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 JANUARY 29, 2014)

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TAB 1

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1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [1999] O.J. No. 4300, [2000] B.P.I.R. 531

Skyepharma PLC v. Hyal Pharmaceutical Corp.

Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant

Ontario Superior Court of Justice [Commercial List]

Farley J.

Heard: October 20, 1999
Judgment: October 24, 1999
Docket: 99-CL-3479

Counsel: *Steven Golick* and *Robin Schwill*, for Receivers of Hyal Pharmaceutical Corp., Pricewaterhouse Coopers Incorporation.

Berl Nadler and *James Doris*, for Skyepharma PLC.

S.L. Secord, for Cangene Corporation.

Robert J. Chadwick, for Bioglan Pharma PLC.

Subject: Insolvency; Corporate and Commercial

Receivers --- Conduct and liability of receiver — Duties

Receiver obtained order directing process for purchase and sale of assets and shares of debtor, including authorization of exclusive parties permitted to make offers — Receiver accepted offer from one of two exclusive parties — Receiver brought motion for order approving agreement of purchase and sale, for issuance of vesting order to effect closing of transaction, and for grant of authority to take steps necessary to complete transaction — Rejected exclusive party and company not selected as exclusive party raised objections to granting motion — Motion granted — Receiver acted properly in accepting agreement — Receiver took reasonable time to analyse offers — Deadline for making offers to receiver was not also deadline for receiver to sign accepted agreement — Creditors had priority over shareholders in liquidation process and offers made to receiver not obligated to include favourable offer to shareholders — Rejected offer had unacceptable conditions that prevented it from being selected by receiver — Receiver's failure to reveal potential claim for damages to rejected bidder did not materially prejudice bidder — Company not selected as exclusive party voluntarily exited from competition and chose not to attempt to re-enter.

Cases considered by *Farley J.*:

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (B.C. S.C.) — applied

Central Capital Corp., Re (1996), 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88, 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, (sub nom. *Royal Bank v. Central Capital Corp.)* 88 O.A.C. 161 (Ont. C.A.) — applied

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) (Ont. H.C.) — applied

Greyvest Leasing Inc. v. Merkur (1994), 8 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.) — applied

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 (Ont. C.A.) — applied

MOTION by receiver for order approving agreement of purchase and sale of debtor's assets and shares.

***Farley J.*:**

Endorsement

1 PWC as court appointed receiver of Hyal made a motion before Ground, J. on Friday, October 15, 1999 for an order approving and authorizing the Receiver's acceptance of an agreement of purchase and sale with Skye designated as Plan C, the issuance of a vesting order as contemplated in Plan C so as to effect the closing of the transaction contemplated therein and the authority to take all steps necessary to complete the transaction as contemplated therein without further order of the court. Ground J. who had not been previously involved in this receivership adjourned the matter to me, but he expressed some question as to the activity of the Receiver as set out in his oral reasons, no doubt aided by Mr. Chadwick's very able and persuasive advocacy as to such points (Mr. Chadwick at the hearing before me referred to these as the Ground/Chadwick points). Further, I am given to understand that Ground, J. did not have available to him the Confidential Supplement to the Third Report which would have no doubt greatly assisted. As a result, it appears, of the complexity of what was available for sale by the Receiver which may be of interest to the various interested parties (and specifically Skye, Bioglan and Cangene) and the significant tax loss of Hyal, there were potentially various considerations and permutations which centred around either asset sales and/or a sale of shares. Thus it is, in my view, helpful to have a general overview of all the circumstances affecting the proposed sale by the Receiver so that the situation may be viewed in context — as opposed to isolating on one element, sentence or word. To have one judge in a case hearing matters such as this is an objective of the Commercial List so as to facilitate this overview.

2 Ground J. ordered that the Confidential Supplement to the Receiver's Third Report be distributed forthwith to the service list. It appears this treatment was also accorded the Confidential Supplement to the Fourth Report. These Confidential Supplements contained specific details of the bids, discussions and the analysis of same by the Receiver and were intended to be sealed pending the completion of the sale process at which time such material would be unsealed. If the bid, auction or other sale process were to be reopened, then while from one aspect the potential bidders would all be on an equal footing, knowing what everyone's then present position was as of the Receiver's motion before Ground J., but from a practical point of view, one or more of the bidders would be put at a disadvantage since the Receiver was presenting what had been advanced as "the best offer" (at

least to just before the subject motion) whereas now the others would know what they had as a realistic target. The best offer would have to be improved from a procedural point of view. Conceivably, Skye has shot its bolt completely; Bioglan on the other hand, in effect, declined to put its "best intermediate offer" forward, anticipating that it would be favoured with an opportunity to negotiate further with the Receiver and it now appears that it is willing to up the ante. The Receiver's views of the present offers is now known which would hinder its negotiating ability for a future deal in this case. Unfortunately, this engenders the situation of an unruly courthouse auction with some parties having advantages and others disadvantages in varying degrees, something which is the very opposite of what was advocated in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) as desirable.

3 Through its activities as authorized by the court, the Receiver has significantly increased the initial indications from the various interested persons. In a motion to approve a sale by a receiver, the court should place a great deal of confidence in the receiver's expert business judgement particularly where the assets (as here) are "unusual" and the process used to sell these is complex. In order to support the role of any receiver and to avoid commercial chaos in receivership sales, it is extremely desirable that perspective participants in the sale process know that a court will not likely interfere with a receiver's dealings to sell to the selected participant and that the selected participant have the confidence that it will not be back-doored in some way. See *Royal Bank v. Soundair* at pp 5, 9-10, 12 and *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.). The court should assume that the receiver has acted properly unless the contrary is clearly demonstrated: see *Royal Bank v. Soundair* of pp.5 and 11. Specifically the court's duty is to consider as per *Royal Bank v. Soundair* at p.6:

(a) whether the receiver made a sufficient effort to obtain the best price and did not act improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which the receiver obtained offers; and

(d) whether the working out of the process was unfair.

4 As to the providence of the sale, a receiver's conduct is to be reviewed in light of the (objective) information a receiver had and not with the benefit of hindsight: *Royal Bank v. Soundair* at p.7. A receiver's duty is not to obtain the best possible price but to do everything reasonably possible in the circumstances with a view to obtaining the best price: see *Greyvest Leasing Inc. v. Merkur* (1994), 8 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.) at para. 45. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonably low that it shows the receiver as acting improvidently in accepting it. It is the receiver's sale not the sale by the court: *Royal Bank v. Soundair* at pp. 9-10.

5 In deciding to accept an offer, a receiver is entitled to prefer a bird in the hand to two in the bush. The receiver, after a reasonable analysis of the risks, advantages and disadvantages of each offer (or indication of interest if only advanced that far) may accept an unconditional offer rather than risk delay or jeopordize closing due to conditions which are beyond the receiver's control. Furthermore, the receiver is obviously reasonable in preferring any unconditional offer to a conditional offer: See *Crown Trust Co. v. Rosenberg* at p. 107 where Anderson J. stated:

> The proposition that conditional offers would be considered equally with unconditional offers is so palpably ridiculous commercially that it is difficult to credit that any sensible businessman would say it, or if said, that any sensible businessman would accept it.

See also *Royal Bank v. Soundair* at p. 8. Obviously if there are conditions in offers, they must be analyzed by the receiver to determine whether they are within the receiver's control or if they appear to be in the circumstances as minor or very likely to be fulfilled. This involves the game theory known as mini-max where the alternatives are gridded with a view to maximizing the reward at the same time as minimizing the risk. Size and certainty does matter.

6 Although the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors. Where the debtor cannot meet statutory solvency requirements, then in accord with the Plimsoll line philosophy, the shareholders are not entitled to receive payments in priority or partial priority to the creditors. Shareholders are not creditors and in a liquidation, shareholders rank below the creditors. See *Royal Bank v. Soundair* at p. 12 and *Re Central Capital Corp.* (1996), 38 C.B.R. (3d) 1 (Ont. C.A.) at pp.31-41 (per Weiler, J.A.) and pp. 50-53 (Laskin, J.A.).

7 Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision, reviewed in detail every element of the procedure by which the receiver made the decision (so long as that procedure fits with the authorized process specified by the court if a specific order to that affect has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval. See *Royal Bank v. Soundair* at p. 14 and *Crown Trust Co. v. Rosenberg* at p. 109.

8 Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interest of the parties directly involved. See *Crown Trust Co. v. Rosenberg* at pp. 114-119 and *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.) at pp. 30-31. The corollary of this is that no weight should be given to the support offered by a creditor *qua* creditor as to its offer to purchase the assets.

9 It appears to me that on first blush the Receiver here conducted itself appropriately in all regards as to the foregoing concerns. However, before confirming that interim conclusion, I will take into account the objections of Bioglan and Cangene as they have shoehorned into this approval motion. I note that Skye and Cangene are substantial creditors of Hyal and this indebtedness preceded the receivership; Bioglan has acquired by assignment since the receivership a relatively modest debt of approximately $40,000.

10 On September 28, 1999, I granted an order with respect to the sale process from thereon in. In para. 3 of the order there is reference to October 8, 1999 but it appears to me that this is obviously an error and should be the same October 6, 1999 as in para. 2 as in my endorsement I felt "the deadline should not be 5:00 p.m. Friday, October 8/99 but rather 5:00 p.m. Wednesday, October 6/99." Bioglan had not been as forthcoming as Skye and Cangene and it was the Receiver's considered opinion (which I felt was well grounded and therefore accepted) that the Receiver should negotiate with the Exclusive Parties as identified to the court in the Confidential Supplement to the Third Report (with Skye and Cangene as named in the Confidential Supplement). These negotiations were to be with a view to attempting to finalizing with one of these two parties an agreement which the Receiver could recommend to the court. While perhaps inelegantly phrased, the deadline of 5:00 p.m. on October 6, 1999 was as to the offerers putting forward their best and irrevocable offer as to one or more of the combinations and permutations available. Both Cangene and Skye submitted their offers (Cangene one deal and Skye three independent alternatives — all four of which were detailed and complex) immediately before the 5:00 p.m. October 6, 1999 time. It would not seem to me that either of them was under a misimpression as to

what was to be accomplished by that time. It would be unreasonable from every business angle to expect that the Receiver would have to rather instantly choose in minutes and therefore without the benefit of reflection as to which of the proposals would be the best choice for acceptance subject to court approval; the Receiver was merely stating the obvious in para. 10 of its Confidential Supplement to the Fourth Report. Para. 31 should not be interpreted as completely boxing in the Receiver; the Receiver could reject all three Skye offers if it felt that appropriate. The Receiver must have a reasonable period to do its analysis and it did (with the intervening Thanksgiving weekend) by October 13, 1999. In my view, it is reasonable and obvious in the context of the receivership and the various proceedings before this court that the finalizing of the agreement by 5:00 p.m. October 6, 1999 did not mean that the Receiver had to select its choice and execute (in the sense of "sign") the agreement by that deadline. Rather the reasonable interpretation of that deadline is as set out above. Bioglan, not being one of the selected and authorized Exclusive Parties did not, of course, present any offer. It had not got over the September 21, 1999 hurdle as a result of the Receiver's reasonable analysis of its proposal before that date. The September 28, 1999 order, authorized and directed the Receiver to go with the two parties which looked as if they were the best bets as candidates to come up with the most favourable deal. As for the question of "realizing the superior value inherent in the respective Exclusive Parties' offers", when viewed in context brings into play the aforesaid concerns about creditors having priority over shareholders and that in a liquidation the creditors must be paid in full before any return to the shareholders can be considered. It was possible that the exclusive parties or one of them may have made an offer which would have discharged all debts and in an "attached" share deal offered something to the shareholders, especially in light of the significant tax losses in Hyal. That did not happen. No one could force the Exclusive Parties to make such a favourable offer if they chose not to. The Receiver operated properly in selecting the Skye C Plan as the most appropriate one in light of the short fall in the total debts. I note that a share deal over and above the Skye C Plan has not been ruled out for future negotiations as such would not be in conflict with that recommended deal and if structured appropriately. Bioglan in my view has in essence voluntarily exited the race and notwithstanding that it could have made a further (and better) offer even in light of the September 28, 1999 order, it chose not to attempt to re-enter the race.

11 I would also note that in the fact situation of this case where Skye is such a substantial creditor of Hyal that the $1 million letter of credit it proposes as a full indemnity as to any applicable clawback appears reasonable in the circumstances as what we are truly looking at is this indemnity to protect the minority creditors. Thus Skye's substantial creditor position in essence supplements the letter of credit amount (or substitutes for a part of the full portion).

12 It is obvious that it would only have been appropriate for the Receiver to have gone back to the well (and canvassed Bioglan) if none of the offers from the Exclusive Parties had been acceptable. However the Skye Plan C one was acceptable and has been recommended by the Receiver for approval by this court.

13 As for Cangene, it has submitted that the Receiver has misunderstood one of its conditions. I note that the Receiver noted that it felt that Cangene may have made an error in too hastily composing its offer. However, the Cangene offer had other unacceptable conditions which would prevent it on the Receiver's analysis from being the Receiver's first choice.

14 Then Cangene submitted that the Receiver erred in not revealing the Nadler letter which threatened a claim for damages in certain circumstances. Clearly it would have been preferable for the Receiver to have made complete disclosure of such a significant contingent liability. However, it seems to me that Cangene can scarcely claim that it was disadvantaged since it was previously directly informed by Mr. Nadler as counsel for Skye of their counterclaim. There being no material prejudice to Cangene, I do not see that this results in the Re-

ceiver having blotted its copybook so badly as to taint the process so that it is irretrievably flawed.

15 I therefore see no impediment, and every reason, to approve the Skye Plan C deal and I understand that, notwithstanding the (interim) negative news from the United States FDA process, Skye is prepared to close forthwith. The Receiver's recommendation as to the Skye Plan C is accepted and I approve that transaction.

16 It does not appear that the other aspects of the motion were intended to be dealt with on the Wednesday, October 20, 1999 hearing date. They should be rescheduled at a convenient date.

17 Order to issue accordingly.

Motion granted.

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2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298, [2000] O.J. No. 467

Skyepharma PLC v. Hyal Pharmaceutical Corp.

Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant

Ontario Court of Appeal

Carthy, Goudge, O'Connor JJ.A.

Heard: December 21, 1999
Judgment: February 18, 2000
Docket: CA M25061, C33086

Proceedings: affirmed *Skyepharma PLC v. Hyal Pharmaceutical Corp.* ((1999)), 1999 CarswellOnt 3641, [1999] O.J. No. 4300, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 ((Ont. S.C.J. [Commercial List]))

Counsel: *James W.E. Doris*, for Skyepharma PLC.

Alan H. Mark, for Appellant/Respondent on the motion, Bioglan Pharma PLC.

Joseph M. Steiner and *Steven G. Golick*, for Price Waterhouse Coopers Inc., court-appointed receiver of Hyal Pharmaceutical Corp.

Subject: Corporate and Commercial; Insolvency

Corporations — Arrangements and compromises — Under general corporate legislation

Receiver was appointed and authorized to liquidate and realize defendant's assets — In its report, receiver pointed out importance of finalizing sale at early date, as defendant's debt was increasing at rate of $70,000 per week — Court ordered receiver to negotiate exclusively with two prospective purchasers, including plaintiff company, and gave receiver discretion to negotiate with non-exclusive purchasers if parties could not reach agreement — Receiver recommended approval of sale to plaintiff company, which would not necessarily maximize realization of assets, but would minimize risk of not closing and risk of increasing liabilities — Court approved sale of assets to plaintiff company — Unsuccessful, non-exclusive purchaser brought appeal to have order approving sale set aside — Receiver brought motion to quash appeal — Motion granted — As unsuccessful purchaser did not acquire sufficient interest to be added as party, unsuccessful purchaser did not have right that was finally disposed of by approval order — Unsuccessful purchaser had no legal or proprietary right in property being sold and did not have right or interest that was affected by sale approval order — Involvement of unsuccessful purchaser would create potential for delay and uncertainty, possibly giving unsuccessful purchaser leverage, which

would be counterproductive — Ordinary meaning of language in order did not require that unsuccessful purchaser extend its outstanding offer — Fact that receiver had discretion to negotiate with non-exclusive buyers did not create duty or right — Fact that court heard submissions from unsuccessful purchaser did not create standing for appeal, because purchaser was heard as creditor and not as unsuccessful purchaser.

Cases considered by *O'Connor J.A.*:

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (B.C. S.C.) — applied

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (N.S. C.A.) — considered

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) (Ont. H.C.) — applied

Halbert v. Netherlands Investment Co., [1945] S.C.R. 329, [1945] 2 D.L.R. 418 (S.C.C.) — 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 (Ont. C.A.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 6(1)(b) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 13.01 — considered

R. 13.01(1)(a) — considered

R. 13.01(1)(b) — considered

MOTION by receiver to quash appeal by unsuccessful prospective purchaser from judgment, reported at (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), ordering approval of sale of assets.

The judgment of the court was delivered by *O'Connor J.A.*:

1 This is a motion to quash an appeal from the order of Farley J. made on October 24, 1999. By his order, Farley J. approved the sale of the assets of Hyal Pharmaceutical Corporation by the court-appointed receiver of Hyal to Skyepharma PLC. Bioglan Pharma PLC, a disappointed would be purchaser of those assets has appealed, asking this court to set aside the sale approval order and to direct that there be a new sale process.

2 The receiver moves to quash the appeal on the ground that Bioglan, as a potential purchaser, did not have any rights that were finally determined by the sale approval order. Accordingly, the receiver contends, this court does not have jurisdiction to hear the appeal.

Background

3 Skyepharma, the largest creditor of Hyal, moved for the appointment of Pricewaterhouse Coopers Inc. as the receiver and manager of all of the assets of Hyal. On August 16, 1999, Molloy J. granted the order which included provisions authorizing the receiver to take the necessary steps to liquidate and realize upon the assets, to sell the assets (with court approval for transactions exceeding $100,000) and to hold the proceeds of any sales pending further order of the court.

4 On August 26, 1999, Cameron J. made an order approving the process proposed by the receiver for soliciting, receiving and considering expressions of interest and offers to purchase the assets of Hyal.

5 The receiver reported to the court on September 27, 1999 and set out the results of the sale process. The receiver sought the court's approval to enter into exclusive negotiations with two parties which had made offers, Skyepharma and Cangene Corporation. The receiver indicated that it had also received an offer from Bioglan and explained why, in its view, the best realisation was likely to result from negotiations with Skyepharma and Cangene.

6 In its report, the receiver pointed out the importance of attempting to finalize the sale of the assets at an early date. The interest and damages on the secured and unsecured debt of Hyal were increasing in the amount of approximately $70,000 a week. Professional fees and operational costs were also adding to the aggregate debt of the company.

7 On September 28, 1999 Farley J. ordered that the receiver negotiate exclusively with Skyepharma and Cangene until October 6, in an attempt to conclude a transaction that was acceptable to the receiver and that realised the superior value inherent in the offers made by Skyepharma and Cangene.[FN1] The court also directed that no party would be entitled to retract, withdraw, vary or counteract any outstanding offer prior to October 29, 1999 and that, if the receiver was unable to reach agreement with Skyepharma or Cangene, then it would have the discretion to negotiate with other parties.

8 On October 13, the receiver reported to the court on the results of the negotiations with Skyepharma and Cangene. The parties had been unable to structure the transaction to take advantage of Hyal's tax loss positions. Nevertheless, the receiver recommended approval for an agreement to sell the assets of Hyal to Skyepharma. In its report, the receiver pointed out that the agreement it was recommending did not necessarily maximize the realisation for the assets but that it did minimize the risk of not closing and also the risk of liabilities increasing in the interim period up to closing, which risks arose from the provisions and timeframes contained in other offers. The receiver said that these risks were not immaterial.

9 At the same time that the receiver filed its report it brought a motion for approval of the agreement with Skyepharma. The motion was heard by Farley J. on October 20, 1999. Counsel for Skyepharma, Cangene and Bioglan appeared and were permitted to make submissions. Skyepharma, which was both a creditor of Hyal and the purchaser under the agreement for which approval was being sought, supported the motion. Cangene and Bioglan, which in addition to being unsuccessful prospective purchasers, were also creditors of the company, opposed the motion.

10 It is apparent that the motions judge heard the submissions of Cangene and Bioglan in their capacities as creditors of Hyal and not in their role as unsuccessful bidders for the assets being sold. In his endorsement made on October 24 he said:

> Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interests of the parties directly involved.

The motions judge continued by saying that he would "take into account the objections of Bioglan and Cangene as they have shoehorned into the approval motion". This latter comment, as it applied to Bioglan, appears to refer to the fact that Bioglan only became a creditor after the receiver was appointed and then only by acquiring a small debt of Hyal in the amount of $40,000.

11 The motions judge approved the agreement for the sale of the assets to Skyepharma. In his endorsement, he noted that the assets involved were "unusual" and that the process to sell these assets was complex. He attached significant weight to the recommendation of the receiver who, he pointed out, had the expertise to deal with matters of this nature. The motions judge noted that the receiver's primary concern was to protect the interests of the creditors of Hyal. He recognized the advantages of avoiding risks that may result from the delay or uncertainty inherent in offers containing conditional provisions. The certainty and timeliness of the Skyepharma agreement were important factors in both the recommendation of the receiver and in the reasons of the court for approving the sale.

12 The motions judge said that "at first blush", it appeared that the receiver had conducted itself appropriately throughout the sale process. He reviewed the specific complaints of Cangene and Bioglan and concluded that, although the process was not perfect (my words), there was no impediment to approving the sale to Skyepharma.

13 This court was advised by counsel that the transaction closed immediately after the order approving the sale was made.

14 Bioglan has filed a notice of appeal seeking to set aside the approval order and asking that this court direct that the assets of Hyal be sold pursuant to a court-supervised judicial sale or, alternatively, that the receiver be required to reopen the bidding relating to the sale. The notice of appeal does not set out any specific grounds of appeal. It states only that the motions judge erred in approving the sale agreement.

15 In argument, counsel for Bioglan said that there are two grounds of appeal. First, the receiver misinterpreted the order of September 28, 1999 and should have negotiated further with the non-exclusive bidders, including Bioglan, once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. Second, the motions judge erred in holding that Bioglan had a full opportunity to participate in the process and was the author of its own misfortune by using a "low balling strategy."

Analysis

16 The receiver moves to quash the appeal on the ground that this court does not have jurisdiction.

17 Section 6(1)(b) of the *Courts of Justice Act* provides for a right of appeal to this court from a final order of a judge of the Superior Court of Justice. A final order is one that finally disposes of the rights of the parties: *Halbert v. Netherlands Investment Co.*, [1945] S.C.R. 329 (S.C.C.).

18 The issue raised by the motion is whether Bioglan had a right that was finally disposed of by the sale ap-

proval order. Bioglan submits that there are four separate ways by which it acquired the necessary right. The first is one of general application that would apply to all unsuccessful prospective purchasers in court supervised sales. The other three arise from the specific circumstances of this case.

19 First, Bioglan submits that because it made an offer to buy the assets of Hyal, it acquired a right that entitled it to participate in the sale approval motion and to oppose the order sought by the receiver. This right, Bioglan maintains, was finally disposed of by the order approving the sale to Skyepharma.

20 A similar issue was considered by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (Ont. H.C.). In that case, a receiver brought a motion to approve the sale of certain properties. On the return of the motion, Larco Enterprises, a prospective purchaser whose offer was not being recommended for approval by the receiver, moved to intervene as an added party under rule 13.01 of the *Rules of Civil Procedure*. The relevant portion of that rule, at the time, read as follows:

> 13.01(1) Where a person who is not a party to a proceeding claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that he or she may be adversely affected by a judgment in the proceeding;
>
> ... the person may move for leave to intervene as an added party.[FN2]

21 Anderson J. concluded that "the proceeding" referred to in rule 13.01 only included an action or an application. The motion for approval of the sale by the receiver was neither. He therefore dismissed Larco's motion. He continued, however, and held that even if the proceeding was one to which the rule applied, Larco did not satisfy the criteria in it because it did not have an interest in the subject-matter of the sale approval motion nor did it have any legal or proprietary right that would be adversely affected by the court's order approving the sale.

22 I adopt both his reasoning and his conclusion. At p. 118, he said:

> The motion brought by Clarkson to approve the sales is one upon which the fundamental question for consideration is whether that approval is in the best interests of the parties to the action as being the approval of sales which will be most beneficial to them. In that fundamental question Larco has no interest at all. Its only interest is in seeking to have its offer accepted with whatever advantages will accrue to it as a result. That interest is purely incidental and collateral to the central issue in the substantive motion and, in my view, would not justify an exercise of the discretion given by the rule.
>
> Nor, in my view, can Larco resort successfully to cl. (*b*) of rule 13.01(1) which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.

23 The British Columbia Supreme Court reached a similar conclusion in *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.). In that case the receiver in a deben-

ture holder's action for foreclosure moved for an order to approve the sale of assets. A group of companies, the Shaw group, had made an offer and sought to be added as a party under a rule which authorized the Court to add as a party any person "whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon ...". Berger J. dismissed this motion. At p. 30, he said:

> The Shaw group of companies has no legal interest in the litigation at bar. It has a commercial interest, but that is not, in my view, sufficient to bring it within the rule. Simply because it has made an offer to purchase the assets of the company does not entitle it to be joined as a party. Nothing in *Gurtner v. Circuit* [cite omitted] goes so far. No order made in this action will result in any legal liability being imposed on the Shaw group, and no claim can be made against it on the strength of any such order.

24 Although the issues considered in these cases are not identical to the case at bar, the reasoning applies to the issue raised on this appeal. If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.

25 There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg, supra.*

26 Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

27 In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process. *Crown Trust v. Rosenberg, supra*; *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). The examination of the sale process will in normal circumstances be focussed on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.

28 In *Soundair*, the unsuccessful would be purchaser was a party to the proceedings and the court considered the fairness of the sale process from its standpoint. However, I do not think that the decision in *Soundair* conflicts with the position I have set out above for two reasons. First, the issue of whether the prospective purchaser had a legal right or interest was not specifically addressed by the court. Indeed, in describing the general principles that govern a sale approval motion, Galligan J.A., for the majority, adopted the approach in *Crown Trust v. Rosenberg*. Under the heading "Consideration of the interests of all the parties", he referred to the in-

terests of the creditors, the debtor and a purchaser who has negotiated an agreement with the receiver. He did not mention the interests of unsuccessful would be purchasers. Second, the facts in *Soundair* were unusual. The unsuccessful offeror was a company in which Air Canada had a substantial interest. The order appointing the receiver specifically directed the receiver "to do all things necessary or desirable to complete a sale to Air Canada" and if a sale to Air Canada could not be completed to sell to another party. Arguably, this provision in the order of the court created an interest in Air Canada which could be affected by the sale approval order and which entitled it to standing in the sale approval proceedings.

29 In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest is not sufficient.

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

31 In arguing that simply being a prospective purchaser accords a broader right or interest than I have set out above, Bioglan relies on the decision of the Nova Scotia Court of Appeal in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (N.S. C.A.). In that case, the receiver invited tenders to purchase lands of the debtor and received three offers. The receiver accepted Cameron's offer and inserted a clause in the sale agreement calling for court approval. On the application to approve the sale, Treby, an unsuccessful bidder, was joined as an intervener. Treby opposed approval, arguing that he had been misled into believing that he would have another opportunity to bid on the property. The court directed that all three bidders be given a further opportunity to bid by way of sealed tender. Cameron appealed the order. The tender process proceeded. Treby and the third bidder submitted bids; Cameron did not. The receiver accepted Treby's offer and the court approved the sale to Treby. Cameron also appealed this order and Cameron's two appeals were heard together. Hart J.A. held that both Cameron and Treby had a right to appear at the original hearing because both were parties directly affected by the decision of the court. He concluded that the first decision reopening the bidding process and the order approving the sale to Treby were both final in their nature in that they amounted to a final determination of the rights of Cameron and Treby. He did not set out specifically what "rights" he was referring to. Having regard to the facts in the case, it is not clear to me that *Cameron* stands for the proposition asserted by Bioglan, that an unsuccessful would be purchaser, without more, has a right that is finally determined by an order approving a sale. If it does, I would, with respect, disagree.

32 In the result, I conclude that the fact that Bioglan made an offer to purchase Hyal's assets did not give it a right or interest that was affected by the sale approval order. It was not entitled to standing on the motion on that basis nor is it now entitled to bring this appeal on that basis.

33 As an alternative, Bioglan relies upon three circumstances in this case, each of which it says, in somewhat different ways, results in it having the right to appeal the sale approval order to this court. First, Bioglan submits that it acquired this necessary right under the provision in the order of September 28 which directed that "no party shall be entitled to retract, withdraw, vary or countermand any offer submitted to the receiver prior to

October 29 1999."

34 Bioglan's offer was, by its terms, to expire on October 4. Bioglan argues that the order of September 28 imposed an obligation on it to keep that offer open until October 29. That being the case, Bioglan maintains that it acquired a right to appear and oppose the motion to approve the sale.

35 I do not accept this argument. The ordinary meaning of the language in the order did not require Bioglan to extend its outstanding offer. The order did nothing more than preclude parties from taking steps to either amend or withdraw their offers before October 29. By its terms, Bioglan's offer was to expire on October 4. The order of September 28 did not affect the expiry date of the offer.

36 Even if the language of the September 28 order is interpreted to preclude an existing offer from expiring in accordance with its terms, the result would be the same. Bioglan made its offer to the receiver under terms and conditions of sale approved by the court on August 26. The terms and conditions of the sale were deemed to be part of each offer made to the receiver. Clause 14 of the terms and conditions provided:

> ... No party shall be entitled to retract, withdraw, vary or countermand its offer prior to acceptance or rejection thereof by the vendor (receiver). [My emphasis.]

37 The order of September 28 tracks the emphasized language. If the language in the order is interpreted to preclude an existing offer from expiring according to its terms, then when Bioglan submitted its offer it agreed, by virtue of clause 14 in the terms and conditions of sale, that its offer would remain open until it was either accepted or rejected by the receiver. Assuming this interpretation, the order of September 28 added nothing to the obligation that Bioglan had assumed when it made its offer.

38 Accordingly I would not give effect to this argument.

39 Next, Bioglan submits that the order of September 28 created a duty on the receiver to negotiate further with the non-exclusive bidders once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. This duty, it is argued, created a corresponding legal right in Bioglan to participate further in the process. This right, Bioglan maintains, was violated by the receiver when it recommended the Skyepharma agreement.

40 I do not read the order of September 28 as imposing this duty on the receiver. The order provided the receiver with a discretion as to whether to negotiate further with the non-exclusive bidders. It did not require the receiver to do so. Moreover, the order of September 28 did not limit the receiver to entering into an agreement with the exclusive bidders only if an agreement could be structured to take advantage of the tax losses. The order of September 28 did not create either the duty or the right asserted by Bioglan.

41 Finally, Bioglan submits that it acquired the necessary right to bring this appeal because the motions judge permitted it to make submissions on the sale approval motion. Again, I see no merit in this argument. As I have set out above, it seems apparent that the motions judge heard Bioglan's argument solely because it was a creditor of Hyal and not because it was an unsuccessful prospective purchaser. Bioglan does not seek to bring this appeal in its role as a creditor, nor does it complain that the sale approval order is unfair to the creditors of Hyal.

42 The motions judge approved the sale based on the recommendation of the receiver that it was in the best

interests of the creditors. The fact that Bioglan was given an opportunity to be heard in these circumstances did not create a right which would provide standing to bring this appeal. The order sought to be appealed does not finally dispose of any right of Bioglan as creditor.

Disposition

43 In the result, I would allow the motion and quash the appeal with costs to the moving party.

Motion granted.

FN1 These offers were superior in that they were the only two that attempted to provide value for the tax loss positions of Hyal.

FN2 The rule as presently worded is not.

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TAB 2

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1989 CarswellAlta 347, 75 C.B.R. (N.S.) 158, 71 Alta. L.R. (2d) 320

Integrated Building Corp. v. Bank of Nova Scotia

INTEGRATED BUILDING CORP. et al. v. BANK OF NOVA SCOTIA, CLARKSON GORDON (Receiver) and EXTRA EQUITY CORP. (Third Party)

Alberta Court of Appeal

Laycraft C.J.A., McClung and Hetherington JJ.A.

Judgment: May 12, 1989
Docket: Edmonton No. 8903-0252-AC

Counsel: *R.G. McLennan*, for appellants.

R.W. Block, for respondent.

W.E. Wilson, Q.C., for receiver.

J.N. Agrios, Q.C., and *R. Reeson*, for third party.

Subject: Corporate and Commercial; Insolvency

Receivers --- Conduct and liability of receiver — Duties

Receivers — Sale of debtor's assets — Receiver not having to reinstitute tender process for sale of land after receiving better offer from person who did not respond to public invitation.

Receivers — Actions — Court refusing to interfere in proposed action by court-appointed receiver to excite interest in sale of land — Receiver having been fair and reasonable in all it did in sale process.

When determining whether to interfere to reject a proposed action by a court-appointed receiver to excite interest in the sale of lands, the court must ask whether the receiver has been fair and reasonable in all that it has done in the sale process, which has a practical, business aspect as well as a judicial aspect to it. Further, when a receiver has received a better offer from a person who did not respond to the public invitation for proposals, the receiver is not bound to reinstitute the tender process.

Cases considered:

Crown Trust Co. v. Rosenberg (1986), 67 C.B.R. (N.S.) 320 (Ont. H.C.) (not yet reported) — *considered*

Appeal from dismissal of application to reject proposed action of court-appointed receiver on sale of lands.

Laycraft C.J.A. **(for the court) (Memorandum of judgment delivered from the bench):**

1 We are all of the view that the reasons for judgment of the learned chambers judge properly assessed the considerations determining when a court will interfere to reject a proposed action by its court-appointed receiver. In this case the chambers judge reviewed the effort made by the receiver to excite interest in the sale of the lands. She quoted the Ontario decision of *Crown Trust Co. v. Rosenberg* [summarized at 67 C.B.R. (N.S.) 320 (H.C.)], which states the test in these terms:

> The court must consider the efficacy and the integrity of the process by which offers are obtained. The court ought not to enter into the marketplace. The court ought not to sit as on appeal from the decision of the receiver reviewing in minute detail every element of the process by which its decision is reached.

2 She then went on to say, applying these principles to the case here:

> There is, of course, a good deal of law restating these basic general principles and I think it comes down to this, that I must ask whether a party in the position of Clarkson Gordon has been fair and reasonable in all that they have done in this process which has a practical business aspect to it, but also a judicial judiciary aspect to it.
>
> Counsel for Genesis has candidly admitted that Genesis was not misled. It is relevant to me that a director of Genesis is a defendant in this action. It is important to me that parties involved in Genesis are related to, or connected to, or are the defendants in the primary action, the Bank of Nova Scotia action, because it indicates that Genesis Corp. was knowledgeable about what was happening with regard to Integrated Building Corp., the Oluks, the Bank of Nova Scotia and this receivership being managed by Clarkson Gordon.

3 The learned chambers judge then found that the receiver had taken reasonable steps. We note that the proposed sale presented for approval was an improvement on the best proposal received after the public exposure of the property. We do not agree with the proposition that, when a receiver has received a better offer from a person who did not respond to the public invitation for proposals, the receiver is then bound to reinstitute the tender process.

4 The chambers judge found that the receiver's actions were reasonable and we are not persuaded that she made any error in fact or in law in exercising her discretion to make that decision.

5 Accordingly, the appeal is dismissed.

Appeal dismissed.

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TAB 3

Case Name:

Battery Plus Inc. (Re)

IN THE MATTER OF The Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Section 47.1, as amended AND IN THE MATTER OF Battery Plus Inc. and 1271273 Ontario Inc.

[2002] O.J. No. 731

Court File No. 01-CL-4319

Ontario Superior Court of Justice
Commercial List

Spence J.

Heard: February 7-8 and 11-14, 2002.
Judgment: February 26, 2002.

(76 paras.)

Receivers -- Property -- Sale of property -- Duties of Receiver -- Bankruptcy -- Voluntary assignments -- Corporations -- Authority to make assignments.

Application by an interim receiver for approval of a sale of assets and to assign a company into bankruptcy. The interim receivers for Battery Plus and 1271273 Ontario entered into an agreement to sell the assets of the companies to a third party. To facilitate this sale, they wanted to assign 1473722 Ontario, the assignee of some of Battery Plus's leases, into bankruptcy. 1271273 was the sole shareholder of 1473722. The sale was opposed by Battery Plus, 1271273, and by two individuals: a creditor of the companies who had unsuccessfully bid for the assets, and by the principal of the companies who was also a guarantor.

HELD: Applications allowed. The sale of assets was approved, and the assignment into bankruptcy was authorized. The interim receiver made a sufficient effort to get the best price for the assets, the process was fair and the interests of the parties would not be prejudiced by the sale. 1473722 was insolvent. As interim receivers for its sole shareholder, they had the authority to file an assignment in bankruptcy.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, ss. 2(c), 244, 244(2).

Ontario Business Corporations Act, ss. 108(3), 108(5).

Counsel:

Harvey Chaiton and George Benchetrit, for the Interim Receiver, Deloitte & Touche Inc.
Melvyn Solmon and Stuart Chelin, for Battery Plus Inc. and 1271273 Ontario Inc.
Aubrey Kauffman, for Laurentian Bank of Canada.
Alan Mark, for Cadillac Fairview Corporation.
Susan Addison, for Pensionfund Realty Limited, Acktion Capital Corporation, Bramalea City Centre Equities Inc., OPB Realty Inc., Kingsway Gardens Holdings Inc., Scarborough Town Centre Holdings Inc., Yorkdale Shopping Centre Holdings Inc., Ivanhoe Cambridge 1 Inc., Morguard Investments Limited and 20 Vic Management Inc.
David Foulds, for Sharpe Electronics of Canada Ltd.
Gavin Tighe and Bryan Skolnik, for Dominick Bellisario.

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1 **SPENCE J.**:-- Deloitte & Touche Inc., the Interim Receiver, requests approval of the sale of the assets of Battery Plus Inc. ("BPI") and 1271273 Ontario Inc. ("127") (the "Companies"), except the Argentia property, pursuant to the Purchase Agreement dated January 21, 2000 between the Interim Receiver and LEAP Energy and Power Corporation ("Leap") and an order authorizing the Interim Receiver to assign into bankruptcy 1473722 Ontario Limited ("147") to facilitate the completion of the Purchase Agreement.

Motion for Approval of Sale

2 The approach to be followed by the Court in determining whether a receiver has acted properly in concluding an agreement for the sale of property and therefore whether to approve that sale is set out in paragraph 16 of the reasons of the Court of appeal in Royal Bank v. Soundair Corp. (1991), 4 O.R. (3d) 1, where the Court, per Galligan J.A. adopts the following statement of the duties the court must perform in making its decision.

3 The Court is required to consider (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained and (iv) whether there has been unfairness in the working out of the process.

Opposition by the Companies and Bellisario

4 The Companies oppose the approval of the sale. They invoke what they say are three duties of a receiver which are relevant in the present case:

(i) the duty of the receiver to make full disclosure to the court: Bennett on Receiverships, 2nd ed. p. 180
(ii) the duty of a receiver and manager to preserve the goodwill of the business: Re Newdigate Colliery Limited, [1915] 1 Ch. 682 (at p. 472 and 475, in the report excerpts provided by the Companies), and
(iii) the duty to be disinterested and impartial so as to deal fairly and even-handedly with the interests of all parties: Re Federal Trust Co. and Frisina et al (1976), 20 O.R. (2d) 32 at 35 (C.A.).

5 The Companies raise issues of fact with respect to the following matters:

(i) the involvement of Radio Shack in the sale process;
(ii) the information as to whether the Interim Receiver used qualified people in the sale process and had all relevant information;

(iii) the information provided by the Interim Receiver as to the advertising process and the time limits for expressions of interest;
(iv) the information provided by the Interim Receiver as to whether sufficient efforts have been made to obtain the best price, in the absence of a valuation;
(v) the disparity in the prices offered by the different bidders and whether they were given different information;
(vi) the assessment made by the Interim Receiver of the Indeka offer net of the Argentia property.

The points identified in items (v) and (vi) do not raise issues that require comment.

6 The Companies also dispute the actions of the Interim Receiver in deciding to close 22 stores at the outset, based on their lack of profitability, and purchasing only a limited quantity of inventory, despite the sales potential said to be afforded by the prospective Christmas season.

7 Mr. Bellisario, an unsuccessful bidder and creditor, raises other issues, as follows:

(i) the failure of the Interim Receiver to pursue the opportunity indicated by Mister Keys' expression of interest through the offers it made for BPI assets;
(ii) the failure of the Interim Receiver to advise Mister Keys that Leap would be accepted as the offeror, which would have allowed Mister Keys to bargain with Leap in the way it is said that Radio Shack must have done and must be assumed to still be doing, even though Radio Shack is not before the Court and may make a deal with Leap that will not be put to the Court for approval and may allow Leap to receive from Radio Shack value that would otherwise have been available to the creditors and other interested parties;
(iii) the Leap deal is conditional on one group of leases being assignable and on price adjustments in respect of leases in a second group that turn out to be non-assignable, so the Leap deal may not proceed even if approved, and its value if it does proceed is subject to the above contingencies;
(iv) the Interim Receiver used an inventory amount of $3.5 million which Mister Keyes relied on in setting its trigger number of $2.5 million and of the Interim Receiver considered that these numbers could lead to a reduction in net price by $980,000 as indicated, that matter should have been raised with Mister Keyes;
(v) the suggestion that the Mister Keyes' offer is effectively subject to the repayment of the loan from Mr. Bellisario, when all that is called for is "satisfactory resolution" in respect of this matter;
(vi) the diminution in the value of the Leap agreement that may be occurring because Leap is not paying operating costs, contrary to its agreement;
(vii) the apparently preferential treatment given to Leap in the form of an option on the Argentia property;
(viii) the possibility of receiving further bids before February 28, 2002, under Court supervision, instead of leaving the matter in the hands of Leap, with the deficiencies referred to above.

8 The Companies say that the Interim Receiver has a duty to take into account the interests of all parties and that the Court is also required to do so and this involves recognizing that Mr. Badr is a guarantor of the Companies, and is an unsecured creditor of the Companies for at least $1 million and is director with the duties of that office and has spent 10 years developing the business of the Companies. Mr. Badr arranged a financing proposal with Mr. Taddeo to assist the Companies for the Christmas season but received no response from the Interim Receiver about it.

9 The Companies take issue with the efficacy and integrity of the sale process. They say their requests for information have been refused, including their requests as to dealings between Laurentian Bank and the Interim

Receiver. The Companies question what information was given to the different bidders. The Companies question the dealings with InterTAN including its conduct of due diligence at present with a view to taking an assignment from Leap, which requires the consent of the Interim Receiver.

10 The Companies say that, contrary to the Purchase Agreement between Leap and the Interim Receiver, Leap is not managing the business of the Companies and there must be an agreement between Leap and the Interim Receiver which has not been disclosed, contrary to what has been told to the Court. The Companies question whether Leap is meeting responsibilities it has under the Purchase Agreement for certain losses and expenses incurred from and after January 21, 2002.

11 The Companies submit that the report of the Interim Receiver to the Court is unreliable because it contains a meritless allegation of theft which the Companies say was made by the Interim Receiver without first making proper enquiry to the Companies.

12 The Companies say that the Interim Receiver failed to disclose that it knew about the transfer of leases to 147, at the end of September, without notice to the landlords. Later, in November, the Interim Receiver consented to the Laurentian Bank registering under the P.P.S.A. against 147 without seeking directions from the Court, which the Companies say showed partiality on the part of the Interim Receiver towards the Laurentian Bank without regard for the interests of other stakeholders.

13 The Companies also complain that the Interim Receiver made an unfounded allegation that certain cheques were never deposited into the Battery Plus account at the Laurentian Bank as they should have been.

14 The Companies say that, although the Interim Receiver said on November 19, 2001 it would give Mr. Badr access to his personal information on the computer hard drive, it failed to do so until after Mr. Badr had to resort to Court for an order for access, and the information was then made available in a form that was not usable.

15 The Companies complain that the process followed by the Interim Receiver in its possession and control of computer information does not reflect paragraph 7 of the Interim Receivership Order. Paragraphs 3(a) and 5 of the Order seem to meet this point.

16 The Companies say that the Interim Receiver has not fairly characterized the undertaking given with respect to communications with prospective purchasers and has misstated that copies of letters were not sent to the Interim Receiver's lawyers.

17 The Companies say that these deficiencies support its claim that the sale process should be redone properly, including marketing in the United States, or at least that there should be a judicial sale. The Company submits no decision should be made to allow the presently proposed sale without allowing examination of Mr. Baigle and Mr. Allen in order to ensure the Court has full disclosure of the relevant information.

18 The Companies submit that the Interim Receiver mismanaged the business by purchasing insufficient inventory to preserve the goodwill, having regard to the credit resources in place, and without seeking Court approval for its course of action. The Company says that the Interim Receiver closed stores that were forecast to be profitable and failed to deliver promised inventory.

Approach to be followed

19 In order to give proper consideration to the issues of principle and fact that are raised by the contending positions it is necessary to determine at the outset the relevant context within which these issues are to be addressed. The context here is a proposed sale by a court-appointed receiver of a business under its direction for the benefit of the interested parties. It is not disputed that the circumstances of the Companies are such that a sale of the business is the appropriate way to address the interests of the parties. The alternatives to the sale now proposed are said to include the holding of a

new sale conducted differently from the present one, or a judicial sale, but there is no proposal that would obviate the need for a sale of some kind. Accordingly, it is appropriate to address the sale now proposed in terms of the tests set out in the Soundair decisions, as stated above.

Sufficient Effort to Get the Best Price

20 The sale process that the Interim Receiver followed is set out in its factum at paragraphs 14 to 23 and paragraphs 27 to 32. The process involved preparation of a Confidential Information Memorandum ("CIM"), preparation of and communication with a list of 80 prospective purchasers, 53 of whom received the CIM, newspaper advertisements, the receipt of 16 expressions of interest for some or all of the assets, determination of the five parties that had submitted the highest offers and met all of the minimum criteria imposed by the Interim Receiver, facilitation of due diligence via data rooms and briefing sessions, the submission of one or more letters of intent ("LOI") by each of the five parties, analysis by the Interim Receiver of the LOI's and discussions and negotiations with each of the parties, identification by the Interim Receiver of the Leap offer as the best offer and further due diligence and negotiation with Leap, and execution of the proposed Purchase Agreement with Leap and a related entity, Winner International LLC, on January 21, 2002.

21 In conducting the sale as described and referred to above the Interim Receiver followed a customary approach for the sale of a business. The proposed sale has the support of the Laurentian Bank of Canada, the largest secured creditor of Battery Plus, with a debt owing to it of $6.6 million and Sharpe Electronics which is owed $500,000. RoyNat Ltd., which is owed $300,000, is not opposed. The sale is opposed by Mr. Bellisario, a secured creditor who is owed about $1 million and is also the principal in Mister Keys, one of the unsuccessful bidders. The sale is also opposed by the Companies and by their principal Mr. Badr. The sale is supported by Cadillac Fairview which is the landlord under about 20 lessees and is not opposed by the landlords under another 20 leases. A group of unsecured creditors takes no position.

22 It is relevant at this stage to refer to the general observations Galligan J.A. made in Soundair (above) immediately before he adopted and set out the enumeration of the Court's duties which is referred to above:

> The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.
>
> The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

23 Also relevant are Galligan J.A.'s comments at paragraph 21 of the Soundair decision, as follows:

> When deciding whether a receiver had acted providently, the court should examine the conduct of

> the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell give to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in Crown Trust Co. v. Rosenberg, 60 O.R. (2d) 87, supra, at p. 112 [O.R.]:
>
> > Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
> >
> > If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

24 The purchase price offered by Leap is $5 million maximum, an amount that may be adjusted downward in certain contingencies. This amount is considerably less than the amount owed to the Laurentian Bank of Canada.

25 The price is subject to a reduction of up to $262,500 on account of non-assignable leases. The next highest offer is that of Mister Keys. The maximum price payable under that offer is $4.75 million. The third and most recent Mister Keys offer is conditional on satisfactory resolution of the security and repayment of the loan of Mr. Bellisario for $1 million. While it is conceivable this condition could be satisfied by some arrangement or concession less than either a recognition of the priority of the security held by Mr. Bellisario or the repayment of his loan, this would be up to Mr. Bellisario and there is no way to determine from the terms of the condition whether any particular amount or concession would be acceptable to him. The provision leaves the matter up to Mister Keys. The Mister Keys offer also requires all remaining leases or allows termination.

26 Mister Keys submits that its interest was evident from its willingness to submit three offers and the Interim Receiver should have come back to it to invite further offers and to disclose that Leap was in the lead, rather than assessing Leap as the highest bidder and commencing exclusive negotiations with it. But whether Mister Keys would have been willing to make an offer better than that of Leap is just a matter of sheer conjecture. Certainly, the fact that it made three offers with the terms and conditions they contained suggests the contrary.

27 The Interim Receiver could properly conclude that the Leap offer provided the prospect of a better deal. It also had a condition as to leases but the Interim Receiver could properly form the view that, after considering the two offers with their differing conditions as to leases, the Leap offer was the better one to pursue; its condition as to leases is potentially less onerous than the Mister Keys condition and if the Leap offer condition as to leases could be met, it provided the prospect of a better price than the Mister Keys offer could be considered to provide.

28 A further relevant factor in comparing the offers is that the Mister Keys offer also has a provision for reduction in respect of an inventory shortfall. The Interim Receiver considered this provision would result in a reduction in the price by a further $950,000. Mister Keys submitted that its use of a $2,500,000 minimum value for inventory was based on the CIM statement that the inventory level was $3.5 million and if the Interim Receiver was subsequently adjusting that

number downward, what it should have done was to so advise Mister Keys so that the parties could have negotiated about the matter. The $3.5 million amount appears as an unaudited figure for September 30, 2001. There is nothing in the terms of the Mister Keys offer to suggest that its minimum was premised on an assumption based on the amount in the CIM and that, if inventory had fallen considerably lower since then, Mister Keys would be prepared to negotiate about reducing its minimum accordingly. It would be at least as reasonable, if not more so, to assume that Mister Keys regarded $2,500,000 of inventory as a necessary component of its maximum purchase price.

29 Article 7 of the Leap Purchase Agreement provides that it is the general intention of the parties that, subject to court approval, Leap is to manage the operations of the business in the period from January 21, 2002 or a later agreed date up to closing. This arrangement has not been activated. Under the arrangement Leap would have paid the cost and expenses of the operations during the period and would have borne any losses during such period. The Interim Receiver submits that this arrangement was, in effect, additional to the basic value of the Leap offer that was the relevant amount to be compared with the other offers, because none of the other offers provided for such a management arrangement. Mr. Davis' affidavit says that Mister Keys offered to help manage the business free of charge in order to maximize value but such an offer does not go as far as the one that was contemplated in the Leap Purchase Agreement. There is nothing on which an assessment could be made that the Mister Keys offer of management assistance should have been considered material to the comparison of the value of the offers.

30 Mister Keys says that the Leap offer is ultimately dependent on the landlords because of the requirements for a minimum number of 40 leases. All the offers, in one way or another, are conditional on leases being assigned. Mister Keys submits that the Leap offer should not be decided until the landlords decide but no reason is apparent why the matter would be better dealt with that way than instead proceeding with the assessment that is now under way.

31 Mister Keys submits that the report of the Interim Receiver discloses that preferential treatment is being given to Leap in respect of the Argentia property, but section G of the report, which deals with the Argentia property, does not suggest that any preference has been given. It simply reports about the status of sale prospects.

32 The Companies submit that the sale process was flawed in two respects that relate in part to lack of full disclosure. The Companies say they were denied disclosure which they requested about the expertise of the representatives of the Interim Receiver who administered the sale process. The Company say no valuation of the business was obtained and the sale was not advertised in the United States and there is no explanation from the Interim Receiver as to why not.

33 The Companies say that, as well, the Interim Receiver has mismanaged the business during the sale process by not purchasing adequate inventory and by prematurely closing unprofitable stores. This latter claim does not clearly amount to or support a claim that the sale process itself has been flawed or improvident, so it is dealt with below in respect of the other tests applicable for purposes of the requested approval.

34 No doubt the sale process, like any sales process, could have been conducted on a larger scale, with the retaining of expert consultants and valuators and an advertising program deployed internationally and a time schedule allowing ample time for exhaustive consideration at each stage. But in the present case, the Interim Receiver considered, based on the financial condition of the business, that it should move promptly to conduct a sale on an expeditious basis, and it did so. The process was certainly not precipitous. Mister Keys was allowed to come in with three successive offers. There is nothing before the court to suggest that if the Interim Receiver had conducted a different kind of sale process it would have had a prospect of obtaining a significantly better offer. The major creditor, the Laurentian Bank, does not think so. The Companies ask the court to second guess the Interim Receiver's decisions about the sale process but they offer no basis for the court to engage in such a venture.

The other requirements for court approval

35 The three other matters which the Soundair decision says require consideration for court approval to be granted are: the interests of the parties; the efficacy and integrity of the process; and the fairness of the process. These

considerations overlap to some extent and so do the factual issues raised in this case, so the following part of these reasons mainly considers the requirements together in the context of the matters that are the subject of complaint.

Interests of the Parties

36 The interests that are involved here are those of secured and unsecured creditors and the shareholder Mr. Badr who is also a guarantor.

37 There is a priorities dispute between certain of the secured creditors and Mr. Bellisario. The order sought by the Interim Receiver will not prejudice the legal positions of the creditors in regard to the priorities dispute. If the leases in 147 are included in a sale the cash proceeds referrable to them will be available to meet the claims of those interested in 147 in accordance with their respective interests and priorities. Mr. Bellisario may have a tactical interest in deferring any sale of the leases but it does not seem that his legal interests would be prejudiced by a sale of the leases as part of the sale of the overall business, since it is not apparent how the leases can have any material value otherwise.

38 Mr. Badr and the Companies propose to bring other proceedings against the Interim Receiver, as mentioned above. The interests of the parties in this regard are addressed below.

Inadequate Purchases of Inventory

39 The Companies say that the Interim Receiver failed to purchase adequate inventory to support the operation of the business and failed to use credit facilities available for this purpose. The Interim Receiver disputes these allegations. Whether the level of inventory was inadequate is disputed. The question of inventory levels is addressed in the first report of the Interim Receiver in the first paragraph on page 4 of the report but no inference can be drawn from that paragraph or from the other material referred to. A proposal was provided for financing from V. Taddeo but it was made to the Laurentian Bank and was not acceptable to the bank. It would have involved the removal of the Interim Receiver and the resumption of management by Mr. Badr. There is a dispute as to what the situation and prospects were with Panasonic and Sony.

40 The issue whether the Interim Receiver failed to purchase adequate inventory is part of the other proceedings the Companies seek to bring against the Interim Receiver, to remove the Interim Receiver and for leave to sue the Interim Receiver. For purposes of the present matter, it cannot be concluded on the material before the court at present that the Interim Receiver failed to purchase adequate inventory.

Premature Store Closings

41 The Interim Receiver decided to close 22 stores promptly, on the basis that the stores were unprofitable and by closing them a core of profitable stores could be created for a sale of the business. The Companies object, based on the affidavit of Mr. Mastantuono, that the commercially responsible course would have been to keep the stores open during the more active Christmas season to get the advantage of the seasonal sales and then to see if the prospective purchasers wanted the stores. This question is obviously one of business strategy and raises a number of other questions to which it offers no answers, such as: what direct and indirect cost consequences would have resulted from the proposed course of action; and, if the stores were basically unprofitable why would the purchasers want them?

42 The matter of how to deal with the unprofitable stores had been a subject of discussions with the Companies from July on, and by October the Companies had put forward a proposal to enhance profitability by closing all unprofitable stores, which were said to be ten in number. If it made sense to the Companies in October to close the unprofitable stores and if by mid-November the number of unprofitable stores was identified by the Interim Receiver at 22, then it is hard to see how the decision to close them can have been unsound.

The Radio Shack Factor

43 The Companies and Mr. Bellisario raise issues about the dealings that it has been learned are underway between Leap and Radio Shack and/or its owner InterTAN for the transfer to Radio Shack of Leap's interest in the purchase of the business. Radio Shack is doing due diligence on the business, facilitated by the Interim Receiver.

44 The Interim Receiver has a binding agreement of purchase and sale with Leap. No basis has been established for an inference that Leap is proposing not to perform its obligations under the agreement. The agreement has not been terminated. The bidding has not been reopened. The Interim Receiver has an agreement, and it is with Leap.

45 Under the terms of the agreement, it cannot be assigned by Leap to another party without the consent of the Interim Receiver. Counsel for the Interim Receiver advised the court that, if an assignment from Leap to Radio Shack is proposed, the Interim Receiver will seek the approval of the court for its consent to the assignment. That effectively disposes of any concern in regard to the Radio Shack matter.

Unreliability of Reports

46 The Companies submit that the Interim Receiver's reports are unreliable in a number of important respects, such that the court ought not to base an approval decision upon them.

47 It is said that the reports make a meritless allegation of theft in respect of batteries that were removed from inventory the night before the Interim Receiver assumed its responsibilities. There is a dispute about the relevant facts. On the material available at present, it cannot be concluded that the way in which the Interim Receiver reported on the matter and dealt with it raises a question about the reliability of its reports for purposes of the present proceeding.

48 The Companies raise an issue about the Interim Receiver's statement on page 15 of its second report as to how and when the facts relating to the assignment of leases to 147 mainly came to its attention, but no material issue of concern is established in this regard.

49 The Companies say that the Interim Receiver acted with partiality in favour of the bank and other secured creditors when it permitted them to register under the PPSA against 147. Assuming the Bellisario security was already registered, the other subsequent registrations would not, without more, have a prejudicial effect against his security but only against subsequent security holders and no case is advance in that regard. This matter can be left for further consideration in the other proceedings to the extent appropriate.

50 The Companies say the Interim Receiver incorrectly alleged that certain cheques were not properly deposited. It is said that the record shows that a cheque for $73,000 on account of G.S.T. refund was in fact picked up for deposit. It is not shown that the report of the Interim Receiver in this regard is materially unreliable.

51 The Companies raise similar issues concerning franchisees' monies, Mr. Badr's access to his hard drive and other matters which counsel for the Companies characterized as minor, as to communications about the proceedings in the Court of Appeal and copying of documents to the counsel for the Interim Receiver. There is nothing material here.

52 For the reasons given above, the objections raised to the sale process and to the purchase price and the Purchase Agreement fail. On the material, the Interim Receiver has satisfied the test in Soundair and the proposed sale in accordance with the Purchase Agreement is approved.

Motions for Authority to Assign 147 into Bankruptcy

53 The Factum of the Interim Receiver provides its submissions on this request at paragraphs 33 to 39 and paragraphs 45 to 48.

54 The Interim Receiver relies, on its argument for the relief it seeks, on its contention that Battery Plus assigned the leases to 147 without notice to or consent from the landlords affected and therefore breached those leases on at least a

number of them, ie. all but four. Nothing in the materials or submissions contradicts the claim that these leases have been put in breach by the assignments and it follows that they have thereby been placed in jeopardy. It is said that Bellisario had a commercially based interest in receiving security on those leases but this hardly justifies Battery Plus placing them in jeopardy to the detriment of the creditors of Battery Plus. It is proper for the Court to take into account this context in considering the Interim Receiver's request to be empowered to file an assignment in bankruptcy on behalf of 147.

55 If 147 is placed in bankruptcy the trustee in bankruptcy would be in a position to seek an order for the assignment of the leases for the benefit of all of the creditors of 147 whatever may be their respective claims and priorities. If such an order were obtained by the trustee it would facilitate the transaction now under consideration. If that transaction is approved then it would also serve the proper interests of the interested parties to have the leases now in 147 dealt with in that manner.

56 Bellisario objects that the authority that the Interim Receiver has by the existing court order is only to make an assignment in bankruptcy on behalf of the Companies, which does not extend to 147. The Interim Receiver submits that 1271273 Ontario ("127") is subject to the court order and, because 127 is the sole shareholder of 147, the Interim Receiver, in the exercise of its powers, may authorize a declaration under the Business Corporations Act of Ontario ("OBCA") to exercise the powers of the Board of Directors of 147 including the power to authorize it to make an assignment in bankruptcy. Bellisario objects that for the Interim Receiver to be allowed to proceed in this way would fail to respect the pledge of shares of 147 and the option on shares of 147 which he holds as security in respect of his loan to Battery Plus, but it is not apparent that the terms of those security instruments preclude 127, and therefore the Interim Receiver, from exercising shareholders rights in respect of 147 unless and until proper action is taken by Mr. Bellisario to exercise his security rights in respect of 147.

57 The Companies submit that, even if the Interim Receiver could, in the effective capacity of the directing authority of 147, make an assignment of 147 into bankruptcy, it could properly do so only if 147 is insolvent and there is no evidence that that is so.

58 It is not disputed that under the terms of the Pledge Agreement relating to the shares of 147, 127 as Pledgor is in default. Accordingly s. 3.3 of the Pledge Agreement is applicable. That section by its terms entitles the Pledgor (sic) to deliver to the trustee holding the shares a default certificate directing the trustee to deliver the shares to the lender, Mr. Bellisario. There is no evidence that 127 as Pledgor has delivered such a default certificate. S. 3.1 of the Pledge Agreement provides that until the security interest becomes enforceable, the shares are to be voted by proxies for 127. No provision addresses how the shares are to be voted after the securities become enforceable but before a certificate is given under s. 3.3. Until that certificate is given, the shares cannot be released to the lender, so the only reasonable inference is that, until then, 127 can direct the voting of the shares. S. 108(3) and (5) of the OBCA give adequate authority to 127 as the sole shareholder of 147 to exercise the duties of the Board of Directors of 147 if 127 is so authorized by a unanimous shareholders agreement, which it would be entirely within the power of 127 to authorize. Since 127 is under the direction of the Interim Receiver, it should be regarded as having the necessary authority, in place of 147, to authorize the assignment into bankruptcy of 147, subject to what is said below.

59 With respect to the above analysis, Bellisario submits that s. 3.3 of the Pledge Agreement is to be construed as permitting the Lender, ie. himself, rather than the Pledgor, to deliver the Default Certificate, on the basis that the word "Pledgor" is obviously an error in the context of the section, and the context requires that the word "Lender" be read in its place. It is apparent that without some change the clause as worded makes no real commercial sense and substituting the word "Lender" would give the provision commercial sense. That does not necessarily mean that it is to be inferred that that is what the parties had in mind and had agreed to. Even if it is, there is still the question whether a Default Certificate has been delivered to the Trustee under s. 3.3. No reference has been made to any document purporting to be a Default Certificate delivered under that section. Reference was made to the letter of November 2, 2001 from Gardiner Roberts LLP to Laurentian Bank (Tab 134 to the Affidavit of Michael Nero, January 31, 2000, Exhibit "A", Vol. IV) which states that demand letters and notices of intention under s. 244 were issued on October 18, 2001 to the

Companies and 147 relating to their obligations under the Bellisario loan to Battery Plus. Copies of the October 18, 2001 letters and notices have been provided by counsel to Mr. Bellisario.

60 Bellisario submits that the October 18, 2001 letters and notices constitute the Certificate of Default required by s. 3.3 of the Pledge Agreement.

61 The November 2, 2001 letter from Gardiner Roberts was sent by them in their capacity as counsel to Bellisario and does not purport to relate to that firm's role as the trustee under the Pledge Agreement. The same is true of the October 18, 2001 letters and notices. So it cannot be said that there has been a delivery to Gardiner Roberts LLP in its capacity as the trustee under the Pledge Agreement as required by s. 3.3.

62 None of the three demand letters constitutes a statement to the effect required under s. 3.3 of the Pledge Agreement. A notice under s. 244 of the Bankruptcy And Insolvency Act is intended to give Notice of an intention to enforce security and not to constitute the act of enforcement contemplated by s. 3.3(c) of the Pledge Agreement. S. 244(2) provides that the act of enforcement is to be effected only after ten days. So a notice of intention under s. 244 does not constitute a Certificate of Default under s. 3.3 of the Pledge Agreement. Nothing in the terms of the October 18, 2001 notices alters this analysis.

63 It was suggested that the letters and notices of October 18, 2001 ought to be considered to be sufficient for purposes of s. 3.3 of the Pledge Agreement, presumably on the basis that the proper inference to be taken from them is that the Lender was thereby effectively giving to the trustee the notification and the authorization and direction required by paragraphs (a), (b) and (c) of s. 3.3 of the Pledge Agreement. However, all that can be concluded is that by giving the letters and notices of October 18, 2001, Bellisario was putting himself in a position where he would be able to trigger s. 3.3, but not that he had actually triggered it. There is nothing in the material that would justify disregarding the express requirements set out in s. 3.3.

64 The Interim Receiver contends that 147 is an insolvent person within the definition of that term in s. 2 of the Bankruptcy And Insolvency Act, with particular reference to paragraph (c) of the definition. Paragraph (c) includes in the definition of an "insolvent person", a person "the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due."

65 According to the reporting letter dated July 27, 2001 from Keyser Mason Ball LLP to Battery Plus, 147 was, at that time "a newly incorporated company, the sole business of which is to act as assignee in respect of the assignment of the Leases", ie. the group of leases of Battery Plus assigned to 147 in connection with the Bellisario loan to Battery Plus. No evidence has been led to suggest that 147 has any other assets. Leave has been requested by the Companies to obtain evidence on the matter. The Notice of Motion by the Interim Receiver made it clear that it would be seeking authority for an assignment in bankruptcy in respect of 147 so the matter of the insolvency of 147 has effectively been in issue from the outset, so there is no basis established for the request for leave at this stage of the proceedings. There is no valuation of the assets of 147 before the Court. The leases held by 147 constitute only a part of the leases of the overall business. All but four of the leases held by 147 are in jeopardy because of their having been assigned without consent. In the circumstances the assets of 147 must be worth substantially less than the value of the total assets of the overall business.

66 147 gave to the Laurentian Bank an undertaking, dated June 5, 2001, in consideration of the continuation of specific credit facilities, to deliver to the Bank a guarantee of the credit facilities and a general security agreement on all of its assets. These instruments have not yet been delivered. Laurentian Bank submitted that, by reason of the definition of "Lien" in the Priority Agreement among certain of the parties, dated June 5, 2001, and the definition in that agreement of "Bank Security" and s. 2.3(a) of that Agreement, the Bank has a claim against 147. The Bank advised that it intends to assert that claim at the appropriate time as a claim having priority over Bellisario with respect to 147. That priority question is not before the Court in the present hearing. What is relevant for now is the submission that the Bank,

by reason of the undertaking given by 147, holds an obligation of 147 in respect of the Battery Plus debt owing to the Bank, for purposes of the "insolvent person" definition in the Bankruptcy And Insolvency Act. This contention is sound. Moreover, since the undertaking of 147 was to give a guarantee in respect of the debt that is due to the Bank from Battery Plus, the obligation of 147 is one that is due or accruing due, as required by the definition. On this basis, the value of the property of 147 must be significantly less than its obligations.

67 For the above reasons, 147 is an insolvent person and the Interim Receiver is in a proper position to act on behalf of 127 to cause 147 to file an assignment in bankruptcy.

Prejudice to Mr. Badr if 147 is assigned into bankruptcy

68 For Mr. Badr it is said that, if 147 is allowed to be assigned into bankruptcy and the leases it holds are therefore allowed to be assigned, this would prejudice Mr. Badr's right, as guarantor, to redeem Mr. Bellisario's loan and recover the leases. It is not shown how or why whatever right of redemption Mr. Badr has in this regard is entitled to priority over the rights of the Interim Receiver in respect of the assets of 127, including the shares of 147.

69 It is also said for Mr. Badr that if an order is to be made to approve the proposed sale, any sale should be subject to any exercise by Mr. Badr of any right of redemption he is determined to have, within 10 days of that determination being made in the priorities application now under way.

70 The Bank submits that there is no reason offered by the known facts to take seriously the prospect that Mr. Badr would pay $1 million to redeem a group of leases most of which are in default and that there is no evidence of any clear intent on the part of Mr. Badr to do so. The most that could be concluded is that Mr. Badr would like to be in a legal position to redeem the loan if he wished to do so.

71 Mr. Chaiton for the Interim Receiver produced on the afternoon of February 14, the last day of the hearing, a document which he said had just come to his office the previous night together with a corporate profile report obtained only minutes earlier in the afternoon of February 14. The document purports to be an assignment dated February 13, 2002, (the previous day) by 147 to 2008612 Ontario Limited of the leases that had previously been assigned by Battery Plus to 147, for a consideration of $2.00. The document appears to have been executed by Mr. Badr on behalf of 147. Counsel for Mr. Badr had no submissions to make about the document other than that information should be obtained about the purported assignee.

72 The document is a suspicious and troubling document. Without some explanation, it appears to be an effort to avoid or obstruct the effect of the order that the Interim Receiver is now before the Court seeking to obtain with respect to 147. An effort of such a kind is obviously offensive to the process of the Court and is not to be countenanced or permitted. For this reason an order is to go that no action shall be taken by any person to give effect to the document and the document shall be stayed from having any effect in respect of the matters now before the Court in the present motion without further order of the Court sought and obtained prior to the closing of any sale that may be approved and effected pursuant to this motion.

73 In all the circumstances, there is no basis for imposing the condition sought by Mr. Badr with respect of the exercise of the right of redemption.

Conclusion

74 For the reasons given above, orders are to go as requested by the Interim Receiver to approve the sale and to authorize the Interim Receiver to assign 147 into bankruptcy.

75 Certain of the matters raised in this motion relate to the motion now pending as to priorities and the proposed litigation between the Companies and Mr. Badr and the Interim Receiver. The material filed in respect of those proceedings was allowed to be referred to in this motion. For the record, it is noted that not all preliminary steps have

been completed in the other proceedings.

76 Counsel may make submissions about costs.

SPENCE J.

cp/d/qlhcc/qlkjg/qlmjb

TAB 4

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **MAY 3, 2010**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

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

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Debtors

And
ERNST & YOUNG INC.
Monitor

And
THE LAND REGISTRAR FOR THE LAND REGISTRY OFFICE FOR THE REGISTRATION DIVISION OF MONTMORENCY
And
THE LAND REGISTRAR FOR THE LAND REGISTRY OFFICE FOR THE REGISTRATION DIVISION OF PORTNEUF
And
THE LAND REGISTRAR FOR THE RESTIGOUCHE COUNTY LAND REGISTRY OFFICE
And
THE LAND REGISTRAR FOR THE THUNDER BAY LAND REGISTRY OFFICE
And
THE REGISTRAR OF THE REGISTER OF PERSONAL AND MOVABLE REAL RIGHTS
Mis en cause

JG1793

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

INTRODUCTION

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

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

THE MOTION AT ISSUE

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

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

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

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

(a) the pulp and paper mill in Belgo, Quebec that was sold to Recyclage Arctic Beluga Inc. ("**Arctic Beluga**"), as approved and authorized by the Court on November 24, 2009;

(b) the St-Raymond sawmill that was sold to 9213-3933 Quebec Inc., as approved and authorized by the Court on December 11, 2009; and

(c) the Mackenzie Facility that was sold to 1508756 Ontario Inc., as approved and authorized by the Court on March 23, 2010.

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

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

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

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

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

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

[12] They believe that the marketing and sale process that was followed was fair and reasonable. While they did receive other offers that were, on their faces, higher in amount than AIM's offer, they consider that none of the other bidders satisfactorily demonstrated an ability to consummate a sale within the time frame and on financial terms that were acceptable to them.

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

a) the sale forms part of Petitioners' continuing objective and strategy to elaborate a restructuring plan, which will allow them (or any successor) to be profitable over time. This includes the following previously announced measures of (a) disposing of non-strategic assets, (b) reducing indebtedness, and (c) reducing financial costs;

b) the Closed Mills are not required to continue the operations of the Petitioners, nor are they vital to successfully restructure their business;

c) each of the Closed Mills faces potential environmental liabilities and other clean-up costs. The Petitioners also incur monthly expenses to maintain the sites in their closed state, including tax, utility, insurance and security costs;

d) the proposed transaction is on attractive terms in the current market and will provide the Petitioners with additional liquidity. In addition to realizing cash proceeds from the Closed Mills and additional proceeds from the sales of the paper machines, the projected sale will also relieve the Petitioners of potentially significant environmental liabilities; and

e) the Petitioners' creditors will not suffer any prejudice as a result of the proposed sale and the issuance of the proposed vesting orders since the proceeds will be remitted to the Monitor in trust and shall stand in the place and stead of the Purchased Assets (as defined in the contemplated Purchase Agreement). As a result, all liens, charges and encumbrances on the Purchased Assets will attach to such proceeds, with the same priority as they had immediately prior to the sale.

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

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

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

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

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

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

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

[21] It thus requests the Court to 1) dismiss the Motion so that the Petitioners may consider its proposal for the Closed Mills, 2) refuse to authorize the Petitioners to enter

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

into the proposed Purchase Agreement and Land Swap Agreement, and 3) declare that its proposal is the highest and best offer for the Closed Mills.

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

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

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

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

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

ANALYSIS AND DISCUSSION

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

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

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

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

[31] The Court's brief reasons follow.

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[3] Exhibits VB-1 and I-5.

THE SALE APPROVAL

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

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

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

- whether sufficient efforts to get the best price have been made and whether the parties acted providently;
- the efficacy and integrity of the process followed;
- the interests of the parties; and
- whether any unfairness resulted from the process.

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

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

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

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4 *AbitibiBowater Inc., Re,* 2009 QCCS 6460, at para. 36 and 37.

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

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

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

8 *Grant Forest Products Inc., Re,* 2010 ONSC 1846, at para. 30-33.

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

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

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

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

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

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

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

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

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

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

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

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[9] See, on that point, *Consumers Packaging Inc., (Re),* [2001] O.J. No. 3908 (Ont. C.A.), at para. 8, and *Canwest Global Communications Corp., Re,* 2010 ONSC 1176, at para. 42.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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10 See Exhibit I-1 and general condition # 5 of the Arctic Beluga penultimate bid.
11 See Exhibits I-6, I-8 and I-9.
12 See Exhibit I-7.
13 See Exhibit I-2.
14 See Exhibit I-6.
15 See Exhibit I-9.

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

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

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

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

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

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

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

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

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

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

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16 *Royal Bank* v. *Soundair Corp.*, (1991) 7 C.B.R. (3d) 1 (Ont. C.A.), at para. 30.
17 (1986) 58 C.B.R. (N.S.) 237 (Ont. S.C.).
18 (1987) 64 C.B.R. (N.S.) 140 (Ont. S.C.).
19 *Railpower Technologies Corp., Re,* 2009 QCCS 2885, at para. 96 to 99, and *Boutique Euphoria inc., Re,* 2007 QCCS 7128, at para. 91 to 95.
20 Exhibits AIM-1 and AIM-2.

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

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

(a) the Petitioners have used their best efforts to obtain the best purchase price possible;

(b) the Petitioners have acted in a fair and reasonable manner throughout the sale process and with respect to all potential purchasers, including Arctic Beluga;

(c) the Petitioners have considered the interests of the stakeholders in the CCAA proceedings;

(d) the sale process with respect to the Closed Mills was thorough, extensive, fair and reasonable; and

(e) Arctic Beluga had ample opportunity to present its highest and best offer for the Closed Mills, including ample opportunity to address the issues of closing risk and the ability to finance the transaction and any future environmental liabilities, and they have not done so in a satisfactory manner.

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

THE STANDING ISSUE

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

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

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

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

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

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

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

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

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

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

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[22] *Skyepharma PLC v. Hyal Pharmaceutical Corporation,* [2000] O.J. No. 467 (Ont. C.A.), affirming [1999] O.J. No. 4300 (Ont. S.C.) ("*Skyepharma*").

[23] *Id*, at para. 30. See also, *Consumers Packaging Inc. (Re),* [2001] O.J. No. 3908 (Ont. C.A.), at para. 7.

> purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended."

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

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

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

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

FOR THESE REASONS, THE COURT:

[1] **AUTHORIZES** Abitibi-Consolidated Company of Canada ("**ACCC**"), Bowater Maritimes Inc. ("**BMI**") and Bowater Canadian Forest Products Inc. ("**BCFPI**" and together with ACCC and BMI, the "**Vendors**") to enter into, and Abitibi-Consolidated Inc. ("**ACI**") to intervene in, the agreement entitled *Purchase and Sale Agreement* (as amended, the "**Purchase Agreement**"), by and between ACCC, BMI and BCFPI, as Vendors, American Iron & Metal LP (the "**Purchaser**") through its general partner American Iron & Metal GP Inc., as Purchaser, American Iron & Metal Company Inc., as Guarantor, and to which ACI intervened, copy of which was filed as Exhibits R-1 and R-1(a) to the Motion, and into all the transactions contemplated therein (the "**Sale Transactions**") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor;

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

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[24] See *Consumers Packaging Inc. (Re),* [2001] O.J. No. 3908 (Ont. C.A.), at para. 7; *BDC Venture Capital Inc.* v. *Natural Convergence Inc.* 2009 ONCA 637, at para. 20; *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 665, at para. 8.

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

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

[4] **ORDERS** and **DECLARES** that upon the filing with this Court's registry of a Monitor's certificate substantially in the form appended as **Schedule "F"** hereto, (the "**Second Closing Monitor's Certificate**"), all right, title and interest in and to the Fort William Assets (as defined below), shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all claims, liabilities, obligations, interests, prior claims, hypothecs, security interests (whether contractual, statutory or otherwise), liens, assignments, judgments, executions, writs of seizure and sale, options, adverse claims, levies, charges, liabilities (direct, indirect, absolute or contingent), pledges, executions, rights of first refusal or other pre-emptive rights in favour of third parties, mortgages, hypothecs, trusts or deemed trusts (whether contractual, statutory or otherwise), restrictions on transfer of title, or other claims or encumbrances, whether or not they have attached or been perfected, registered, published or filed and whether secured, unsecured or otherwise (collectively, the "**Fort William Assets Encumbrances**"), including without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order issued on April 17, 2009 by Justice Clément Gascon, J.S.C., as amended, and/or any other CCAA order; and (ii) all charges, security interests or charges evidenced by registration, publication

or filing pursuant to the Ontario *Personal Property Security Act* or any other applicable legislation providing for a security interest in personal or movable property, excluding however, the permitted encumbrances, notification agreements, easements and restrictive covenants generally described in **Schedule "G"** (the **"Permitted Fort William Assets Encumbrances"**) upon their registration on title. This Order shall not be registered on title to the Fort William Assets until all of such generally described Permitted Fort William Assets Encumbrances are registered on title, at which time the Petitioners shall be at liberty to obtain, without notice, an Order of this Court amending the within Order to incorporate herein the registration particulars of such Permitted Fort William Assets Encumbrances in Schedule "G";

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

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

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

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

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

- Hypothec dated April 20, 2009 registered under number 16 123 864 in the index of immovables with respect to lot 3 681 454 (legal construction) and

Prior notice for sale by judicial authority dated July 23, 2009 registered under number 16 400 646 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency; and;

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

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

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

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

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

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

- Hypothec dated March 18, 1997 registered under number 482 357 modified on August 30, 1999 under registration number 497 828 with respect to lots

3 507 098, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf; and

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

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

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

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

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

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[26] Assigned to Law Debenture Trust Company of New York registered under number 09-0288002-0001.
[27] Assigned to U.S. Bank National Association and Wells Fargo Bank, N.A. under number 10-0018318-0001.
[28] *Ibid.*

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

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

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

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

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

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

[15] **ORDERS** that notwithstanding:

(i) the proceedings under the CCAA;

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

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

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

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

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

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

[19] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

Me Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud
STIKEMAN, ELLIOTT
Attorneys for the Debtors

Me Avram Fishman
FLANZ FISHMAN MELAND PAQUIN
Attorneys for the Monitor

Me Robert E. Thornton
THORNTON GROUT FINNIGAN
Attorneys for the Monitor

Me Serge F. Guérette
FASKEN MARTINEAU
Attorneys for the Term Lenders

Me Nicolas Gagné
Gravel, Bernier, Vaillancourt
Attorneys for Ville de Beaupré

Me Éric Vallière
McMILLAN LLP
Attorneys for the Intervenor, American Iron & Metal LP

Me Marc Duchesne
BORDEN, LADNER, GERVAIS
Attorneys for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders

Me Frederick L. Myers
GOODMANS LLP
Attorneys for the Ad hoc Committee of Bondholders

Me Bertrand Giroux
BCF
Attorneys for the Intervenor, Recyclage Arctic Béluga Inc.

Date of hearing: April 26, 2010

SCHEDULE "A"

ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.
20. ABITIBI-CONSOLIDATED (U.K.) INC.

SCHEDULE "B"

BOWATER PETITIONERS

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

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. ABITIBIBOWATER INC.
2. ABITIBIBOWATER US HOLDING 1 CORP.
3. BOWATER VENTURES INC.
4. BOWATER INCORPORATED
5. BOWATER NUWAY INC.
6. BOWATER NUWAY MID-STATES INC.
7. CATAWBA PROPERTY HOLDINGS LLC
8. BOWATER FINANCE COMPANY INC.
9. BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED
10. BOWATER AMERICA INC.
11. LAKE SUPERIOR FOREST PRODUCTS INC.
12. BOWATER NEWSPRINT SOUTH LLC
13. BOWATER NEWSPRINT SOUTH OPERATIONS LLC
14. BOWATER FINANCE II, LLC
15. BOWATER ALABAMA LLC
16. COOSA PINES GOLF CLUB HOLDINGS LLC

SCHEDULE "D"

FIRST CLOSING MONITOR'S CERTIFICATE

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No. : 500-11-036133-094

SUPERIOR COURT

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

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

ABITIBIBOWATER INC.,

and

ABITIBI-CONSOLIDATED INC.,

and

BOWATER CANADIAN HOLDINGS INC.,

and

the other Petitioners listed herein

Petitioners

and

ERNST & YOUNG INC.,

Monitor

CERTIFICATE OF THE MONITOR

RECITALS:

WHEREAS on April 17, 2009, the Superior Court of Quebec (the "**Court**") issued an order (as subsequently amended and restated, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**") in respect of (i) Abitibi-Consolidated Inc. ("**ACI**") and subsidiaries

thereof (collectively, the "**Abitibi Petitioners**"),[1] (ii) Bowater Canadian Holdings Inc. and subsidiaries and affiliates thereof (collectively, the "**Bowater Petitioners**")[2] and (iii) certain partnerships[3]. Any undefined capitalized expression used herein has the meaning set forth in the Initial Order and in the Closed Mills Vesting Order (as defined below);

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

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

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

THE MONITOR CERTIFIES THAT IT HAS BEEN ADVISED BY THE VENDORS AND THE PURCHASER AS TO THE FOLLOWING:

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

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

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

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

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

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

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

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

Name: _____

Title: _____

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SCHEDULE "E"

PERMITTED FIRST CLOSING ASSETS ENCUMBRANCES

1. Beaupré Mill

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Dalhousie Mill

None

3. Donnacona Mill

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

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

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

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

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

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

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

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

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

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

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

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

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

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SCHEDULE "F"

SECOND CLOSING MONITOR'S CERTIFICATE

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No. : 500-11-036133-094

SUPERIOR COURT

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

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

ABITIBIBOWATER INC.,

and

ABITIBI-CONSOLIDATED INC.,

and

BOWATER CANADIAN HOLDINGS INC.,

and

the other Petitioners listed herein

Petitioners

and

ERNST & YOUNG INC.,

Monitor

CERTIFICATE OF THE MONITOR

RECITALS:

WHEREAS on April 17, 2009, the Superior Court of Quebec (the "**Court**") issued an order (as subsequently amended and restated, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**") in respect of (i) Abitibi-Consolidated Inc. ("**ACI**") and subsidiaries

thereof (collectively, the "**Abitibi Petitioners**"),[1] (ii) Bowater Canadian Holdings Inc. and subsidiaries and affiliates thereof (collectively, the "**Bowater Petitioners**")[2] and (iii) certain partnerships[3]. Any undefined capitalized expression used herein has the meaning set forth in the Initial Order and in the Closed Mills Vesting Order (as defined below);

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

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

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

THE MONITOR CERTIFIES THAT IT HAS BEEN ADVISED BY THE VENDORS AND THE PURCHASER AS TO THE FOLLOWING:

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

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

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

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

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

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

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

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

Name: _____

Title: _____

*****

SCHEDULE "G"

PERMITTED FORT WILLIAM ASSETS ENCUMBRANCES

Section 1 Permitted Fort William Land Titles Assets Encumbrances

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

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

Section 2 Permitted Fort William Registry Assets Encumbrances

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

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

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

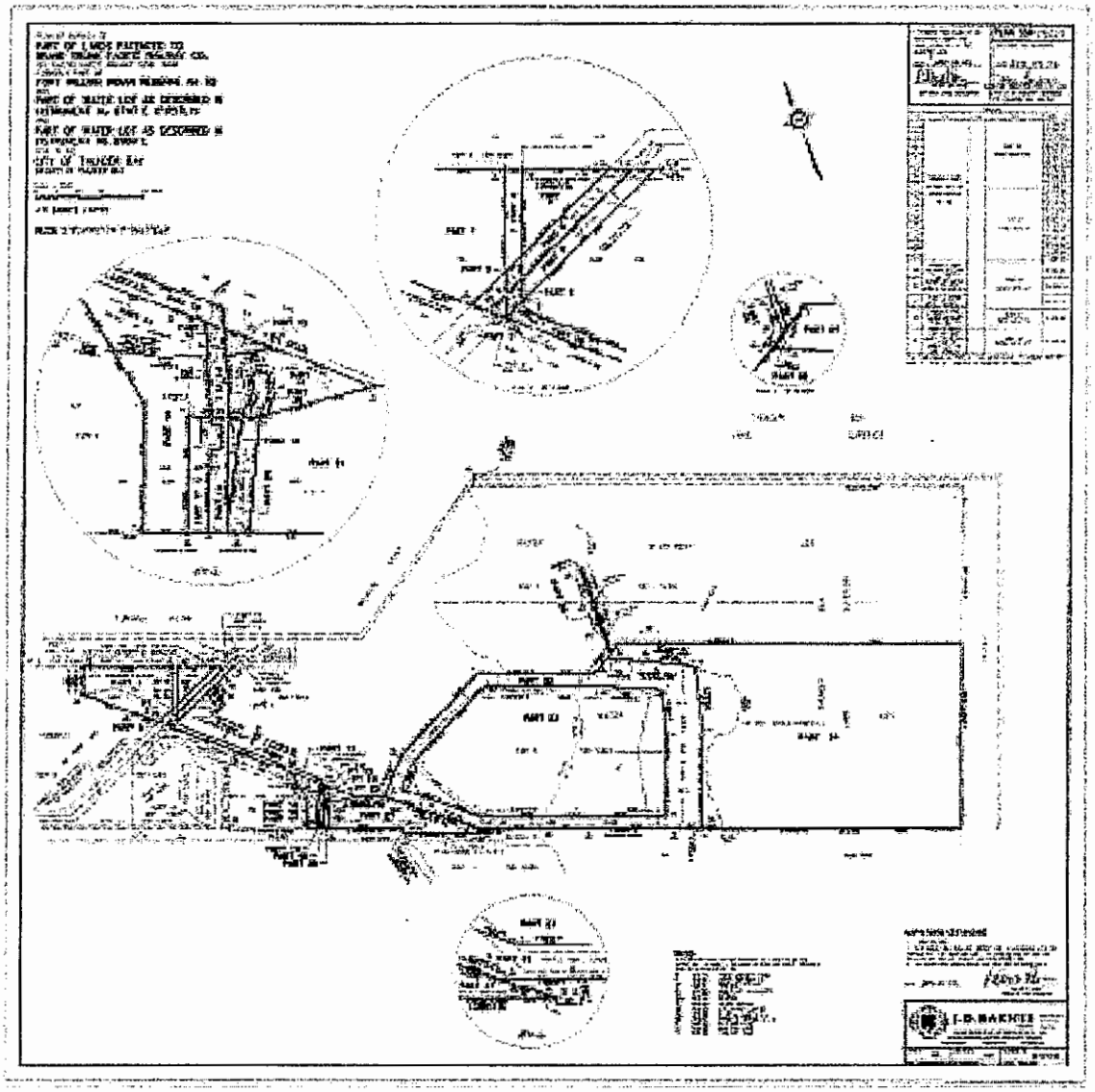
6. Easement in favour of Union Gas, registered on Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 20 and 25, 55R-13027

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

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

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

Annex A



SCHEDULE "H"

DALHOUSIE ASSETS

Municipal address:

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

Legal description (Property Identifier No.):

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

SAVE AND EXCEPT FOR

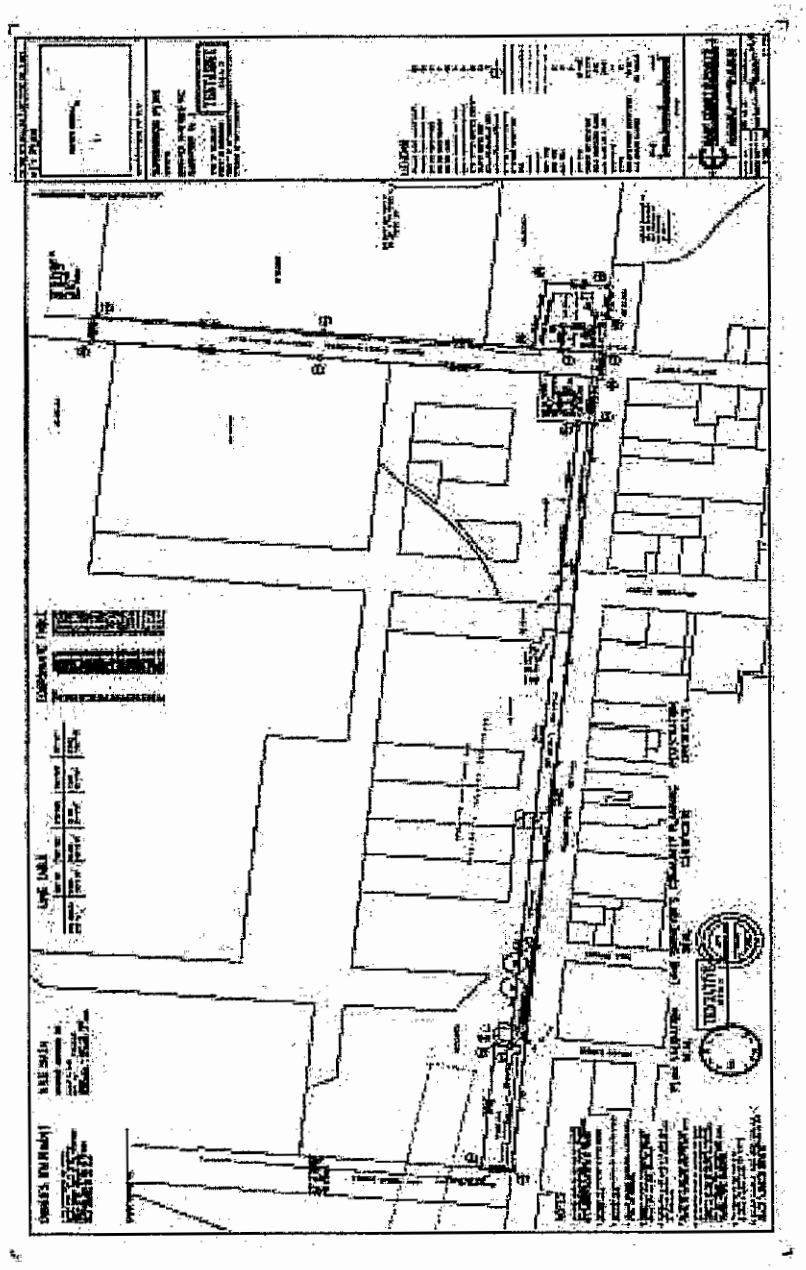
The surveyed land bounded by the bolded line in the plan attached in Annex A to this Schedule H (the "**Dalhousie Plan**").

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

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

Annex A

Dalhousie Plan



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SCHEDULE "I"

FORT WILLIAM ASSETS

Municipal address:

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

Legal description:

Section 1 Fort William Land Titles Assets

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

Section 2 Fort William Registry Assets

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

*****

TAB 5

C

2010 CarswellOnt 2445, 2010 ONSC 1846, 67 C.B.R. (5th) 258

Grant Forest Products Inc., 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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

Ontario Superior Court of Justice [Commercial List]

C. Campbell J.

Heard: February 1, 8, 2010
Judgment: March 30, 2010
Docket: CV-09-8247-00CL

Counsel: Sean Dunphy, Kathy Mah for Monitor

Daniel Dowdall, Jane O'Dietrich for Applicants, Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., Grant U.S. Holdings GP

Kevin McElcheran for Toronto-Dominion Bank, Agent for First Lien Lenders

Fred Myers, Joe Pasquariello for Bank of New York Mellon, Agent for SLL

Sheryl Seigel for Georgia-Pacific LLC

Richard Swan for Peter Grant Sr.

Aubrey Kauffman for Independent Directors of Grant Forest Products Inc.

Subject: Insolvency; Corporate and Commercial

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous

Applicants, being GFP Inc., its parent company, its Canadian subsidiaries, G U.S., and its related entities,

obtained protection under Companies' Creditors Arrangement Act (CCAA) — Applicants had two levels of primary secured debt owed to FLL and SLL — GFP Inc. and G U.S. were in default under FLL agreement, and G U.S. was in default under SLL agreement — Applicants engaged financial advisor to advise on options to address debt position and locate investors or sell business, and marketing process was created — Bid of GP LLC, purchaser, was accepted and purchase and sale agreement was finalized — GFP Inc. et al. brought application to seek approval of sale and vesting order to complete transfer of control to purchaser — SLL opposed approval of transaction — Application granted — Once process put in place by Court Order for sale of assets of failing business, process should be honoured excepting extraordinary circumstances — Numerous parties participated over number of months in complex process designed to achieve not only maximum value of assets of business, but to ensure its survival as going concern for benefit of many stakeholders — To permit invitation to reopen process not only would have destroyed integrity of process, but likely would have doomed transaction that had been achieved.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — General principles — Jurisdiction — Court

Applicants, being GFP Inc., its parent company, its Canadian subsidiaries, and G U.S. and its related entities, obtained protection under Companies' Creditors Arrangement Act (CCAA) when stay of proceedings was granted — Applicants had two levels of primary secured debt owed to FLL and SLL — GFP Inc. and G U.S. were in default under FLL agreement, and G U.S. was in default under SLL agreement — Applicants engaged financial advisor to advise on options to address debt position and locate investors or sell business, marketing process was created — Bid of GP LLC was accepted and purchase and sale agreement was finalized — Transaction required that security granted in favour of FLL and SLL be released and discharged upon closing of transaction — FLL's position was that only way transaction could be accomplished at proposed price was by creating tax benefits arising from proposed structure that would include transfer of G U.S. interests as partnership interests, rather than direct transfer of assets of G U.S. — FLL brought motion to add additional applicants — Motion granted — SLL opposed motion to add applicants and approve sale on basis that such relief would have had effect of mandatory order against U.S. parties which would extinguish U.S. security over U.S. realty and personalty — Issues raised by SLL were inextricably linked to restructuring of applicants and completion of transaction and as such were appropriate for consideration by Court — Transaction would not have been possible without tax advantages that were available as result of transaction form — Submissions that entire transaction was flawed because it resulted in transfer of some assets in U.S. without sale process envisaged in U.S. Bankruptcy Code, would have been triumph of form over substance — Relief sought was not merely device to sell U.S. assets from Canada, it was unified transaction, each element of which was necessary and integral to its success, it was Canadian process.

Cases considered by *C. Campbell 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

Metcalfe & Mansfield Alternative Investments, Re (January 5, 2010), Doc. 09-16709 (U.S. Bankr. S.D. N.Y.) — considered

Morguard Investments Ltd. v. De Savoye (1990), 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 52 B.C.L.R. (2d) 160, [1990] 3 S.C.R. 1077, 1990 CarswellBC 283, 1990 CarswellBC 767 (S.C.C.) — followed

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — considered

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

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

Statutes considered:

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

Generally — referred to

Bankruptcy Code, 11 U.S.C.

Generally — referred to

Chapter 11 — referred to

Chapter 15 — considered

s. 363 — referred to

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

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Generally — referred to

APPLICATION by insolvent seeking approval to complete transfer of control to purchaser; MOTION by creditor to add applicants.

***C. Campbell J.*:**

Reasons for Decision

1 This Application seeks approval of the Sale transaction and a Vesting Order to complete the transfer of the control of the business of Grant Forest Products Inc. to the purchaser Georgia-Pacific. The transaction is the culmination of the marketing process under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended ("CCAA"), authorized by an order of this Court dated June 25, 2009.

2 Approval of the transaction is opposed by the Second Lien Lenders ("SLL")[FN1] under an Inter-Creditor Agreement (the "ICA") of which Grant Forest is a party, on the basis that this Court does not have jurisdiction to, in effect, convey real property assets located in the United States.

3 An adjournment of the approval motion sought by the largest shareholder of Grant Forest, seeking time for improvement of expressions of interest by others into bids, was not granted. Consideration of the issues raised on this motion requires analysis of the many similarities and few differences between the restructuring and insolvency processes in Canada and the United States in cross-border transactions.

4 For reasons that follow, I am satisfied that this Court does have jurisdiction and it is appropriate to approve this complicated transaction. In order to deal with the objections raised, it is necessary to outline the transaction in some detail, the particulars of which are summarized in the Sixth Report of the Monitor.

5 Grant Forest Products Inc. ("GFP"), an Ontario company, and certain of its subsidiaries are privately owned corporations carrying on an Oriented Strand Board manufacturing business from facilities located in Canada and the United States. The most common uses of the companies' products are sheathing in the walls, floors and roofs in the construction of buildings and residential housing.

6 Two GFP mills are located in Ontario, one in Alberta (50% with Footner Forest Products) and two in the counties of Allendale and Clarendon in South Carolina.

7 The U.S. mills are owned indirectly through one of the Applicants, being the Grant Partnership registered in the state of Delaware. At present, due to decreased demand, only one Ontario mill and the Allendale mill in South Carolina are operating.

8 The Applicants, being the parent GFP, its Canadian subsidiaries Grant Alberta Inc. and Grant Forest Product Sales Inc., together with Grant U.S. holdings GP ("Grant U.S. Partnership") and its related entities, obtained protection under the CCAA on June 25, 2009, when a stay of proceedings was granted and Ernst and Young Inc. ("E&Y") was appointed Monitor. The Order also approved the continuation of the engagement of a chief restructuring advisor.

9 The Applicants have two levels of primary secured debt. The total debt obligations are comprised of the following facilities:

First Lien Creditor Agreement

10 As at May 31, 2009, the First Lien Lenders ("FLL")[FN2] were owed the principal amount of $399 million plus accrued interest of approximately $5.3 million pursuant to a credit agreement dated October 26, 2005 and amended March 21, 2007. An additional $8.7 million was owed to one or more of the FLL pursuant to interest rate swap agreements the liability of which was secured to the FLL Agent.

Second Lien Creditor Agreement

11 The bank of New York Mellon ("BNY") as successor is the Agent for the SLL, to whom as of May 31, 2009 was owed the principal amount of approximately $150 million plus accrued interest of approximately $42 million pursuant to a credit agreement dated as of March 21, 2007 as amended as of April 30, 2009. GFP and the Grant U.S. Partnership are the borrowers under the FLL Agreement with all related entities as guarantors of the FLL indebtedness. The Grant U.S. Partnership is the borrower under the SLL Agreement with all related entities as guarantors of the SLL debt.

12 GFP and the Grant U.S. Partnership are in default under the FLL Agreement and the Grant U.S. Partnership is in default under the SLL Agreement. Both the FLL and SLL Agents hold various security in

Canada over each of their respective property and assets.

Inter-Creditor Agreement

13 The Applicants together with the entities related to the Grant U.S. Partnership, the FLL and SLL are parties to an Agreement dated March 21, 2007, which among other things deals with the relationship between the FLL security and the SLL security. Both the FLL and the SLL rely on this Agreement in respect of the issue as between them, which affects priority over assets.

The Marketing Process

14 Prior to the filing that gave rise to the initial order, the Applicants had engaged a financial advisor and an investment banking firm to advise on capital and strategic options to address the Applicants' debt position and liquidity needs and to locate investors or sell the business. While this process did not result in a transaction that could be implemented, the Applicants were of the view that the business could be sold as a going concern or they could sponsor a plan of arrangement to be consummated in CCAA proceedings. The Initial Order, which has not been objected to since being granted on June 25, 2009, contained a six page elaborate "Investment Offering Protocol" to provide interested parties with the opportunity to offer to purchase the business and operations in whole or in part as a going concern or to offer to sponsor a plan of arrangement of the Applicants or any of them.

15 The three phases of the marketing process are described in detail in paragraphs 35 to 47 of the Sixth Report of the Monitor. The process, which commenced in July 2009, involved contact with 91 potentially interested parties, narrowed to 13 who responded with expressions of interest, with eight parties invited to phase Two to conduct further due diligence.

16 At this phase, the interested parties were provided access to the Applicants' facilities, advised of the bid process and had until August 30, 2009 to submit revised proposals. This was subsequently extended to September 11, 2009 in order to accommodate due diligence requirements, plant tour schedules and management meetings with the eight interested parties who were to submit revised proposals on or before September 11, 2009.

17 As reported by the Monitor, two of the bids were inferior by their terms or consideration and three were within a similar range. As a result of due diligence items and closing conditions which risked the completion of the transaction, revised bids were extended to October 2, 2009 for the three interested parties.

18 As of October 16, 2009, 66 2/3% of the FLL debt and the Independent Directors Committee voted in favour of the selection of the Georgia-Pacific bid, one of the world's leading manufacturers and marketers of tissue, packaging, paper pulp and building products, to proceed to Phase Three.

19 As reported in the Fifth Report of the Monitor dated November 26, 2009, SLL who were prepared to agree to certain confidentiality provisions were apprised on October 15 of the status of the marketing process.

20 An exclusivity agreement was reached with Georgia-Pacific on October 20, 2009, which required the Applicants to refrain from seeking bids, responding to or negotiating with any party other than Georgia-Pacific with respect to the items included in the bid of Georgia-Pacific during a period of exclusivity which extended through a series of extensions to January 8, 2010, when the parties finalized a purchase and sale agreement that

is in the material filed with the Court.

21 I accept the conclusion of the Monitor as set out in paragraph 56 of the Sixth Report:

> 56. It is the Monitor's view that the Marketing Process included a structured, fair, wide and effective canvassing of the market as demonstrated by the following:
>
> a. contact by the Investment Offering Advisor of 91 interested parties comprising both financial and strategic parties located in North America, South America, Europe and Asia;
>
> b. the execution of 32 NDAs by interested parties who were then granted access to review the Data Room and the subsequent submission of 13 EOIs at the end of *Phase I*;
>
> c. the EOIs of eight interested parties that were invited to participate in *Phase II* provided a value range which was market derived and tested, and as such, supported the conclusion that the consideration included in Georgia Pacific's bid reflected fair value;
>
> d. of the eight interested parties that were invited to *Phase II*, five submitted improved bids in respect of consideration and/or closing conditions at the close of *Phase II* and of the three interested parties that were invited through to *Phase IIb*, each party again improved its bid in terms of consideration and/or closing conditions at the end of *Phase IIb*.
>
> e. the selection of Georgia Pacific to negotiate a PSA was based on a thorough analysis of all of the financial and commercial terms presented in all of the bids, was recommended by the Monitor and the CRA and was approved by the First Lien Lenders Steering Committee and the Independent Directors Committee; and
>
> f. the Second Lien Lenders were consulted, and their views and questions were taken into account in the final selection of Georgia Pacific.

22 This approval motion was originally returnable on February 1, 2010; it was adjourned to allow the parties to respond to two additional motions. The first, brought on behalf of the FLL, seeks to add as "Additional Applicants" the U.S. entities directly related to the Grant U.S. Partnership, "Grant NewCo LLC" and various Georgia-Pacific Canadian and U.S. entities.

23 The second motion, on behalf of the SLL, was to adjourn or dismiss the Approval Vesting motion on the basis that this Court did not have jurisdiction to deal with the assets in the United States that are the subject of the transaction and such assets would have to be dealt with under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

24 On February 1 and on the adjourned date of February 8, counsel for Peter Grant Senior sought a further adjournment to enahle consideration of a recently received "offer." In its Seventh Report the Monitor reported on receipt of a letter which expressed interest in the Applicants' assets by a new "bidder." In its Report, the Monitor advised that in its opinion, the expression of interest could be considered as no more than that and reported that it did not comply with the Investment Offering Protocol.

25 Counsel for the SLL sought and was granted access to the correspondence but Mr. Grant was not, due to

his involvement in a bid as per the terms of the Investment Offering Protocol.

26 On February 5, with knowledge of the position taken by the SLL and the specifics of the Georgia-Pacific agreement, another expression of interest was received by the Monitor and brought to the attention of the Court. This expression of interest from a previous "bidder" whose bid was rejected, sought to amend its previous position to accommodate the concern that the SLL had with respect to the Georgia-Pacific agreement.

27 The Court ruled that both of these expressions were no more than invitations to negotiate. In neither case by their terms were they intended to create binding obligations until definitive agreements were reached.

28 The Applicants and those parties supporting the Georgia-Pacific agreement urged that the integrity of the process would be compromised if further consideration were given to nothing more than expressions of interest.

29 It is now well established in insolvency law in Canada that once a process has been put in place by Court Order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances.

30 In *Tiger Brand Knitting Co., Re*, [2005] O.J. No. 1259 (Ont. S.C.J.), I noted at para. 31 that integrity of "process is integral to the administration of statutes such as the BIA and CCAA."

31 The leading case in Ontario, which confirms the importance of integrity of process, is *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), 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. In reinforcing the importance of integrity of process, the Court quoted from Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at p. 92 adopted the following:

> 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.

32 In this case, numerous parties participated over a number of months in a complex process designed to achieve not only maximum value of the assets of the business, but to ensure its survival as a going concern for the benefit of many of the stakeholders.

33 I am satisfied that to permit an "invitation" to reopen that process not only would destroy the integrity of the process, but would likely doom the transaction that has been achieved.

Motion to Add Applicants

34 The motion brought by the FLL Agent to add additional applicants was supported by the original Applicants, the purchasers and the Monitor, and opposed by the SLL as part of the objection to jurisdiction of this Court. The purpose of adding Additional Applicants was said to be necessary to make the transaction effective.

35 The transaction with Georgia-Pacific contemplates the transfer of certain assets that are on terms as set out in the Agreement between GFP and related Canadian entities, and to the Canadian purchaser (a Georgia-Pacific subsidiary) with the claims of any person against such transferred assets attaching to the net proceeds received from the sale of such transferred assets.

36 Additionally, the transaction contemplates that the partnership interests in Grant U.S. Partnership will be surrendered and cancelled. Grant U.S. Partnership will issue new partnership interests to the Georgia-Pacific U.S. purchaser vehicle and the additional purchaser.

37 The aggregate consideration being paid by the Canadian purchaser for the transferred assets and the U.S. purchasers for the Grant U.S. Partnership interests is $403 million, subject to adjustment.

38 Through the U.S. purchasers' acquisition of the purchasers' partnership interests, the U.S. purchasers will acquire Grant U.S. Partnership, Southeast, Clarendon, Allendale, U.S. Sales, Newco. It is urged that through this structure the Applicants will maximize the value of their assets.

39 The agreement and transaction require that the security previously granted by the applicable U.S. applicants (the "Additional Applicants") in favour of the FLL and SLL and the indebtedness and liability of the applicable Additional Applicants to them and the Lenders under the FLL Agreement and the SLL Agreement be released and discharged upon closing of the transaction.

40 The position of the FLL, supported by the Applicants and the Monitor, is that the only way in which the transaction can be accomplished with the price that the FLL and the Applicants are prepared to accept is with the proposed structure that would include a transfer of the Grant U.S. Partnership interests as partnership interests, rather than a direct transfer of the assets of Grant U.S. Partnership.

41 The FLL, the Applicant and the Purchasers urge that without the tax benefit that arises from the proposed structure, the Agreement of Purchase and Sale with Georgia-Pacific would not have been completed.

Position of SLL

42 The position of the SLL, both in opposing the motion to add Additional Applicants and opposing Approval of the Sale, is that the relief sought is overly broad, inappropriate and would have the effect of mandatory orders against U.S. parties which would extinguish U.S. security over U.S. realty and personalty. The effect of the extinguishment is to absolve FLL of all forms of liability when it is neither a CCAA debtor nor an officer of this Court.

43 It is urged that there is no jurisdiction on which the FLL can seek an unlimited judicial release. The FLL cannot add the SLL as a party for any purpose that is to seek avoiding prior scrutiny in the U.S. courts of the merits of its actions and of the U.S. affiliates of the Original Applicants and the SLL.[FN3]

44 The SLL Agent asserts that the effect of the Application is to ask this Court, in the guise of a motion in a CCAA proceeding concerning Canadian debtors, to allow it on behalf of U.S. FLL to sue U.S. defendants for a final declaration of right and a mandatory injunction under the Inter-Creditor Agreement that is governed by U.S. law and U.S. choice of forum.

45 This is said to occur without delivering any originating process or meeting tests for the exercise of jurisdiction of this Court over U.S. parties concerning U.S. property. SLL submits that the FLL failed to provide

any of the legal and procedural safeguards required by the Rules of Civil Procedure to any foreign or proposed defendant.

46 It is further urged that the ICA specifically provides the FLL with rights only upon the sale of assets under section 363 of the U.S. bankruptcy code. Therefore, it is submitted, a motion in a CCAA proceeding by the Original Applicants is not an appropriate forum for the resolution of the interpretation of a contract between the U.S. non-parties that is to be decided under U.S. law.

47 The SLL also complain that engaging the term "center of main interest" with respect to the U.S. affiliates is not a relevant question for this Court. Rather, it is a transparent attempt to pre-empt a U.S. court from making a determination required under the U.S. Bankruptcy Code, which may affect the standard of review afforded by the U.S. court upon any recognition proceedings that the original Applicants may choose to bring before the U.S. court in the future.

48 Finally, it is suggested that what the FLL Agent seeks is contrary to the principles of comity and the common law principle that a court should decide only matters properly before it and necessary to its own decision.

49 The evidence before the Court is that on completion of the transaction, there will be a shortfall to the FLL on their debt and likely no recovery by the SLL on their debt. The SLL suggest that a separate auction sale of the U.S. mills might achieve a better price for these assets. There is no evidence before the Court to back up this assertion.

Inter-Creditor Agreement

50 The ICA, which was entered into as of March 21, 2007, binds the GFP group of companies, including Grant U.S. Partnership as well as the FLL and the SLL. The FLL and the SLL rely on the Agreement in support of their respective positions.

51 The stated purpose of the Agreement was to induce the FLL to consent to GFP incurring the second lien obligations and to induce the FLL to extend credit for the benefit of GFP.

52 By its terms and the definition of "bankruptcy code" in the ICA, the parties recognized that the Canadian statutes, being the CCAA and the BIA, as well as the U.S. Bankruptcy Code, might apply.

53 Counsel for the SLL relies on clause 9.10 of the ICA definition of "Applicable Law," which provides: "this agreement and the rights and obligations of the parties hereunder shall be governed by, and shall be construed and enforced in accordance with, the laws of the state of New York."

54 Accordingly, it is argued on behalf of the SLL that this Court should not have regard to any issues as between the FLL and SLL, but rather leave those to be litigated as between those parties in the State of New York.

55 The position of the FLL is that a Court having jurisdiction over insolvency of a Canadian entity might well be required to have regard to the ICA in dealing with legitimate and appropriate insolvency remedies in Canada. In this regard, counsel notes that clause 9.7 of the ICA identifies New York as a "non-exclusive" venue for disputes involving the Agreement.

56 The position of the Applicants and those supporting the ICA is that this Court is being asked to consider and approve a restructuring transaction in a process that has been overseen by this Court, and which includes, *inter alia*, a comprehensive marketing process involving an Ontario Court-appointed officer. This process has always expressly included the Applicants and their subsidiaries and the business that the integrated corporate group operated in North America from headquarters situated in Ontario.

57 The Applicants submit it is appropriate for this Court to deal with issues raised under the ICA between the FLL and SLL, where that is incidental to approval of this Canadian restructuring transaction.

58 I am satisfied that the issues raised by the SLL are inextricably linked to the restructuring of the Applicants and the completion of the transaction and as such are appropriate for consideration by this Court.

59 I am satisfied that, by operation of the Credit Agreement and ICA, the FLL are entitled to exercise their remedies, which they propose to do in this motion by adding the Additional Applicants as CCAA Applicants. They may then release their security over the assets to be transferred in connection with the exercise of their remedies and by doing so, the security of the SLL over the Transferred Assets is automatically and simultaneously released.

60 I am satisfied that the transaction, whereby Canadian assets are transferred to a Canadian Georgia-Pacific subsidiary and the assets of the essentially GFP-owned partnership interests in Grant U.S. Partnership are transferred to a newly created U.S. partnership by Georgia-Pacific, would not have been possible without the tax advantages that are available as a result of the form of this transaction.

61 To suggest, as does the submission of the SLL, that the entire transaction is flawed because the effect is a transfer of some assets in the United States without the sale process envisaged in section 363 of the U.S. Bankruptcy Code, would be a triumph of form over substance.

62 I accept that the effect of the transaction may indirectly be a transfer of U.S. real property assets and the release of a security over them of the SLL. The effect of the transaction is such that the claims of local creditors of the business of the U.S. mills remain unaffected. The Court was not apprised of any ordinary creditor other than the SLL that would be so affected.

Comity and U.S. Chapter 15

63 Counsel for the SLL Agent objected to the use by the Applicants of the term COMI (being Center Of Main Interest) in respect of this CCAA Application.

64 I accept that the term COMI has only been formally recognized in amendments to the CCAA, which came into effect in September 2009 after the filing of this Application. The term has gained recognition in the last few years as cross-border insolvencies have increased, particularly with the use of flexibility of the CCAA.

65 Comity, as expressed by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*[FN4], is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." Comity balances "international duty and convenience" with "the rights of (a nation's) own citizens... who are under the protection of its laws."[FN5]

66 Without in any way intending to intrude on the law of another jurisdiction, it is appropriate to have a look at the plain wording of the ICA.

67 It is to be noted that there is no evidence put forward by the SLL Agent to suggest that the position of the FLL in respect of the ICA is incorrect. The only response from the SLL Agent is that the matter is not for this Court.

68 The suggestion by the SLL is that the effect of the Order sought is to vest title in U.S. assets. The FLL assert that all that is being done is the enforcement of their secured creditor remedies and release of their security, which under the ICA has the effect of releasing the security of the SLL.

69 The FLL submit that Section 3.1 of the ICA recognizes the broad remedies available to the FLL to enforce their security, using all the remedies of a secured creditor under the Bankruptcy Laws of the U.S. including the CCAA, without consultation with the SLL. The submission is further that the SLL are bound by any determination made by the FLL to release its security. The SLL is to provide written confirmation on the FLL becomes the agent of the SLL for that purpose.

70 The relevant sections of the ICA are set out in Appendix A hereto. As noted above, the position of the FLL is that they are exercising contractual remedies under the ICA.

71 For the SLL, the argument is that this Court should not interfere with the obligation of the FLL to commence proceedings in the appropriate jurisdiction (New York) to enforce its obligations against the SLL. Neither the SLL nor the FLL has commenced New York actions.

72 I am satisfied that this Court does have jurisdiction to provide the relief requested, which is the product of the marketing process that was not only approved by this Court, but not objected to by any party when it was initiated.[FN6]

73 I do not accept the submission on behalf of the SLL that "the proposed CCAA proceedings for the U.S. Affiliates are not proper CCAA proceedings at all, but are merely proposed as a mechanism for Canadian vesting of U.S. assets."

74 The relief sought is not merely a device to sell U.S. assets from Canada. This is a unified transaction, each element of which is necessary and integral to its success. It is properly a Canadian process.

75 There are many instances in which Canadian courts have granted vesting orders in relation to assets situated in the United States. Some of the orders are referred to in the factum of the FLL, including *Re Maax Corporation et al.*,[FN7] *Re Madill Equipment Canada*,[FN8] *Re ROL Manufacturing (Canada) Ltd.*,[FN9] *Re Biltrite Rubber Inc.*[FN10] and *Re Pope and Talbot, Inc. et. al.*[FN11]

76 Decisions on both sides of the border have recognized that the United States and Canada have a special relationship that allows bankruptcy and insolvency matters to proceed with relative ease when assets lie in both territories. As the U.S. Bankruptcy Court for the Southern District of New York acknowledged in ABCP's *Metcalfe & Mansfield Alternative Investments, Re* [, Doc. 09-16709 (U.S. Bankr. S.D. N.Y. January 5, 2010)] [FN12] both systems are rooted in the common law and share similar principles and procedures. Bankruptcy proceedings in the United States acknowledge international proceedings and work alongside, rather than over, foreign matters. Chapter 15 of the U.S. Bankruptcy Code exemplifies this in its foreign bankruptcy proceedings: "the court should be guided by principles of comity and cooperation with foreign courts."[FN13]

77 In the cross-border case of *Muscletech Research & Development Inc., Re*,[FN14] COMI was found to be

in Canada despite factors indicating the U.S. would also be a suitable jurisdiction. Particularly, most of the creditors were located in the U.S., as was the revenue stream. Most of the major decisions regarding the company were made in Canada, its directors and officers were located in Ontario, banking was done in Ontario, etc. Justice Farley noted the positive relationship between Canada and the U.S. and credited this relationship to the adherence to comity and common principles. Judge Rakoff, presiding over the Chapter 15 proceedings, agreed with Farley J.'s endorsement, specifically noting that the factors outlined in the Canadian endorsement persuaded him over the factors in favour of U.S. COMI. Farley J. noted at paragraph 4 of his endorsement, and Judge Rankoff implicitly agreed, that "the courts of Canada and the U.S. have long enjoyed a firm and ongoing relationship based on comity and commonalities of principles as to, *inter alia*, bankruptcy and insolvency."

78 As noted by counsel for the SLL at paragraph 44 of their factum:

> Courts routinely enforce Canadian judgments in banluptcy, respecting our similar common law traditions including our respect for comity and restraint. In enforcing the decision of this Honourable Court in Metcalfe & Mansfield Alternative Investments et al., ("ABCP") the US Bankruptcy Court for the Southern District of New York, wrote:
>
> > The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportnity to be heard in a manner consistent with standards of U.S. due process. u.s. federal courts have repeatedly granted comity to Canadian proceedings. United Feature Syndicate, *Inc. v. Miler Features Syndicate*, Inc., 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002) ("There is no question that bankruptcy proceedings in Canada-a sister common law jurisdiction with procedures akin to our own-are entitled to comity under appropriate circumstances.") (internal quotation marks and citations omitted); Tradewell, *Inc. v. American Sensors Elecs.*, Inc., No. 96 Civ. 2474(DAB), 1997 WL 423075, at *l n.3 (S.D.N.Y. 1997) ("It is well-settled in actions commenced in New York that judgments of the Canadian courts are to be given effect under principles of comity.") (internal quotation marks and citation omitted); Cornjeldv. Investors Overseas Servs., Ltd., 471 F. Supp. 1255, l259 (S.D.N.V. 1979) ("The fact that the foreign country involved is Canada is significant. It is wellsettled in New York that the judgments of the Canadian courts are to be given effect under principles of comity. Trustees in bankruptcy appointed by Canadian courts have been recognized in actions commenced in the United States. More importantly, Canada is a sister common law jurisdiction with procedures akin to our own, and thus there need be no concern over the adequacy of the procedural safeguards of Canadian proceedings.") (internal quotation marks and citations omitted)[FN15]

79 *MAAX Corporation* (*MAAX*) provides some assistance on the U.S. treatment to CCAA proceedings in asset sales. The salient elements in *MAAX* included the fact that the sale was conducted prior to entering CCAA protection, only the Canadian entity ultimately sought protection under the Act and no concurrent U.S. proceedings were initiated at first. The MAAX companies operated extensively in the U.S. and internationally, and were eventually brought into the U.S. via Chapter 15. The Canadian court approved the move into the U.S. and granted the sale. While there were some operating companies based almost solely in the U.S. (opening bank accounts to qualify under the CCAA, as was done in the present case), the U.S. Bankruptcy Court looked at the entity as a whole and granted the petition.[FN16] The American court approved of a flexible approach to the U.S. asset sale, allowing it to go forward without a competitive bidding process, stalking horse or auction.

80 One of the essential features of the orders sought is the requirement that recognition be sought and obtained in the U.S. Bankruptcy Court, pursuant to Chapter 15 of that Code, of the Orders sought in this Court, including the adding of Additional Applicants.

81 I am satisfied that if there is a valid objection by the SLL, it is appropriately made in the U.S. Bankruptcy Court at a hearing to recognize this Order. I do not accept the proposition that this Court, by making the Order sought, would usurp a determinative review by the U.S. Court should it be found necessary.

82 Given the purpose and flexibility of the CCAA process, it is consistent with the jurisdiction of this Court to add the Additional Applicants for the appropriate purpose of facilitating and implementing the entire transaction, which is approved.

Conclusion

83 For the foregoing reasons, I am satisfied:

1. That it is not appropriate to re-open the Marketing Process;

2. That this Court does have jurisdiction to consider a sale transaction that incidentally does affect assets of a Canadian company in the United States;

3. That in all the circumstances it is appropriate to approve the proposed transaction.

Appendix A

Applicable Provisions of the Inter-Creditor Agreement

Section 3.1

Until the Discharge of First Lien Obligations has occurred, whether or not any Insolvency or Liquidation Proceeding has been commenced by or against the Company or any other Grantor, subject to Section 3.1(a)(1), the First Lien Collateral Agent and the other First Lien Claimholders shall have the right to enforce rights, exercise remedies (including set-off and the right to credit bid their debt) and make determinations regarding the release, disposition, or restrictions with respect to the Collateral without any consultation with or the consent of the Second Lien Collateral Agent or any other Second Lien Claimholder...

Section 5.1 (a)

If in connection with the exercise of the First Lien Collateral Agent's remedies in respect of the Collateral provided for in Section 3.1, the First Lien Collateral Agent, for itself or on behalf of any of the other First Lien Claimholders, releases any of its Liens on any part of the Collateral or releases any Grantor from its obligations under its guaranty of the First Lien Obligations in connection with the sale of the stock, or substantially all the assets, of such Grantor, then the Liens, if any, of the Second Lien Collateral Agent, for itself or for the benefit of the Second Lien Claimholders, on such Collateral, and the obligations of such Grantor under its guaranty of the Second Lien Obligations, shall be automatically, unconditionally and

simultaneously released...

...The Second Lien Collateral Agent, for itself or on behalf of any such Second Lien Claimholders, promptly shall execute and deliver to the First Lien Collateral Agent or such Grantor such termination statements, releases and other documents as the First Lien Collateral Agent or such Grantor may request to effectively confirm such release.

Section 5.1 (c)

Until the Discharge of First Lien Obligations occurs, the Second Lien Collateral Agent, for itself and on behalf of the Second Lien Claimholders, hereby irrevocably constitutes and appoints the First Lien Collateral Agent and any officer or agent of the First Lien Collateral Agent, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of the Second Lien Collateral Agent or such holder or in the First Lien Collateral Agent's own name, from time to time in the First Lien Collateral Agent's discretion, for the purpose of carrying out the terms of this Section 5.1, to take any and all appropriate action and to execute any and all documents and instruments which may be necessary to accomplish the purposes of this Section 5.1 , including any endorsements or other instruments of transfer or release.

Order accordingly.

FN1 The appearing party on this motion is the Agent for the Second Lien Lenders, also referred to in the materials as Second Lien Creditors, hereinafter SLL.

FN2 Like the Second Lien Lenders, the First Lien Lenders appeared formally by their Agent, were sometimes referred to as the First Lien Creditors and will be hereinafter referred to as the FLL.

FN3 It is to be noted that there is no existing U.S. action of which the Court was made aware by either the SLL or the FLL.

FN4 [1990] 3 S.C.R. 1077 (S.C.C.) at 1096

FN5 Ibid.

FN6 Supplemental Initial Order, at paragraphs 8 and 24, Motion Record of the First Lien Lenders' Agent, at pages 10 and 18

FN7 *Re Maax Corporation*, unreported, Orders of the Superior Court of Quebec, TD Supplementary Brief of Authorities, Tabs 1a-c; Order by the US Bankruptcy Court for the District of Delaware Granting Recognition and Related Relief, TD Supplementary Brief of Authorities, Tab 1d.

FN8 *Re Madill Equipment Canada*, Case No. 08-41426, Distribution and Vesting Orders of the Supreme Court of British Columbia; Order of the US Bankruptcy Court (Western District of Washington at Tacoma) Granting Motion Authorizing Sale of Assets, TD Supplementary Brief of Authorities, Tab 2.

FN9 *Re. ROL Manufacturing (Canada) Ltd., et al.*, unreported, Order of the Quebec Superior Court (Commercial Division) Approving the Sale of the PSH Division, TD Supplementary Brief of Authorities, Tab 3a; Order of the US Bankruptcy Court, Southwestern District of Ohio, Authorizing and Approving Sale of PSH

Division, TD Supplemental Brief of Authorities, Tab 3c.

FN10 *Re Biltrite Rubber Inc.*, Case No. 09-31423 (MAW), Sale Approval and Vesting Order and Distribution Order of the Ontario Superior Court of Justice, TD Supplemental Brief of Authorities, Tabs 4a-b; Order of the US Bankruptcy Court for the Northern District of Ohio Western Division Enforcing the Orders of the Ontario Court, TD Supplementary Brief of Authorities, Tab 4c.

FN11 *Re. Pope and Talbot, Inc. et al.*, Case No. 08-11933 (CSS), Orders of the US Bankruptcy Court for the District of Delaware, TD Supplementary Brief of Authorities, Tab 5.

FN12 United States Bankruptcy Court, Case No. 09-16709, January 5, 2010, Martin Glenn J.

FN13 *Metcalfe* at 18

FN14 (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) (*Muscletech*), titled *Re RSM Richter Inc. v. Aguilar*, 2006 U.S. Dist. LEXIS 57595 (S.D.N.Y.) (*Re RSM Richter*)

FN15 See footnote 12, *supra.*

FN16 *In re MAAX Corp., et al.*, No. 08-11443 (Bankr. D. Del. Aug. 6, 2008)

END OF DOCUMENT

TAB 6

C

2012 CarswellOnt 7248, 2012 ONSC 3367, 216 A.C.W.S. (3d) 551, 91 C.B.R. (5th) 285

PCAS Patient Care Automation Services Inc., 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 PCAS Patient Care Automation Services Inc. and 2163279 Ontario Inc. Applicants

Ontario Superior Court of Justice [Commercial List]

D.M. Brown J.

Heard: June 5-6, 2012
Judgment: June 9, 2012
Docket: CV-12-9656-00CL

Counsel: S. Babe, I. Aversa for Applicants

M. Wasserman, J. MacDonald for Monitor, PricewaterhouseCoopers Inc.

J. Porter, A. Shepherd for 2320714 Ontario Inc., the DIP Lender

B. O'Neill for Castcan Investments (secured creditor)

R.M. Slattery for Royal Bank of Canada (secured creditor)

M. Laugesen, G. Finlayson for Successful Bidder, DashRx, LLC

C. Besant for Walgreen Co.

A. Scotchmer for Lanworks Inc.

P. Saunders for himself and other shareholders

B. Jaffe for Merge, a potential bidder

S-A. Wilson for Dan Brintnell, a shareholder

Subject: Insolvency; Corporate and Commercial; Estates and Trusts

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Section 67 of Financial Administration Act (FAA) does not apply to rights created by court order, including lending charge granted over all of company's property pursuant to s. 11.2(1) of Companies' Creditors Arrangement Act (CCAA) — Lender's charge created by order under CCAA is not transaction under s. 67 of FAA.

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

Bank of Montreal v. i Trade Finance Inc. (2011), 17 P.P.S.A.C. (3d) 250, 77 C.B.R. (5th) 231, 332 D.L.R. (4th) 193, (sub nom. *i Trade Finance Inc. v. Webworx Inc.)* 416 N.R. 166, (sub nom. *i Trade Finance Inc. v. Webworx Inc.)* 276 O.A.C. 141, (sub nom. *i Trade Finance Inc. v. Bank of Montreal)* [2011] 2 S.C.R. 360, 2011 CarswellOnt 3306, 2011 CarswellOnt 3307, 2011 SCC 26 (S.C.C.) — considered

Beauty Counsellors of Canada Ltd., Re (1986), 1986 CarswellOnt 171, 58 C.B.R. (N.S.) 237 (Ont. S.C.) — referred to

Cargill Ltd. v. Ronald (Trustee of) (2007), 2007 MBQB 102, 2007 CarswellMan 191, [2007] 8 W.W.R. 366, 32 C.B.R. (5th) 169, (sub nom. *Ronald (Bankrupt), Re)* 216 Man. R. (2d) 138 (Man. Q.B.) — referred to

Christensen, Re (1961), 2 C.B.R. (N.S.) 324, 1961 CarswellOnt 50 (Ont. S.C.) — referred to

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

Front Iron & Metal Co., Re. (1980), 36 C.B.R. (N.S.) 317, 1980 CarswellOnt 198 (Ont. Bktcy.) — referred to

Marzetti v. Marzetti (1994), [1994] 7 W.W.R. 623, (sub nom. *Marzetti v. Marzetti (Bankrupt))* 155 A.R. 340, (sub nom. *Marzetti v. Marzetti (Bankrupt))* 73 W.A.C. 340, 116 D.L.R. (4th) 577, [1994] 2 S.C.R. 765, 5 R.F.L. (4th) 1, 26 C.B.R. (3d) 161, 20 Alta. L.R. (3d) 1, (sub nom. *Marzetti v. Marzetti (Bankrupt))* 169 N.R. 161, [1998] B.P.I.R. 732, 1994 CarswellAlta 942, 1994 CarswellAlta 346 (S.C.C.) — considered

McKay & Maxwell Ltd., Re (1927), 8 C.B.R. 534, 1927 CarswellNS 5 (N.S. T.D.) — referred to

PCAS Patient Care Automation Services Inc., Re (2012), 2012 CarswellOnt 4733, 2012 ONSC 2423 (Ont. S.C.J. [Commercial List]) — referred to

PCAS Patient Care Automation Services Inc., Re (2012), 2012 ONSC 2714 (Ont. S.C.J. [Commercial List]) — referred to

PCAS Patient Care Automation Services Inc., Re (2012), 2012 ONSC 2778, 2012 CarswellOnt 5675 (Ont. S.C.J. [Commercial List]) — referred to

PCAS Patient Care Automation Services Inc., Re (2012), 2012 ONSC 2840, 2012 CarswellOnt 5922 (Ont. S.C.J. [Commercial List]) — referred to

PCAS Patient Care Automation Services Inc., Re (2012), 2012 CarswellOnt 6629, 2012 ONSC 3147 (Ont. S.C.J. [Commercial List]) — referred to

Profitt v. A.D. Productions Ltd. (Trustee of) (2002), (sub nom. *Profitt v. A.D. Productions Ltd. (Bankrupt))* 157 O.A.C. 356, (sub nom. *Profitt v. Wasserman, Arsenault Ltd.)* 2002 G.T.C. 1162, 2002 CarswellOnt 922, 32 C.B.R. (4th) 94 (Ont. C.A.) — considered

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.) — distinguished

Selkirk, Re (1986), 1986 CarswellOnt 172, 58 C.B.R. (N.S.) 245 (Ont. S.C.) — referred to

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.) — followed

Torstar Corp. v. ITI Information Technology Institute Inc. (2002), 207 N.S.R. (2d) 9, 649 A.P.R. 9, 36 C.B.R. (4th) 114, 2002 NSSC 200, 2002 CarswellNS 335 (N.S. S.C. [In Chambers]) — 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:

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

Generally — referred to

s. 6(5)(a) — considered

s. 11 — considered

s. 11.2(1) [en. 2005, c. 47, s. 128] — referred to

s. 36(1) — considered

s. 36(2) — considered

s. 36(3) — considered

s. 36(6) — considered

s. 36(7) — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Generally — referred to

Financial Administration Act, R.S.C. 1985, c. F-11

s. 67 — considered

APPLICATION by debtor companies under *Companies' Creditors Arrangement Act* for orders approving agreement of purchase and sale between debtor companies and purchaser, vesting purchased assets in purchaser and distributing sale proceeds, together with related orders including termination of proceedings under Act.

D.M. Brown J.:

I. Request for sale approval, vesting and distribution orders under the CCAA

1 PCAS Patient Care Automation Services Inc. and 2163279 Ontario Inc. move under the *Companies' Creditors Arrangement Act* for orders approving the agreement of purchase and sale between the Applicants and DashRx, LLC ("DashRx") dated May 29, 2012 (the "Purchase Agreement"), vesting the Purchased Assets in DashRx and distributing the sale proceeds, together with certain other related orders, including the termination of this *CCAA* proceeding.

2 At the continuation of the hearing on June 6, 2012, I granted the requested orders. These are my reasons for so doing.

II. The proposed sale

A. The sales and investor solicitation process

3 The Applicants are healthcare technology companies which were developing an automated pharmacy dispensing platform. They were in the pre-commercialization phase of operations and encountered financing difficulties. The Initial Order under the *CCAA* was made by Morawetz J. on March 23, 2012; it appointed PricewaterhouseCoopers Inc. as Monitor.

4 The subsequent history of this matter is set out my previous Reasons.[FN1]

5 On May 14, 2012, I approved a sale and investor solicitation process ("SISP"). The Applicants developed the SISP with the assistance of the Monitor, the Monitor's agent, PricewaterhouseCoopers Corporate Finance Inc. ("PwCCF") and the DIP Lender. The SISP sought to maximize stakeholder value either through (i) a going concern sale of the Applicants' business and assets or (ii) new investment and a plan of compromise or arrangement. The SISP set out the procedural and substantive requirements for a qualified purchase or investment bid (a "Qualified Bid").

6 A feature of the approved SISP was the DIP Lender's "stalking horse" bid under which the DIP Lender would pay the Stalking Horse Price by a release of the DIP Indebtedness and the assumption of the outstanding senior secured claims. The terms of the Stalking Horse Bid were not required to be emulated in other Qualified Bids; the Stalking Horse Bid served to set a floor price in the SISP. The Stalking Horse Agreement was posted in the Applicants' data-room.

7 The SISP was conducted by the Applicants with the support and assistance of the Monitor. Under the terms of the SISP, bids were due by 12:00 p.m. on May 24, 2012. Two bids, including the DashRx bid, were received before the Bid Deadline, and one further bid was received on May 24, 2012, but after the Bid Deadline. These three bids were reviewed in a series of meetings held by the Applicants, the DIP Lender, the Monitor and their counsel on May 24 and May 25, 2012.

8 In a Confidential Appendix to its Seventh Report the Monitor described the financial terms of each bid

and disclosed the materials filed by each bidder, as well as the written communications with each bidder.

B. The Unsuccessful Bids

9 As described in detail in the evidence, the bid submitted by Unsuccessful Bidder 1 was received the evening of May 24, but provided no cash consideration to the Applicants. On the evening of May 25, 2012, Applicants' counsel sent a letter to Unsuccessful Bidder 1 advising that its bid was not a Qualified Bid and that certain additional details would need to be provided before it could be considered a Qualified Bid. Unsuccessful Bidder 1 did not respond to the request for clarification and its bid was not treated as a Qualified Bid.

10 By letter dated May 23 Unsuccessful Bidder 2 offered to buy PCAS for cash. On May 23 the Applicants wrote to Unsuccessful Bidder 2 about how it would need to alter its bid to satisfy the requirements for a Qualified Bid in the SISP. Notwithstanding follow-up communications, Unsuccessful Bidder 2 did not respond to the Applicants' inquiries until Sunday, May 27, 2012 and it did not provide any material new information. The bid by Unsuccessful Bidder 2 therefore was not treated as a Qualified Bid under the SISP.

C. The Successful Bid

The purchaser

11 DashRx is a Delaware limited liability corporation formed by a large, California-based investment fund to purchase the assets of the Applicants. The fund's Investment Manager has approximately US$500 million in assets under management, almost exclusively in the health care and pharmaceutical sectors.

12 On May 24, 2012, prior to the bid deadline, DashRx submitted a version of the Purchase Agreement. It was the only bid received in the form of a formal asset purchase agreement. DashRx also remitted a cash deposit to the Monitor.

13 The Investment Manager had been performing due diligence and engaging in talks with the Applicants for several months prior to the commencement of the *CCAA* proceedings with an aim to investing in or purchasing PCAS. A major U.S. retail pharmacy chain, Walgreen Co. is participating in the Successful Bid as a substantial investor in DashRx. Walgreen was the potential large U.S. customer identified in previous evidence in this proceeding.

14 The Monitor requested that it be allowed to reveal the name of the Investment Manager; the latter expressed a strong preference that its identity not be disclosed. Against that background the Monitor reported that it had requested independent evidence of the financial position of the Investment Manager:

> [T]he Monitor has received additional information regarding the Investment Manager and is satisfied that the Purchaser should have the financial wherewithal to close the transaction. The Purchaser and Walgreens have shown their commitment by jointly paying the deposit and agreeing to fund the operating needs of the Company to June 6, 2012 (with a cap of $250,000). The Monitor also notes that Walgreens' participation provides another source of financial support to the Purchaser.

15 By May 27, 2012, following further negotiations and an enhancement of the DashRx bid to permit some recovery for unsecured creditors, the material terms of the DashRx Purchase Agreement were settled to a point that the Applicants, in consultation with the DIP Lender and the Monitor, were prepared to recognize the Purchase Agreement as a Qualified Bid, as a bid superior to the Stalking Horse Bid, and to identify it as the

Successful Bid under the SISP, subject to final negotiation of the APA.

16 The Purchase Agreement was finalized, executed and delivered by the parties on June 1, 2012. DashRx committed to provide $250,000 to fund the Applicants' operations from May 31, 2012 until closing on June 6. That funding was received on May 31, 2012.

Purchased and Excluded Assets

17 Under the Purchase Agreement the purchaser will acquire Purchased Assets on an "as is, where is" basis. Certain tax credit entitlements are treated as Excluded Assets.

The purchase price and consideration

18 The consideration payable under the Purchase Agreement is a combination of the assumption of secured liabilities, cash, and the issuance of secured and unsecured convertible promissory notes to the Applicants' creditors, including unsecured creditors. The Applicants do not expect that there will be any surplus proceeds from the transaction for PCAS shareholders.

19 The cash portion of the purchase price is designated for:

(i) distribution in payment of all statutory priority claims, comprised of approximately $235,000 in accrued and unpaid vacation pay;

(ii) distribution to the DIP Lender to be used by the DIP Lender:

a. first, to obtain the consent of the Senior Secured Creditors, RBC and Castcan, to the discharge of their security interests and charges over the Purchased Assets and to obtain their consent for the issuance of an approval and vesting order in respect of the Sale Agreement; and,

b. as to the balance, in partial satisfaction of the DIP Indebtedness;

(iii) payment of the amounts payable under the court-approved key employee retention plan; and

(iv) payment of $100,000 to the Applicants, in trust for a trustee in bankruptcy to be appointed in respect of the Applicants, and the other direct and indirect subsidiaries of PCAS, to pay for the costs of administering their anticipated bankruptcies

20 The non-cash portion of the purchase price in the transaction will be comprised of:

(i) the assumption of the secured obligations to IBM;

(ii) interest-bearing promissory notes issued in favour of the DIP Lender, secured against the assets of DashRx and ranking junior only to the secured assumed obligations to IBM ("Secured Note"); and,

(iii) interest-bearing unsecured promissory notes issued to the Applicants, in trust, for the pool of unsecured creditors of the Applicants ("Unsecured Note").

21 At the commencement of the hearing on June 5 one unsecured creditor, Lanworks, raised concerns about

the lack of transparency regarding the terms of the Unsecured Notes. The details of the terms of the Notes had been placed in the Monitor's Confidential Appendix. Prior to the resumption of the hearing on June 6 Lanworks was provided with information about the terms of the Unsecured Note, as a result of which Lanworks indicated that it neither consented to nor opposed the orders sought. The terms of the Secured and Unsecured Notes were finalized by the time of the continuation of the hearing on June 6.

Proposed releases

22 In its Seventh Report the Monitor noted that under the terms of the Purchase Agreement certain claims against former employees of the Applicants were included in the Purchased Assets and the Agreement required the Applicants to deliver a broad release in favour of the Purchaser and related parties. The Monitor observed that the releases were negotiated as part of the comprehensive arrangements in respect of the transactions contemplated by the Agreement.

Proposed occupancy agreements

23 A condition of the Sale Agreement was that PCAS provided DashRx with post-Closing occupancy and access to the Applicants' leased premises at 2440 Winston Park Drive. DashRx will pay all rent and other occupancy costs and will indemnify the Applicants. The Applicants are seeking approval of, and authorization to enter into, an occupancy agreement with DashRx.

III. The proposed distribution of sale proceeds

24 The Applicants seek an order under which the sale proceeds would be distributed to the following persons or groups:

> (i) To use $235,315 to satisfy statutory priority claims relating to employee accrued and unpaid vacation pay claims;
>
> (ii) To pay the cash component of the purchase price to the DIP Lender to be used by the DIP Lender (i) to obtain the consent of the secured creditors, RBC and Castcan Investments Inc., to discharge their security interests and charges over the Purchased Assets and (ii) as to the balance, to make partial repayment of the DIP Lending Facility;
>
> (iii) To distribute $261,000 to the beneficiaries of the KERP Charge; and,
>
> (iv) To pay $100,000 to PwC, the proposed Trustee in Bankruptcy, for fees in connection with the anticipated bankruptcies of the Applicants.

Payment to the DIP Lender

25 The only parties claiming interests in priority to the DIP Lender are IBM, RBC and Castcan. The Purchaser will assume the liability for IBM. As to RBC and Castcan, at the time the DIP Lending Facility was put in place the DIP Lender negotiated a Pari Passu Agreement with RBC and Castcan. An issue arose concerning the validity of the security taken by Castcan in respect of certain assets, specifically Harmonized Sales Tax Refunds (the "HST Refunds"). I will discuss that issue in more detail below. For present purposes, suffice it to say that the Applicants propose that upon paying out the claims of the Senior Secured Creditors

from the cash proceeds received on Closing, the DIP Lender will be subrogated to and/or take an assignment of the Senior Secured Creditor's claims. The Applicants are expected to receive sizable tax credit entitlements within a matter of weeks. Those entitlements are Excluded Assets under the Purchase Agreement. As a result, any claims on them will not be vested out by operation of the proposed Approval and Vesting Order.

26 Against this background the Applicants seek an order authorizing and directing them, and any Trustee, to distribute to the DIP Lender amounts equal to any specified tax credit entitlements received. Such distributions would enable the DIP Lender to recoup part of the purchase price it will flow through to one of the Senior Secured Creditors — Castcan - on Closing.

27 If the aggregate amount of all tax credit entitlements received by the Applicants/Trustee post-Closing and distributed to the DIP Lender end up being less than the aggregate amount that the DIP Lender paid to RBC and Castcan out of the cash proceeds of the Transaction on Closing, then the DIP Lender will be issued an Additional Secured Note to cover the difference. The amount of the Additional Secured Note will come out of the pool of funds otherwise set aside for the unsecured creditors of the Applicants. The Unsecured Note therefore will be less than the total pool of possible proceeds for unsecured creditors, and an additional Unsecured Note will be issued to the Trustee for the benefit of the unsecured creditors once the face amount of the Additional Secured Note is known.

28 Although the DIP Indebtedness is not being paid out in full on Closing, the DIP Lender has consented to the payments of cash on account of the KERP and the future costs of bankruptcy estate administration.

29 Under the Initial Order the Directors' Charge ranked ahead of the KERP Charge. The Applicants asked the Court to terminate the Directors' Charge. Those benefiting from the Directors' Charge did not oppose that request.

KERP employees

30 The KERP originally benefitted twenty employees and allowed for a total maximum allocation of $500,000. The KERP was to be paid in the following installments: (i) 20% upon the raising of $8,000,000 for funding the DIP Facility, and PCAS receiving the authorization of this Court to borrow up to or in excess of that amount; (ii) 20% at the midway mark of the SISP; and, (iii) the balance of 60% upon the earliest of (i) the closing of a sale of all or substantially all of the assets, property and undertaking of the Applicants, or (ii) Court approval and sanction of a plan of arrangement or compromise in the *CCAA* Proceedings.

31 The commitment under the DIP Facility never reached $8 million, so the initial payment was not made. The second scheduled 20% payment was made on May 25, 2012. Payment of the 60% balance will be made from the cash proceeds on closing. Due to attrition, only sixteen employees remain in the KERP. The final 60% installment payable from the transaction proceeds will total $242,100, resulting in total KERP payments of $322,800.

IV. Positions of the Parties

32 The Senior Secured Creditors supported the orders sought by the Applicants. The Monitor recommended that the Court grant the orders. As noted, one unsecured creditor, Lanworks, sought to obtain further information and, on so doing, advised that it neither consented to nor opposed the orders sought. No other creditors appeared on the return of the motion.

33 The hearing of the motion started at 4:45 p.m. on June 5, 2012. At that time Mr. Peter Saunders, a shareholder, stated that he appeared on behalf of himself and other shareholders. He read a statement which expressed concern about the bidding process, and Mr. Saunders indicated that he and other shareholders would be meeting with counsel at 8:00 a.m. on June 6. Over the opposition of the Applicants and the Purchaser, I adjourned the hearing to June 6 at 10:00 a.m.

34 On June 6 Mr. Saunders returned, but without counsel. Ms. Wilson appeared for the first time on behalf of another shareholder, Mr. Dan Brintnell, and asked to make submissions. Also, Mr. Jaffe appeared on behalf of a potential bidder, Merge, which had not participated in the SISP and asked for leave to submit an offer. What then transpired was described in the following portions of my handwritten endorsement of June 6:

> This is the continuation of the approval/vesting/distribution motion commenced yesterday @ 4:45 p.m. At yesterday's hearing I asked questions of counsel for the applicants, Monitor and DIP lender on certain points and was provided answers.
>
> . . .
>
> Yesterday Mr. Peter Saunders, a shareholder, on behalf of himself and some other SHs, read a statement dated June 5/12 expressing concern about the bidding process. Mr. Saunders indicated they would be meeting counsel today @ 8 a.m. I adj'd the matter to 10 a.m. today to facilitate that meeting. This morning Mr. Saunders advised that counsel was unable to meet them; they plan to meet this afternoon. Mr. Saunders indicated that their counsel would like a 5-day adjm't of this motion.
>
> I will not grant the requested adjm't. By reasons dated May 14/12 I approved the SISP. By reasons dated May 28 I granted an extension of the stay until June 6. Both Reasons made clear the urgent nature of the SISP in the particular circumstances of these companies. No appeal was taken from, nor stay sought in respect of, either order. The public portion of the present motion materials provide detailed information about the conduct of the SISP and the bids. The portions sought to be sealed meet the test in *Sierra Club*. From previous motions I am aware that the applicants have communicated frequently with shareholders; the Monitor has posted all materials on its website.
>
> I am satisfied in the circumstances reasonable notice of this motion and the SISP has been given to all affected parties. The shareholders have not previously participated; that was their choice. It is unreasonable for them to seek to adjourn matters at this stage. The applicants run out of money tomorrow; the shareholders offer no concrete alternative.
>
> After writing these Reasons, on my return to Court, I was advised by counsel for Merge that they only learned of the sale process on May 30 and now wish to tender an Offer. I did not accept the Offer. The SISP was an open and transparent process. The OCA in *Soundair* spoke about the need to maintain the integrity of a court-approved sale process.[FN2] I am not prepared to accept an offer at this late stage. I note [that] Merge did not have counsel at yesterday's hearing.
>
> Ms. Wilson appeared for a SH, Dan Brintnell. After obtaining instructions, Ms. Wilson advised she had no further submissions.

V. Analysis of the proposed sale transaction

A. Guiding legal principles

35 In most circumstances resort is made to the *CCAA* to "permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets" and to create "conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all". The reality, however, is that "reorganizations of differing complexity require different legal mechanisms." This has led courts to recognize that the *CCAA* may be used to sell substantially all of the assets of a debtor company to preserve it as a going concern under new ownership, or to wind-up or liquidate it.[FN3]

36 The portions of section 36 of the *CCAA* relevant to this proposed sale to a non-related person are as follows:

> 36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> (2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
>
> (3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> (6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.
>
> (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

B. Consideration of the factors

Was notice of the application given to the secured creditors who are likely to be affected by the proposed sale or

disposition?

37 The applicants have satisfied this requirement. The Purchaser will assume the liability owing to IBM Canada. The other two secured creditors, RBC and Castcan, support the proposed transaction.

The reasonableness of the process leading to the proposed sale

38 The SISP was approved by this Court by order made May 14, 2012. In my Reasons of that date I stated:

> Given the extensive efforts to date by management of the applicants to solicit interest in the business and given the liquidity crunch facing the applicants, I was satisfied that the proposed SISP would result, in the specific circumstances of this case, in a fair, transparent and commercially efficacious process which should allow a sufficient opportunity for interested parties to come forward with a superior offer and thereby optimize the chances of securing the best possible price for the assets up for sale or the best possible investment in the continuing operations of the applicants. For those reasons I approved the SISP.[FN4]

39 Although the applicants took the lead in running the SISP, the evidence disclosed that the Monitor was involved in all stages of the process.

40 Before the commencement of these *CCAA* proceedings, members of the PCAS Board of Directors had engaged in separate dialogues with a significant number of parties who were interested in either investing in the DIP Lender to provide financing to the Applicants, purchasing the assets of the Applicants, or buying PCAS. During the SISP PCAS, with the assistance of PwCCF and the Monitor, (i) ran an electronic due diligence data-room, (ii) identified 184 potential bidders from around the globe and contacted 164 of them, (iii) developed a "teaser" which was circulated to 121 of the identified parties, as well as a confidential information memorandum which was posted to the data room and sent to the all of the 18 interested parties who had executed a non-disclosure agreement, (iv) conducted site tours at its Premises, with the Monitor in attendance, for seven potential bidders, (v) developed a non-reliance letter for Qualified Bidders to sign in order to be able to review third-party review of the PCAS technology prepared for the Board and facilitated meetings with the authors of the Technology Review at the request of two potential bidders.

41 In its Sixth Report dated May 28, 2012 the Monitor described in detail the steps taken up until that point of time in conducting the SISP. The Monitor provided updated information in its Seventh Report dated June 1, 2012. In its Confidential Appendix to the Seventh Report the Monitor presented detailed, un-redacted information about the bids which were tendered, the resulting communications with the bidders, and its comparative evaluation of the bids.

42 I am satisfied that the SISP run by the Applicants, with the extensive involvement of the Monitor, complied with the terms of the SISP approved in my May 14 Order.

43 As mentioned, on the continuation of the approval hearing on June 6 counsel appeared for a potential bidder, Merge, seeking to submit an offer on behalf of his client. In *Royal Bank v. Soundair Corp.*, in the context of an approval motion for a sale by a court-appointed receiver, Galligan J. considered the approach which a court should take where a second offer was made after a receiver had entered into an agreement of purchase and sale. He cited two judgments by Saunders J. which had held that the court should consider the second offer, if constituting a "substantially higher bid",5 and Galligan J.A. continued:

> What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.
>
> If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.[FN5]

44 In the present case I departed from the process described in the *Soundair* case and declined to accept Merge's offer for consideration. The facts in *Soundair* are quite distinguishable. In the *Soundair* case the second bidder had secured a court order permitting it to make an offer. By contrast, in the present case the court had approved a SISP which set a May 24, 2012 bid deadline. All other bids complied, or came very close to complying, with that court-approved deadline. Merge contended that it did not learn of the bidding process until May 30, a week after the bid deadline. The prompt posting of all court orders on the Monitor's website, when combined with Merge's delays in pursuing an offer after learning of this proceeding make it completely unreasonable for Merge to expect that a court would grant it leave to submit an offer for consideration. The court-approved SISP would be stood on its head were that allowed.

45 Moreover, as was apparent from the Monitor's detailed narration of the consideration given to the bids which were filed on or just after the court-approved bid deadline, time was spent during the SISP process for discussions amongst the Applicants, the Monitor and the bidders to ascertain whether their bids constituted Qualified Bids. The stay of proceedings in this case was set to expire on June 6, the date Merge came forth in court with its offer. The only cash available for Applicants' operations through to June 6 was the advance of $250,000 by the Purchaser to the Applicants on May 31. The Applicants stated that they would be out of funds by day's end on June 6 or early on June 7. Consequently, there was no realistic prospect that any offer tendered on June 6 could receive a measured consideration while the companies continued to operate.

46 Finally, Merge did not tender its offer at the commencement of the approval motion on June 5. Its counsel made no submissions that day nor signed the counsel sheet. The only reason I adjourned the hearing to June 6 was to afford some shareholders a brief opportunity to consult with counsel. I made it clear on the record on June 5 that hearing from those shareholders was the only order of business for June 6. Merge did not come forth until the resumption of the hearing on June 6. In those circumstances it was difficult to treat Merge's proffer of a bid as a serious one.

47 In sum, the compliance of the Applicants with the court-approved SISP and the unreasonableness of the timing of Merge's offer led me to conclude that the process leading to the proposed sale was reasonable.

Did the Monitor approve the process leading to the proposed sale or disposition?

48 In its Fifth Report dated May 11, 2012 the Monitor recommended approving the SISP.

Did the Monitor file with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy?

49 In its Seventh Report the Monitor set out at some length its views about the proposed sale transaction:

> The Monitor is of the view that the transaction contemplated by the APA meets the factors set out in section 36(3) of the *CCAA*. As previously described in the Fifth Report and the Sixth Report, the Monitor is of the view that an expedited SISP was likely the only viable process to maximize the value of the Company for the benefit of its stakeholders given the Company's dire liquidity situation.
>
> The APA provides for a going concern sale of the Company's business that maintains some Canadian operations and should allow for some continued employment.
>
> The Company and the DIP Lender developed the SISP in consultation with Monitor and, in the Monitor's view, the Company implemented a fair, transparent and efficient SISP in the circumstances in accordance with the Orders of this Court and the Court's reasons for decision dated May 14, 2012. Given the Company's liquidity situation, the necessity of implementing an expedited SISP and the bids received, it is the Monitor's view that the price obtained for the Company's assets is fair and reasonable in the circumstances. In addition, as reported in the Second Report, the Monitor is of the view that it is unlikely that a Trustee would have been able to appropriately take possession, market and sell the technology, intellectual property and other assets of the Company as a result of the Company having effectively no cash, limited accounts receivable and few unencumbered assets available to be monetized quickly in liquidation.

The Monitor recommended approving the Successful Bid.

To what extent were the creditors consulted?

50 The record disclosed that discussions had taken place with the secured creditors. Appropriate notice was given by the Applicants of all steps taken to seek approval of the DIP Lending Facility, the various extensions of the stay and approval of the SISP. As noted, only one unsecured creditor appeared at the approval hearing and its information questions were answered.

What are the effects of the proposed sale or disposition on the creditors and other interested parties?

51 As summarized by the Monitor in its Seventh Report:

> The APA does not provide for any recovery for the Company's shareholders. The APA provides as follows:
>
> a) statutory priority claims are paid in full in cash.
>
> b) The beneficiaries of the KERP are to be paid in full and in cash.
>
> c) The claim of the DIP Lender will be partially satisfied through a combination of cash and interest bearing secured notes convertible at maturity into cash or common shares of the Purchaser.
>
> d) The Company's unsecured creditors will receive their pro rata share of a pool of interest bearing unsecured notes convertible at maturity into cash or common shares of the Purchaser.
>
> e) The Company will assume the Assumed Liability [IBM].

> In addition, the APA also provides funding for a bankruptcy of the Company or a continuation of the CCAA Proceedings in respect of the Company. As described in further detail below, it is anticipated that the Company will be assigned into bankruptcy and that the entitlement of the unsecured creditors to the unsecured convertible notes will be determined through the statutory claims process provided under the *Bankruptcy and Insolvency Act* ... It is anticipated that one unsecured note will be provided to a trustee in bankruptcy to be appointed in respect of the Company.

Is the consideration to be received for the assets reasonable and fair, taking into account their market value?

52 In its Seventh Report the Monitor expressed its view that "the price obtained for the Company's assets is fair and reasonable in the circumstances". In the *Soundair* case Galligan J.A. stated:

> At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after ten months of trying to sell the airline, is strong evidence that the price in it was reasonable.[FN6]

So, too, in this case. Although no valuation was filed in respect of the companies' assets, the evidence filed on previous motions disclosed that the applicants had made efforts for many months prior to initiating *CCAA* proceedings to secure further investment in or the sale of the companies. The state of the companies, and the potential business opportunity they offered, were extensively known. Notwithstanding the short SISP, the Monitor reported that contact was made with a large number of potentially interested parties. Only three bids resulted. Of those three, two were not treated as Qualified Bids. The record, especially the Monitor's Confidential Appendix, supported the selection of the DashRx offer as the Successful Bid. Against the backdrop of those efforts, I concluded that the proposed purchase price was fair and reasonable.

Does the proposed transaction satisfy the requirements of section 36(7) of the CCCA?

53 The applicants did not sponsor a pension plan for its employees. With the payment of the statutory priority claims from the proceeds of sale, obligations under section 6(5)(a) of the *CCAA* will be satisfied.

C. Conclusion

54 In sum, the proposed Purchase Agreement met the specific factors enumerated in section 36(3) of the *CCAA* and, when looked at as a whole in the particular circumstances of this case, represented a fair and reasonable transaction.[FN7] For those reasons I authorized the proposed Purchase Agreement and granted the vesting order which was sought.

VI. Analysis of the proposed distribution

55 The distribution of the sale proceeds proposed by the Applicants, and supported by the Monitor, was straight-forward, save for one issue — the validity of Castcan's security in respect of HST Refunds.

A. The Castcan security issue described

56 In its Seventh Report the Monitor described the Pari Passu Agreement which the DIP Lender had negotiated with two secured creditors, RBC and Castcan, at the time of putting in place the DIP Lending Facility:

> The Monitor has been advised that the DIP Lender entered into an agreement with Castcan and others, whereby the DIP Lender agreed that its claims against the Company would be subordinate to the claims of Castcan (the "Pari Passu Agreement"). Pursuant to the Pari Passu Agreement, Castcan has the right to be repaid in full before the DIP Lender receives any consideration for the amounts it advanced under the DIP Facility... The Monitor has been advised that the DIP Lender has agreed that its position will also be subordinate to RBC, as provided for in the Initial Order.
>
> Although the Purchaser was willing to assume the liabilities owed to RBC and Castcan, they both advised that they were not willing to become creditors of the Purchaser and wanted to be paid in cash in full on closing. In order to accommodate the secured creditors' requests, the DIP Lender has agreed to pay RBC and Castcan in full in cash from the amount payable to the DIP Lender pursuant to the terms of the APA. As a result of that payment, the DIP Lender will be subrogated to or take an assignment of the positions of RBC and Castcan in respect of their validly perfected and secured positions, subject to the lack of clarity in the law in respect of the Castcan Loan and Security discussed below.

57 The lack of clarity in the law in respect of the Castcan Loan stemmed from the assignment of Crown debts, on a full recourse basis, made in the March 6, 2012 Factor Agreement between Castcan and the Applicants. The Crown debts assigned to Castcan included certain Scientific Research and Experimental Development ("SR&ED") refundable tax credit entitlements, Ontario Innovation Tax Credit ("OITC") refunds and harmonized sales tax ("HST") refunds. The Applicants executed a GSA in favour of Castcan to secure the obligations owing to Castcan, including those under the Factor Agreement.

58 Counsel to the Monitor provided an opinion that the assignment of the SR&ED Tax Credits and the OITC Tax Credits under the Factor Agreement was valid and the security granted in each GSA in respect of such assignments was valid and enforceable.

59 Section 67 of the *Financial Administration Act (Canada)*, R.S.C. 1985, c. F-11 (the "*FAA*") provides as follows:

> Except as provided in this Act or any other Act of Parliament,
>
> (a) a Crown debt is not assignable; and
>
> (b) no transaction purporting to be an assignment of a Crown debt is effective so as to confer on any person any rights or remedies in respect of that debt.

In light of that section, counsel to the Monitor advised that the HST Refunds might not be assignable and that the security granted in respect of the HST Refunds might not be valid and enforceable because no provision in the *Excise Tax Act* (Canada) or the *FAA* exempted the HST Refunds from section 67 of the *FAA*.

60 Castcan took the position that certain provisions in the Factor Agreement entitled it, in any event, to receive the HST Refunds. The Monitor commented on part of the argument advanced by Castcan:

> Section 12 of the Factor Agreement provides that if any right or entitlement that, as a matter of law is not assignable, the Company will: (a) co-operate with Castan to provide the benefits of these Non-Assignable Rights to Castcan, including, holding them in trust; (b) enforce any rights of Castcan arising from these Non-Assignable Rights; (c) take all actions to ensure that the value of these Non-Assignable Rights are

preserved; and (d) pay over to Castcan all monies collected in respect of these Non-Assignable Rights. One interpretation is that the obligations set out in Section 12 of the Factor Agreement with respect to the HST Refunds are enforceable and are secured by the GSAs. Another interpretation is that Section 12 simply gives rise to a claim in equity against the Company and that such an equitable claim may not be secured by the GSAs.

The Monitor is of the view that there is strong argument that Castcan has a claim against the Company for unjust enrichment and, to the extent of such unjust enrichment, a Court may order that a constructive trust applies to the monies advanced by Castcan in respect of the HST Refunds.

Given the provisions of the FAA and existing case law, counsel to the Monitor has advised that it cannot conclude with certainty that the obligations in the Factor Agreement in favour of Castcan with respect to the HST Refunds are secured by the GSAs. Accordingly, the Monitor is of the view that it is unclear whether any payment by the Company to Castcan in respect of the HST Refunds should be made in priority to other creditors.

The Monitor is of the view that the equities clearly favour paying Castcan the full amount owed to it under the Factor Agreement, including the amounts in respect of the HST Refunds. The Monitor notes that Castcan paid $1,000,000 to the Company in good faith on a full recourse basis at a time when the Company was in dire need of liquidity. The vast majority of the amounts paid by Castcan were used to fund the Company's payroll. In the Monitor's view, it would be inequitable for the Company or any of its creditors to get a windfall at the expense of a creditor that provided value to the Company as a result of lack of clarity in the existing law and the wording of the Factor Agreement.

61 The Applicants proposed that upon paying out the claims of the Senior Secured Creditors from the cash proceeds received on closing, the DIP Lender would be subrogated to and/or take an assignment of the Senior Secured Creditor's claims. The Applicants also sought an order which provided, in part, that they, or the proposed Trustee, pay to the DIP Lender any tax credit entitlements received in respect of the HST Refund, notwithstanding section 67 of the *FAA*. The Monitor explained the rationale for this request:

The DIP Lender is of the view that since there is likely no secondary market for the secured convertible notes, the net present value of the secured convertible notes is less than the face value of such notes. As a result, the DIP Lender is taking the position that the consideration it is receiving is insufficient to satisfy the full amount of the DIP Lender's claim against the Company. The DIP Lender is also of the view that the DIP Lender's Charge should continue to secure the obligations owing to the DIP Lender as a result of its shortfall after distribution of the proceeds to it on closing of the transaction contemplated by the APA. The Monitor supports the DIP Lender's views.

The DIP Lender is also of the view that the value of the notes should be discounted by an amount that is at least as great as the amount of the HST Refunds in order to permit the proceeds of the HST Refunds once received by the estate to be paid to the DIP Lender on account of its DIP Charge. The Monitor supports the DIP Lender's views with respect to the DIP Lender's Charge. Accordingly, the Monitor is of the view that the DIP Lender's Charge should remain effective over all of the Excluded Assets until such time as such refunds are received and become proceeds of the estate and the DIP Lender is repaid in full.

The parties with an economic interest in the proceeds of the transaction and the Tax Credit Entitlements have agreed to the arrangement with the DIP Lender described above with respect to the HST Refunds.

Such an arrangement will permit the DIP Lender to satisfy its obligations under the Pari Passu Agreement while still receiving the consideration that was agreed to be paid to it pursuant to the APA.

B. Legal analysis

62 Section 67 of the *FAA* provides that "no transaction purporting to be an assignment of a Crown debt is effective" except as provided in that Act or any other federal Act. In *Marzetti v. Marzetti* the Supreme Court of Canada held that under section 67 "a purported assignment of a Crown debt is rendered absolutely ineffective, as between debtor and creditor, and as between assignor and assignee."[FN8] The Court of Appeal, in *Profitt v. A.D. Productions Ltd. (Trustee of)*, held that purported assignments of federal sales tax refunds were invalid. [FN9]

63 In their factum the Applicants pointed to several cases which they contended might limit the application of the decisions in *Marzetti* and *Profitt*.[FN10] Castcan had submitted to the Monitor that several provisions of the Factor Agreement operated to give it priority to the HST Refund notwithstanding the *Marzetti* and *Profitt* decisions. I did not need to address those points to decide the motion. Assuming, for purposes of argument, the ineffectiveness of Castcan's security as it related to the HST Refund, that refund would constitute property of the Applicants. Pursuant to the Initial Order the DIP Lender was granted a charge on the "Property" of the Applicants which was defined as the Applicants' "current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof". The "Property" of the applicants included their entitlement to the HST Refund. Accordingly, in the event of a failure of Castcan's security, the DIP Lender would be entitled to the HST Refund.

64 Section 67 of the *FAA* does not prevent such a result since it only renders ineffective any "*transaction* purporting to be an assignment of a Crown debt". The DIP Lender's Charge created by the Initial Order was not such a "transaction". As the Supreme Court of Canada pointed out in *Bank of Montreal v. i Trade Finance Inc.*, rights which result from a court order are not rights stemming from a "transaction".[FN11] Section 67 of the *FAA* does not apply to rights created by a court order, including a DIP lending charge granted over all of a company's property pursuant to section 11.2(1) of the *CCAA*.

65 Since the DIP Lender would be entitled to the HST Refund in the event of a defect in Castcan's security, it was open to the DIP Lender to agree, with Castcan, as a matter of contract, that Castcan should receive full payout as contemplated by the Pari Passu Agreement.

66 As to the Applicants' request for an order that they, or the proposed Trustee, pay to the DIP Lender any tax credit entitlements received in respect of the HST Refund, I was satisfied that it was appropriate to exercise my discretion under section 11 of the *CCAA* to make such an order. I accepted the Monitor's view that the DIP Lender was entitled to be repaid in full upon the conclusion of the *CCAA* proceedings and that its charge should continue to secure the obligations to it as a result of the shortfall after distribution of the transaction proceeds. The use of the Secured Note to repay the DIP Lender entails a risk that the DIP Lender might not receive full repayment of its DIP Lending Facility. Consequently, I accepted the Monitor's view that it would be appropriate to discount the value of the note by an amount equal to the HST Refund. Such a result promotes, in part, the remedial purposes of the *CCAA* by ensuring that DIP lenders, whose role often is critical to the successful completion of a re-organization, can advance interim financing with the reasonable assurance of receiving repayment of their DIP loans.

67 As to the distribution of $100,000 of the sales proceeds to fund bankruptcy proceedings involving the

Applicants, I accepted the Monitor's view that since no further funds existed to continue the *CCAA* proceedings, a bankruptcy would serve as the most cost effective and efficient way in which to complete the winding-up of the companies' affairs, including establishing a mechanism to determine the quantum for unsecured claims.

68 For those reasons I approved the distribution of the sale proceeds proposed by the Applicants, as well as the related orders terminating the *CCAA* proceedings upon the Monitor filing its discharge certificate and approving the Monitor's Seventh Report and the activities described therein.

VII. Sealing order

69 The information contained in the Confidential Appendix to the Monitor's Seventh Report clearly met the criteria for a sealing order set out in *Sierra Club of Canada v. Canada (Minister of Finance)*.[FN12] In order to protect the integrity of the SISP and the proposed sales transaction, I granted an order that the appendix be sealed until the completion of the Purchase Agreement transaction.

Application granted.

FN1 April 20, 2012 (2012 ONSC 2423 (Ont. S.C.J. [Commercial List])); May 5, 2012 (2012 ONSC 2714 (Ont. S.C.J. [Commercial List])); May 8 (2012 ONSC 2778 (Ont. S.C.J. [Commercial List])); May 14, 2012 (2012 ONSC 2840 (Ont. S.C.J. [Commercial List])); May 28, 2012 (2012 ONSC 3147 (Ont. S.C.J. [Commercial List])).

FN2 *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). See in particular the Reasons of Galligan J.A. at pp. 7d to 10c.

FN3 See the cases summarized in *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]), para. 32.

FN4 2012 ONSC 2840 (Ont. S.C.J. [Commercial List]), para. 19. 5 *Selkirk, Re* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.); *Beauty Counsellors of Canada Ltd., Re* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.)

FN5 *Soundair, supra.*, pp. 9h-10c.

FN6 *Soundair, supra.*, p. 8g.

FN7 *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (Que. S.C.), paras. 48 and 49.

FN8 [1994] 2 S.C.R. 765 (S.C.C.), para. 99.

FN9 (2002), 32 C.B.R. (4th) 94 (Ont. C.A.), para. 28.

FN10 *Cargill Ltd. v. Ronald (Trustee of)* (2007), 32 C.B.R. (5th) 169 (Man. Q.B.); *McKay & Maxwell Ltd., Re* (1927), 8 C.B.R. 534 (N.S. T.D.); *Christensen, Re* (1961), 2 C.B.R. (N.S.) 324 (Ont. S.C.); *Front Iron & Metal Co., Re.* (1980), 36 C.B.R. (N.S.) 317 (Ont. Bktcy.).

FN11 [2011] 2 S.C.R. 360 (S.C.C.), para. 30. See also, *Torstar Corp. v. ITI Information Technology Institute Inc.* (2002), 36 C.B.R. (4th) 114 (N.S. S.C. [In Chambers]), paras. 29 and 32.

FN12 [2002] 2 S.C.R. 522 (S.C.C.).

END OF DOCUMENT

TAB 7

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 8

2009 CarswellOnt 9415

SkyPower Corp., Re

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

In the Matter of a Plan of Compromise or Arrangement of SkyPower Corp.

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Judgment: October 27, 2009
Docket: 09-8321-00CL

Counsel: Robert Chadwick, Fred Myers, Cathy Costa, for Applicant

G. Smith & C. Costa, for Applicant

M. McNaughton, for KPMG Inc.

R. Askew, for Cad-Fairview

J. Bunting, for Nordback

J. MacDonald, for HSH Nordback Syndicate

K. Mak, for Lehman Bros.

S. Laubman, for Sean Edison

M. Weinczoh, for Golden Assoc.

R. Stabile, for CIM Group

K. McEachern, for West L.B.

Subject: Insolvency

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Cases considered by *Morawetz J.*:

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.) — followed

Morawetz J.:

1 Counsel to the Applicant advised that two orders were being sought namely the stay extension to November 30/09 and the approveal of the sale of the Applicants Solar business to 1495359 Alberta ULC (the "Purchaser"), an affiliate of CIM Group, the Applicant's DIP lender. The motions were not opposed.

2 The portion of the motion relating to an authorization to draw an increased amount under the DIP facility did not proceed.

Stay Extension

3 A sales process was authorized on Aug 25/09. The sales process is progressing.

4 The third report of the Monitor provides a summary of the process to date. The Monitor has been actively involved in the process, in part due to the fact that the proposed transaction on the solar business is between the Applicant and an affiliate of the DIP lender.

5 I am satisfied having reviewed the record and having heard submission that the applicant continues to work in good faith and with due diligence such that the xtension to November 30, 2009 is awarded. The projected cash flow did contemplate on increase DIP facility.

6 The Court was advised that the Applicant has decided that the Development Expense of $3.318 million scheduled for the week of Nov 29/09 will not be incurred. In the event the situation changes, counsel advised that a further court application will he made. Based in this representation I am satisfied that there should be sufficient availability in the DIP Facility to permit operations to continue during the extension period.

7 Accordingly an order shall issue in the form presented extends the stay to November 30, 2009.

Approval of Sale to Purchase

8 The details of the proposed transaction relating to the Solar Business are set out in the Adler affidavit and the Third Report of the Monitor.

9 In addition, the Applicant filed separately a copy of the Sale purchase Agreement which disclosed the purchase price. The Monitor also filed a 2 page summary of the various offer received for the sales Business. This summary also contained comments of the Monitor which composed the various offers and the reasons why the Monitor recommended approval of the transactions with the purchaser. Having reviewed the complete record

and having heard submissions and upon being advised that the secured creditors support the proposed transaction.

10 I am satisfied that the transaction provides for a reasonable outcome for affected stakeholders in the circumstances. I am also satisfied that the parties have conducted the sales process in accordance with guidelines set forth in *Royal Bucks v. Soundarin.* I specifically note that, with one exception, all competing offers to that of the purchaser, were significantly lower. With respect to the one offer that was not substantially lower, I accept the Monitor's recommendation and that of the Applicant that the offer of the purchaser is preferable and should be accepted.

11 The proposed schedules to the agreement have been amended in non-material areas. These proposed changes are acceptable.

12 I am also satisfied that proposed amendments to the draft order relating to landlord issues and secured creditors issues are acceptable.

13 The proposed transaction with the purchaser for the Sales Business is approved. It goes without further comment that nothing in this endorsement is intended to impact on any parties rights with respect to any sale approval motion relating to other assets of the Applicant.

14 The Applicant has also requested that Sale Agreement be sealed on the basis that it contains sensitive price information, the disclosure of which could be harmful to the stakeholders. Likewise, the Monitor has requested that the 2 page summary of offers also be sealed for the same reason. I am satisfied that the disclosure of this informations could be harmful to the stakeholders. Having considered the "sealing tests" as set out ion the *Sierra Club of Canada v. Canada (Minister of Finance)* [2002 CarswellNat 822 (S.C.C.)] decision of the S.C.C., I am satisfied that these two documents should be sealed pending further order.

15 An order giving effect to the foregoing is to be issued in the form presented.

END OF DOCUMENT

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 JANUARY 29, 2014)

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