender can separately influence the supply and timing of funding.[18]

While the debtor, in consultation with its advisors, nominally determines these aspects of the sale process, a stalking horse bidder may try to stifle competition through these factors. While it is natural that stalking horse bidders will act in their own self-interest in negotiating the stalking horse agreement and the bid procedures, courts have been wary of allowing such self-interest to adversely affect the integrity of the sale process. While courts now accept that protections and incentives for the stalking horse bidder are necessary, they will scrutinize the type and extent of such features to ensure that there is no unreasonably detrimental effect on stakeholders. Therefore, debtors and proposed stalking horse bidders should be alert to these considerations when structuring stalking horse agreements and bid procedures.

In contrast, other potential bidders and the debtors' stakeholders will attempt to minimize the amount and type of such protections as it is in their interest to have the most active auction possible. After all, at the end of the day, they will bear the cost of such protections.[19] A review of market practices provides a range of reasonable options. Nevertheless, terms that are more favourable to a stalking horse bidder may be justifiable if they are the result of a thorough canvassing of the market or a competitive stalking horse selection process.

2. JUDICIAL TREATMENT OF STALKING HORSE BIDS

a) Approval of the Stalking Horse Process

While the *CCAA* sets out the test for approval of a sale of a debtor's assets in the absence of a plan of arrangement or compromise, it does not provide a test for approving a sale process.[20] Although there is limited jurisprudence considering this issue, two competing lines of cases have emerged and it is possible to draw conclusions about what issues have drawn the courts' attention in approving stalking horse processes.

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18 *Ibid.*

19 Andrew S Brown, "Breaking Up and Making Out (Rich): Recommendations for Revision of *Bankruptcy Code* Provisions Governing Break-Up Fees Used by Stalking Horse Bidders in §363 Bankruptcy Asset Sales" (2010) 62 Fla. L. Rev. 1463 at 1480.

20 *Brainhunter Inc., Re*, 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]) [*Brainhunter*].

i) Boutique Euphoria

One line of cases stems from *Boutique Euphoria inc., Re*,[21] a relatively early decision of the Quebec Superior Court that dealt with a stalking horse bid in a *CCAA* proceeding. In that proceeding, Justice Gascon of the Quebec Superior Court refused to grant an order approving a proposed stalking horse agreement. After acknowledging the paucity of jurisprudence to guide his analysis, Justice Gascon set out a non-exhaustive list of factors to be considered when approving a stalking horse bid process:

> 1. Has there been some control exercised at the first stage of the competition (namely that to become the stalking horse bidder) and to what extent?
> 2. Is there a need for stability within a very short time frame for the debtor to continue operations and the restructuring contemplated to be successful?
> 3. Are the economic incentives for the stalking horse bidder, in terms of break up fee, topping fee and overbid increments protection, fair and reasonable?
> 4. Are the time lines contemplated reasonable to insure a fair process at the second stage of the competition, namely that to become the successful over bidder?[22]

Justice Gascon concluded that the proposed stalking horse agreement failed to satisfy the first and fourth considerations for approving a stalking horse process. In particular, Justice Gascon expressed concern that no competitive process preceded the selection of the stalking horse bidder. A competitive selection process for the stalking horse bidder was necessary, in Justice Gascon's view, because:

> On the one hand, the stalking horse bid establishes the benchmark to attract other bids and its accuracy is therefore key to the integrity of the whole process. On the other hand, as the stalking horse bid is normally subject to a break up fee, it is even more important that it be accurate, as the call for overbids will have to exceed a certain margin over and above the stalking horse bid.[23]

In that case, the monitor had "merely" negotiated a stalking horse agreement with the stalking horse bidder without the benefit of a comparison against other potential bidders.

As noted above, Justice Gascon's requirement that there be a "double-barreled" competitive process should alleviate many of the concerns associated with stalking horse processes by providing a competitive environment within which to establish a reasonable break fee and other bid protections,

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21 2007 CarswellQue 14279, 2007 QCCS 7129, EYB 2007-171199, 65 C.B.R. (5th) 57 (Que. S.C.) [*Boutique Euphoria*].

22 *Ibid.*

23 *Ibid.*

and should be helpful in persuading a court that the integrity of the sale process has been protected. Even so, conducting two competitive selection processes does add cost and delay to the proceeding, potentially ultimately reducing recoveries by stakeholders.

Justice Gascon also took issue with the amount of the break fee, holding that it was so unfair and unreasonable that the stalking horse agreement was unlikely to satisfy the *Soundair* requirements for approval of a sale.[24] In particular, Justice Gascon held that the fourth factor "is obviously also linked [to] the fairness of the bid process to ensure inasmuch as possible an equal opportunity to all interested bidders."[25]

Justice Gascon held that the fact that the debtor approved the break fee was not dispositive of his analysis of its fairness and reasonableness. He noted that the business judgment rule (the proposition that a court should show deference to the properly exercised business judgment of directors or management) was inconsistent with the supervisory role that the courts must play in approving a sale process. However, Justice Gascon did not have the evidentiary basis on which to determine whether the break fee was appropriate. He reasoned that the break fee must "be related to the stalking horse bid process itself and the efforts undertaken towards that end."[26] Since there was no evidence of the "real administrative expenses associated with this stalking horse bidder role," Justice Gascon could not conclude that the break fee was fair and reasonable.[27]

The test for approval set out in *Boutique Euphoria* has not been applied extensively, either in or outside of Quebec. Even so, practitioners should be cognizant of the *Boutique Euphoria* factors in structuring a stalking horse process, particularly insofar as they overlap with other tests (including the *Nortel* Factors described below) that are commonly applied in Ontario and elsewhere.

I. Applying *Boutique Euphoria*

In *AbitibiBowater Inc., Re*,[28] the Quebec Superior Court made reference to *Boutique Euphoria*, among other cases, for the factors to be applied in approving bid procedures. In that proceeding, the Superior Court noted that the process whereby the "backstop commitment agreement" was produced was "transparent, inclusive and reasonable", in part because it "included thorough consultation with key financial advisors and stakeholders." The Superior Court also observed that no party had argued that further can-

24 *Ibid.* at paras. 55–60.

25 *Ibid.* at para. 37.

26 *Ibid.* at para. 71.

27 *Ibid.* at paras. 67–68.

28 2010 QCCS 2556, 2010 CarswellQue 5953, EYB 2010-175389 (Que. S.C.) [*Abitibi*].

vassing of the market would have produced a better result. In considering the timeline, the Superior Court considered the circumstances and context of the *CCAA* proceeding and found that the timelines were reasonable given, among other things, the "limited and highly sophisticated market of potential bidders," and the high monthly cost of the restructuring. Finally, the Superior Court stated that in the absence of any argument that the break fee "could have a detrimental, dissuasive or chilling effect upon the bid or auction process contemplated at this stage", the break fee should be approved. It went on to state that "[i]f anything better results from the bid procedures and auction process, the Termination Payment [i.e. the break fee] may prove to be fees well-earned and properly spent."[29]

Mecachrome Canada Inc., Re[30] involved a sale process that was, in substance if not in name, a stalking horse process. The case is noteworthy because of the very favourable terms negotiated by the stalking horse bidder, which led the court to refuse to approve the proposed sale process. In *Mecachrome*, the Quebec Superior Court dismissed the motion to approve a plan funding agreement (PFA) pursuant to which the DIP lenders in Mecachrome's *CCAA* proceeding would fund a plan of compromise or arrangement.

The proposed PFA allowed the debtor to consider, negotiate and accept a "Superior Proposal" (as that term was defined in the PFA), but it also gave the DIP lenders the right to match the Superior Proposal within a five-day period.[31] The PFA also provided for a break fee payable to the DIP lenders, and required the debtor to reimburse all fees and expenses to the PFA *and* the DIP loan agreement in the event the PFA was not ultimately approved.[32] The PFA was opposed by, among others, an ad hoc committee of noteholders.

The Superior Court identified the overarching principles that governed its analysis and held:

> In a situation like this one, where the Court is asked to approve and give its blessing to a PFA leading to a Proposed Plan pursuant to which the DIP Lenders will end up acquiring [the debtor], a CCAA restructuring requires the Canadian Debtors and the Monitor to satisfy the Court that they have proceeded in a manner where the trans-

29 *Ibid.* at para. 9.

30 2009 CarswellQue 9963, EYB 2009-164655, [2009] Q.J. No. 16095, 58 C.B.R. (5th) 49 (Que. S.C.) [*Mecachrome*].

31 *Mecachrome*, *ibid.* and *Sembiosys*, *infra* note 55, are the only two known instances of a debtor seeking approval of a stalking horse agreement containing a right to match or a right of first refusal. As explained in greater detail below, it is unlikely that a court will approve such a right on the part of the stalking horse bidder because of its detrimental effect on the auction and recoveries by stakeholders.

32 *Mecachrome*, *supra* note 30 at para. 9.

> parency, integrity, credibility and fairness of the process is beyond reproach.[33]

The Court concluded that a value-maximizing process which would justify approving the plan funding agreement had not been conducted. Indeed, no parties other than the DIP lenders and the ad hoc committee had been solicited, and the DIP financing agreement contained an exclusivity clause that apparently hampered the ability of the debtor to seek outside funding, including in respect of a plan funding agreement.[34] The Superior Court observed that there must be:

> some demonstration by [the debtor] that reasonable attempts have been made to properly canvass the market before approving a PFA that is, in essence, presented to the affected creditors as the best available deal under the circumstances.[35]

Under the circumstances, however, no such demonstration had been made, particularly because the narrow definition of "Superior Proposal" in the plan funding agreement:

> Seriously limits the possibility of even seeing other bidders involved once the PFA is approved. In other words, because of the content of the PFA as it stands now, once it is approved as sought, it appears unlikely that any kind of transparent and open process will follow.[36]

The Superior Court took issue with other aspects of the PFA as well. For example, the Superior Court questioned whether the alleged urgency that supposedly justified the abbreviated timelines for finding a Superior Proposal actually existed. The break fee, set at approximately 4.5 percent of the amount to be paid pursuant to the PFA, was at least double the real expenses incurred by the DIP Lenders in connection with the PFA. While the Superior Court was prepared to accept that some "risk premium or effort premium" was acceptable, it was wary of imposing unreasonable costs on unsecured creditors "who are already suffering the consequences of the restructuring" and would be required to pay the break fee.[37]

Ultimately, the Superior Court was concerned that the PFA "would limit the flexibility and optionality of the process at a time when, given that the DIP Lenders' PFA has not been tested and is not supported by key stakeholder[s], the process does require flexibility, optionality and credibility."[38]

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33 *Ibid.* at para. 33.

34 *Ibid.* at paras. 29–41.

35 *Ibid.* at para. 45.

36 *Ibid.* at para. 50.

37 *Ibid.* at paras. 60–64.

38 *Ibid.* at para. 75.

ii) Nortel

The other major line of cases originates with *Nortel Networks Corp., Re*,[39] a decision of the Ontario Superior Court. In that proceeding, Justice Morawetz set out a set of factors ("*Nortel* factors") that a court should consider in deciding whether to authorize a sale under the *CCAA* in the absence of a plan:

1. Is a sale transaction warranted at this time?
2. Will the sale benefit the whole "economic community"?
3. Do any of the debtor's creditors have a *bona fide* reason to object to a sale of the business?
4. Is there a better viable alternative?[40]

The *CCAA* was amended in 2009 to include the test for sale approval in section 36(3), among other things. Later that year, Justice Morawetz had the opportunity to revisit the four *Nortel* Factors in *Brainhunter*. Justice Morawetz observed:

> There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.[41]

In considering whether the break fee negotiated between the debtor and the stalking horse bidder in *Brainhunter* should be approved, Justice Morawetz held — contrary to the earlier *Boutique Euphoria* decision, to which he did not refer — that deference to the business judgment of the debtor was justified. Justice Morawetz observed that a special committee of the debtor's board of directors had considered and unanimously recommended the break fee, and the board had unanimously approved the break fee.[42] The break fee in that case was 2.5 percent of the amount of the stalking horse bid.

The *Nortel* factors have been applied to a consideration of whether to approve a sales process in a number of proceedings, including *Sino-Forest Corp., Re*,[43] *Clothing for Modern Times Ltd., Re*,[44] and *Canwest Global*

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39 2009 CarswellOnt 4467, [2009] O.J. No. 3169, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) [*Nortel*].

40 *Ibid.* at para. 49.

41 *Brainhunter*, *supra* note 20 at para. 17.

42 *Ibid.* at para. 20.

43 2012 ONSC 2063, 2012 CarswellOnt 4117, 213 A.C.W.S. (3d) 831 (Ont. S.C.J. [Commercial List]).

44 2011 ONSC 7522, 2011 CarswellOnt 14402, 210 A.C.W.S. (3d) 575, 88 C.B.R. (5th) 329 (Ont. S.C.J. [Commercial List]). This proceeding began with a Notice of Intention

Communications Corp., Re.[45] The *Nortel* factors have also been applied outside the *CCAA* context, for example when approving a sale process to be conducted by a liquidator[46] and by a receiver.[47]

However, in *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*,[48] Justice Brown applied a different test in considering whether to approve a sale process involving a court-appointed receiver:

> When reviewing a sales and marketing process proposed by a receiver a court should assess:
>
> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.[49]

Justice Brown subsequently applied the *CCM Master* approach in *PCAS Patient Care Automation Services Inc., Re*,[50] a proceeding under the *CCAA*. Arguably, these factors overlap with the *Nortel* factors and point to the same conclusion.

In approving a proposed sale process, the court will naturally have an eye to the criteria to be applied when approving the final sale.[51] Accordingly, if it is clear at the outset that the final sale will not be approved, then the court should not permit the process to run at all.

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to Make a Proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, and was continued under the *CCAA*. In granting approval of the sale process, Justice DM Brown applied the *Nortel* factors.

45 2010 ONSC 1176, 2010 CarswellOnt 1077, 64 C.B.R. (5th) 221 (Ont. S.C.J. [Commercial List]). In this proceeding, Justice Pepall acknowledged that the *Nortel* factors are to be considered when approving a sale process, but declined to apply them on the basis that the sale process, and not the sale itself, was up for approval in that proceeding.

46 *Clark v. Carson*, 2011 ONSC 6256, 2011 CarswellOnt 11100 (Ont. S.C.J. [Commercial List]).

47 *Schembri v. Way*, 2011 ONSC 4021, 2011 CarswellOnt 5644, 84 C.B.R. (5th) 185 (Ont. S.C.J. [Commercial List]); reversed in part 2011 CarswellOnt 6821 (Ont. C.A.); additional reasons 2011 CarswellOnt 8805 (Ont. C.A.); additional reasons 2011 CarswellOnt 9448 (Ont. S.C.J.).

48 2012 ONSC 1750, 2012 CarswellOnt 3158, 213 A.C.W.S. (3d) 12, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) [*CCM Master*].

49 *Ibid.* at para. 6.

50 2012 ONSC 2840, 2012 CarswellOnt 5922, 216 A.C.W.S. (3d) 284, 94 C.B.R. (5th) 69 (Ont. S.C.J. [Commercial List]) [*PCAS Patient Care*].

51 *Brainhunter*, *supra* note 20 at paras. 16-17.

3. AN EMPIRICAL REVIEW

In approving sale processes, courts in Canada have sought to balance these competing interests and maintain a fair and open sale process that promotes the objectives of the *CCAA*. In an attempt to characterize the balance that has been struck, we reviewed stalking horse agreements and bidding procedures in 17 stalking horse processes conducted under the *CCAA*, dating between 2004 and 2012. We evaluated the amount of the stalking horse bid, the bid protections negotiated by the stalking horse bidders and the salient features of the bidding procedures. Our findings are summarized in Appendix 1.

a) Outcomes

Of the 17 proceedings reviewed, no superior bid was received by the bid deadline and the stalking horse agreement became the definitive agreement of purchase and sale in five instances. In three other proceedings, the stalking horse bidder was selected as the winning bidder following an auction. In the other nine proceedings, at least one offer superior to the stalking horse bid was received and was successful at the auction and the stalking horse bidder was paid its break fee.

In proceedings where one or more superior bids were received, the successful bid was, approximately, between 1.4 and two times the amount of the stalking horse bid, and was on average 1.73 times the amount of the stalking horse bid.[52] Recoveries net of break fees, expense reimbursements and other payments to the stalking horse bidder were substantially the same: the successful bid was, approximately, between 1.4 and 1.9 times the amount of the stalking horse bid.

While an apples to apples comparison of stalking horse processes with traditional tender sales is not possible, these results suggest that: (1) despite the incorporation of bid protections in favour of the stalking horse bidder, stalking horse processes are succeeding in promoting competitive auctions and concerns that bid protections unreasonably erode recoveries are misplaced; (2) debtors are successfully negotiating competitive stalking horse agreements; and (3) the competitive process will, in most cases, result in the maximization of value for stakeholders.

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52 One outlier is the sale of Nortel's patent portfolio in *Nortel*, *supra* note 39, where the winning bid was five times the stalking horse bid. This sale process was excluded from our analyses. If it had been included, stalking horse sales were on average about double the stalking horse bid. Net of payments to the stalking horse bidder, the successful bid in this sale was 4.97 times the stalking horse bid, pushing the average successful bid to 2.05 times the stalking horse bid.

b) Protections Offered

i) Break Fees and Expense Reimbursements

Almost all of the stalking horse processes we reviewed included a break fee payable to the stalking horse bidder in the event that it was not ultimately successful. The amount of the break fee negotiated in the proceedings reviewed ranged between $375,000 and $25,000,000. This is between 1.8 and 4.5 percent of the consideration payable under the stalking horse agreement. The average break fee was about $6.8 million, or 3.2 percent of the stalking horse bid.

Despite the recommendations of commentators and notwithstanding the comments of the Quebec Superior Court in *Boutique Euphoria*, break fees are frequently not limited to the actual expenses incurred by a stalking horse bidder. Indeed, in 12 of the 17 proceedings reviewed, a separate expense reimbursement was payable to the stalking horse bidder in addition to the break fee. In one of these 12 proceedings, no limit was set on the expenses reimbursable by the debtor; in another two, a dollar amount was specified in advance for the expense reimbursement.

The amounts of the expense reimbursements in the proceedings reviewed ranged from $250,000 to $9,500,000 or 0.1 percent and 3.8 percent (approximately) of the amount of consideration payable under the stalking horse agreement. The average expense reimbursement was capped at about $2.5 million or about 1.7 percent.

Although the standard practice is to calculate break fees as a percentage of the stalking horse bid, on at least two occasions, the break fee payable to the stalking horse bid was determined as a percentage of the final purchase price resulting from the auction.

In cases where both a break fee and an expense reimbursement were paid to the stalking horse bidder, the average aggregate payment to the stalking horse bidder was about $6.9 million and represented approximately 3.7 percent of the amount of the stalking horse bid.

In *AbitibiBowater*, a "backstop agreement" was used in place of a stalking horse agreement and the counterparty to the backstop agreement was paid a "termination fee" analogous to a break fee in the amount of the lesser of $15 million or 5 percent of the capital raised in an alternative transaction, but in no event less than $7.5 million.[53] While this practice would seem to align the incentives of the stalking horse bidder, the debtor and stakeholders to maximize price, it is unclear whether the benefit of such an alignment would outweigh the potentially negative effect of increasing the cost of the transaction.

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53 No bids were received and no auction was conducted, so no break fee was paid.

In *Stelco*, the amount of the break fee payable to the stalking horse bidder increased over time, presumably to compensate the stalking horse bidder for the increased risk it incurred as time elapsed.

In *PCAS Patient Care*,[54] no break fee or expense reimbursement was payable because the stalking horse bidder (who was also the DIP lender), would receive part of the cash consideration paid by a successful bidder.

This data suggests that, allowing for the particular circumstances of a *CCAA* proceeding and the individual stalking horse bidder, the market will support a break fee of approximately 3.2 percent, together with a separate expense reimbursement linked to the actual out-of-pocket expenditures of the stalking horse bidder incurred in connection with the sale process of about 1.7 percent.

ii) Overbids and Bid Increments

Minimum overbids and mandatory bid increments were common features of the bid procedures in the proceedings we reviewed. The minimum overbid ranged from $250,000 to $5 million and between 0.1 percent and 3.3 percent of the stalking horse bid, and was on average about 1 percent of the stalking horse bid. The bid increment was often equal to the minimum overbid, but was on average slightly lower — 0.8 percent of the stalking horse bid.

iii) Rights of First Refusal

As noted above, in *Mecachrome*, the Quebec Superior Court refused to approve a plan funding agreement that included a right to match any superior bid received by the debtor. The receiver in *Sembiosys Genetics Inc.*[55] recently sought approval of a stalking horse agreement containing a similar provision. In this proceeding, the receiver negotiated a stalking horse bid with a group of the debtor's secured creditors that included, at the secured creditors' request, a right of first refusal in their favour. Notwithstanding the receiver's reservations about the inclusion of such a right in the stalking horse agreement, it sought approval of the agreement and the associated bid procedures. The Alberta Court of Queen's Bench rejected the proposed right of first refusal and the stalking horse agreement was eventually approved without it.

We have been unable to find any examples of a court approving a stalking horse agreement that included a right of first refusal and it is difficult to imagine what circumstances would justify such a right in favour of a stalking horse bidder. A right of first refusal or a right to match is the antithesis of a competitive process and is likely to have a profoundly adverse

54 *PCAS Patient Care*, *supra* note 50.

55 Alberta Court of Queen's Bench Court File No. 1201-07916 [*Sembiosys*].

effect on the integrity of the sale process and on recoveries by stalking horse bidders. Why would a prospective bidder devote the time and money necessary to conduct the due diligence necessary to make a bid if its bid could be unilaterally topped by the stalking horse bidder? By deterring participation in the auction, a right of first refusal would erode recoveries by stakeholders.

iv) Priority Charges

Another unusual feature of the *Sembiosys* sale process was the granting of a priority charge over certain of the debtor's assets in favour of the stalking horse bidder to secure payment of the break fee. While a similar charge was sought in *Boutique Euphoria*, the Superior Court in that proceeding did not consider it at great length as it had already rejected the quantum of the proposed break fee. The Superior Court simply observed that:

> Suffice to say at this stage that none of the authorities cited on the subject seems to discuss this [i.e. the granting of a priority charge] and the request appears awkward at first sight.
>
> The termination fee is, in essence, included in the over bids to be received. There thus appears to be many other ways to guarantee its payment. It seems doubtful that using the extraordinary measure of the creation of a priority charge would consequently be appropriate in such situations.[56]

Unlike *Boutique Euphoria*, the Alberta Court of Queen's Bench granted the charge in *Sembiosys*. As the Superior Court noted in *Boutique Euphoria*, a charge in favour of the stalking horse bidder should be unnecessary as the break fee is payable to the stalking horse bidder from the proceeds of the sale, and does not form part of the estate to be divided among creditors.

4. CONCLUSIONS

Stalking horse processes are now a well-established part of the Canadian insolvency practitioner's toolkit. As debtors, creditors and third parties become increasingly comfortable with the strengths and weaknesses of stalking horse processes, we are likely to see greater innovation in their use and structure. Such innovation will be tempered by a watchful judiciary concerned with preserving the fairness and integrity of sale processes, and with upholding the overarching goals of the *CCAA*.

It is accepted that a stalking horse bidder deserves to be compensated for the role it plays in a sale process. Protections like break fees, expense reimbursements and overbid protections are now widely accepted and courts are unlikely to interfere with protections that fall within the market norms outlined above. While above-market consideration for the stalking

56 *Boutique Euphoria*, *supra* note 21 at paras. 78–79.

horse bidder may be justifiable if they are the product of a thorough and competitive process, the cost and complexity of such processes may outweigh their benefits.

It is commonly accepted among insolvency practitioners that break fees in the range of 2–4 percent of the stalking horse bid are appropriate. Our review of stalking horse processes in *CCAA* proceedings confirms this rule of thumb and shows that the average break fee approved by the courts is 3.2 percent. Although most stalking horse bidders received a break fee and had their expenses reimbursed, in several proceedings, the stalking horse bidder received only one of these two types of payments. When expenses were reimbursed, the amount of the reimbursement was on average approximately 1.7 percent of the stalking horse bid. In cases where both a break fee and an expense reimbursement were paid, the average aggregate payment was about 3.7 percent of the value of the stalking horse bid.

Finally, the courts have regularly approved minimum overbids and mandatory bid increments that are approximately 1 percent of the stalking horse bid. While these may be interpreted as protections for the stalking horse bidder, they also have the potential to maximize the value produced through the auction process.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
Digital Domain Media Group	September 2012	US $15,000,000	US $30,200,000	US $375,000	2.5%	Capped at $375,000	Capped at 2.5%	Minimum overbid of $500,000 Minimum bid increments of $250,000	Ch. 11 proceeding in US was foreign main proceeding. Bid(s) superior to stalking horse bid received; auction held.
Northstar Aerospace Inc.	July 2012	CDN $24,500,000 *plus* US $45,500,000 *plus* assumed liabilities.	No qualified bids were received other than the initial stalking horse bid.	$2,450,000	3.5%[57]	Included in break fee.	N/A	Minimum overbid of $300,000 Minimum bid increment of $300,000	No qualified bids were received, no auction was held. Stalking horse bidder was the purchaser.

Appendix 1

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Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
PCAS Patient Care Automation Services	June 2012	Credit bid by the DIP Lender in the amount of DIP loan plus assumption of all senior secured indebtedness. Bid value estimated at $7,900,000.	Purchase price was comprised of cash (including a cash amount payable to the DIP lender), secured and unsecured promissory notes, and assumption of certain liabilities.	No break fee.	N/A	No expense reimbursement.	N/A	No minimum overbid. No minimum bid increments.	DIP lender was stalking horse bidder. No break fee or expense reimbursement payable to the stalking horse bidder. DIP lender received part of the cash consideration payable by the successful bidder and promissory notes.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
									Following auction, a bid superior to the stalking horse bid was accepted. Total consideration payable by winning bidder is unknown.
Timminco Limited A) Silicon Metal Assets and the HP2 Property	March 2012	$20,000,000 subject to adjustment in accordance with stalking horse agreement.	Successful Bid was an Aggregated Bid in the amount of $34,525,000, representing cash and assumed obligations.	No break fee.	N/A	$500,000	2.5% of the base stalking horse cash purchase price of $20,000,000.	Minimum overbid of $250,000 Minimum bid increments of $250,000.	Bids superior to stalking horse bid received. Successful bid was an aggregated bid comprised of two portion bids.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
B) Solar Equipment, HP1 Property and Solar Intellectual Property of Timminco Solar									No groups of assets being bid for. Stalking horse bidder was successful in purchasing the larger group of assets and another bidder was successful with respect to the smaller group.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
White Birch Paper Holding Company	September 2010	Purchase price included, among other things: credit bid, assumption of liabilities, cash and payment of applicable wind-down fees. Total consideration estimated at $150,000,000 to $178,000,000.	$236,052,825 (including cash, credit bid, assumed liabilities, and specified cure costs).	No break fee.	N/A	Capped at US $3,000,000	Approximately 2% of estimated total consideration.	Minimum overbid of $1,000,00 Minimum bid increments of $500,000	Only two parties participated in the auction. The stalking horse bidder was successful.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
AbitibiBowater Inc.	June 2010	Backstop Commitment Agreement: $500,000,000 in Convertible Notes at purchase price of $1 per Note.	No bids were received. The Backstop Commitment Agreement with the Backstop Investors was approved	*Backstop Payment* equal to the greater of $15,000,000 and 6% of the total size of the Rights Offering payable half in cash and half in new stock. *OR*	$15,000,000 termination payment represents 3% of the $500,000,000 rights offering.	Reimbursement for reasonable out-of-pocket expenses incurred by Backstop Investors in connection with the transaction. No cap.	N/A	No minimum overbid. No minimum bid increments.	Court referred to Backstop Commitment Agreement as "stalking horse agreement." No bids were received and therefore, no auction was conducted.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
				Termination payment akin to a break fee (payable in the event Backstop Payment not earned) in the amount of the *lesser of* (a) $15 million or (b) 5% of the capital raised in an alternative transaction, *but not less than* $7.5 million.					The Backstop Commitment Agreement with the Backstop Investors was approved by the court. The Termination payment was subject to modification depending on the timing of the triggering termination event and the final size of the offering.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
Canwest Global Communications Corp.	June 2010	Pursuant to stalking horse bid contained in support agreement between debtor and senior lenders, the senior lenders credit bid approximately $950 million in debt.	Bid submitted by ad hoc committee of holders of 9.25% senior subordinated notes in the amount of $1,075,000,000 plus the amount of assumed liabilities.	No break fee.	N/A	No expense reimbursement.	N/A	No minimum overbid. No minimum bid increments.	Offers superior to stalking horse bid were received. Stalking horse bidder was not successful.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
Brainhunter Inc.	December 2009	Estimated $28,000,000 in consideration, including cash, assumption of specified liabilities, and payment of certain post-*CCAA* costs.	Equivalent to purchase price under the Stalking Horse APA, *plus* break fee of $700,000, *plus* an additional $150,000 cash consideration.	$700,000	2.5%[58]	No expense reimbursement.	N/A	No minimum overbid. No minimum bid increments.	The Stalking Horse bidder was an insider and related party. One or more bids superior to the stalking horse bid were received and an auction was held. Stalking horse bidder was not successful.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
Indalex Limited	June 2009	$151,183,000	$151,183,000	$5,300,000	3.5%	No expense reimbursement.	N/A	Minimum overbid of $250,000 Minimum bid increments of $250,000	No qualified bids were received and no auction was held. Stalking horse bid was successful.
Nortel Networks Corp. Patent assets and certain related assets	July 2011	$900,000,000	$4,500,000,000	$25,000,000	2.8%	Capped at $4,000,000	Capped at approximately 0.5%	No minimum overbid. Minimum bid increments of $5,000,000 (Note: at auction, in the second round of bidding, the bid increments were increased to $50,000,000).	Bids superior to the stalking horse bid were received and an auction was held. Stalking horse bidder was not successful.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
Nortel Networks Corp. Multi-Service Switch (MSS) Business	September 2010	$39,000,000	$65,000,000	$2,500,000 minus any Expense Reimbursement	2.5–6.4%, depending on reduction in break-fee in accordance with Expense Reimbursement	Capped at $1,500,000	Capped at approximately 3.8%	Minimum overbid requirement of $1,000,000 Minimum bid increments of $1,000,000	Stalking horse bidder was not successful.
								(Note: at auction, in the fourth round of bidding the bid increments increased to $2,000,000).	

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
Nortel Networks Corp. CVAS Business	December 2009	$282,000,000	$282,000,000 (subject to $100,000,000 of adjustments)	$5,000,000	1.8%	Capped at $5,000,000	Capped at 1.8%	Minimum overbid of $4,000,000 Minimum bid increments of $3,000,000	No bids superior to the stalking horse bid were received and no auction as held. Stalking horse bidder was successful.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
Nortel Networks Corp. Metro Ethernet Networks (MEN) Business	November 2009	$390,000,000 plus $10,000,000 in common shares (to be reduced by $5,000,000 if landlord consent not obtained).	$530,000,000 cash plus $239,000,000 aggregate principal amount of senior notes.	$16,044,000 in the stalking horse agreement, reduced to $10,696,000 in winning bid.	4% (break-up fee in stalking horse agreement as percentage of stalking horse agreement purchase price) 2.6% (actual break-up fee paid as a percentage of stalking horse agreement purchase price)	Capped at $5,348,000	Capped at approximately 1.3% of stalking horse bid amount of $400,000,000	Minimum overbid of $5,000,000 Minimum bid increments of $5,000,000	Following auction, stalking horse bidder was successful. Stalking horse agreement provided for termination fee of $21,392,000 payable in the event of certain Cure Costs in respect of which the Purchaser may terminate the agreement.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
Nortel Networks Corp. Enterprise Solutions Business	September 2009	$475,000,000	$900,000,000 plus assumed liabilities	$14,250,000	3%	Capped at $9,500,000	Capped at 2%	Minimum overbid of $500,000 Minimum bid increment of $500,000	No other bids received. The stalking horse bidder was successful. Bid increment increased in fourth round of auction.
Nortel Networks Corp. CDMA Business and LTE Access Products	July 2009	$650,000,000	$1,130,000,000 plus assumed liabilities	$19,500,000	3%	Capped at $3,000,000	Capped at approximately 0.5%	Minimum overbid of $5,000,000 Minimum bid increments of $5,000,000	Auction held; stalking horse bidder was not successful. Bid increment increased at second round of auction.

Appendix 1

COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
Nortel Networks Corp. Layer 4–7 business and certain related US contracts.	April 2009	$17.650,000	$17.650,000 plus certain adjustments (e.g. relating to inventory, warranties, etc.)	$650,000	3.7%	Capped at $400,000	Capped at approximately 2.3%	Minimum overbid of $500.000 (or such other increment as the Sellers in consultation with financial advisors, Creditors' Committee and the Monitor deem to be appropriate). Minimum bid increments of $500,000	The stalking horse bid was the only bid. Because of adjustments, the purchase price exceeded the amount set forth in the proposed agreement.

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COMPARISON OF STALKING HORSE BID PROTECTIONS

Proceeding	Date	Stalking Horse Bid	Winning Bid	Break Fee	Break Fee as a % of Stalking Horse APA Purchase Price	Expense Reimbursement	Expense Reimbursement as % of Stalking Horse APA Purchase Price	Minimum Overbid / Overbid Increments	Notes
Eddie Bauer of Canada, Inc.	July 2009	$202,300,000	$286,000,000	$5,000,000	2.5%	$250,000	Approximately 0.1%	No minimum overbid. No minimum bid increment.	Three types of bids were received. Bid for business as going concern offered highest net recovery. The Stalking Horse for $202.3 million was not successful.

Notes:

57 Break-up fee and expense reimbursement were defined in the stalking horse APA as an aggregate percentage of the total Cash Purchase Price under the Stalking Horse Agreement, equal to the dollar amount specified therein.

58 The decision referred to the break fee expressed as a percentage of the purchase price under the stalking horse APA.

COMERICA BANK	and	ARXX BUILDING PRODUCTS INC., ARXX CORPORATION, ARXX BUILDING PRODUCTS U.S.A. INC., ECB HOLDINGS, LLC, APS HOLDINGS, LLC, UNISAS HOLDINGS, LLC, AND ECO-BLOCK INTERNATIONAL, LLC	Court File No. CV-13-10353-00CL
APPLICANT		RESPONDENTS	

ONTARIO
SUPERIOR COURT OF JUSTICE

BRIEF OF AUTHORITIES
(RETURNABLE DECEMBER 27, 2013)

Torys LLP
79 Wellington Street West, Suite 3000
Box 270, TD Centre
Toronto, Ontario M5K 1N2
Fax: 416.865.7380

David Bish (LSUC#: 41629A)
Tel: 416.865.7353

Lily Coodin (LSUC#: 62143S)
Tel: 416.865.7541

Lawyers for Duff & Phelps Canada Restructuring Inc., in its capacity as the Receiver for ARXX Building Products Inc., ARXX Corporation, ARXX Building Products U.S.A. Inc., ECB Holdings, LLC, APS Holdings, LLC, UNISAS Holdings, LLC, Eco-Block International, LLC