Court File No. CV-18-608978-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

(COMMERCIAL LIST)

BETWEEN

BRIDGING FINANCE INC., as agent for 2665405 ONTARIO INC.

Applicant

-and-

1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) 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 February 25, 2019)
(Approval of Brampton Transaction and Supplemental Relief)

February 21, 2019

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Lawyers for KSV Kofman Inc.,
in its capacity as Court-appointed Receiver

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3.	*Skyepharma PLC v. Hyal Pharmaceutical Corp.*, (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)).
4.	*Integrated Building Corp. v. Bank of Nova Scotia* (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.).
5.	*Battery Plus Inc. (Re.)*, [2002] O.J. No. 731.
6.	*Re AbitibiBowater Inc.*, 2010 QCCS 1742.
7.	*Re Grant Forest Products Inc.*, 2010 ONSC 1846 [Comm. List].
8.	Houlden, Lloyd W. et al, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2018), L20.
9.	*Royal Bank of Canada v. Atlas Block Co. Limited*, 2014 ONSC 1531.
10.	*Re Windsor Machine & Stamping Ltd.*, 2009 CanLII 39772 (ON SC).
11.	*Re Abitibibowater Inc.*, 2009 QCCS 6461 (CanLII) (QC SC).
12.	*Confectionately Yours Inc., Re*, 2002 CarswellOnt 3002 (C.A.).
13.	*Belyea v. Federal Business Development Bank*, 1983 CarswellNB 27 (C.A.).
14.	*BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, 1997 CarswellOnt 1246 (Sup. Ct. (Commercial List)).
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TAB1

Court File No. CV-18-608978-00CL

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE HONOURABLE MR.	)	**MONDAY, THE 19TH**
	)	
JUSTICE HAINEY	)	**DAY OF NOVEMBER, 2018**

BETWEEN

BRIDGING FINANCE INC., as agent for 2665405 ONTARIO INC.

Applicant

- and -

1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) 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

ORDER
(Appointing Receiver)

THIS APPLICATION made by Bridging Finance Inc. (the "**Applicant**"), as agent for 2665405 Ontario Inc., for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") appointing KSV Kofman Inc. ("**KSV**") as receiver and manager (in such capacities, the "**Receiver**") without security, of (i) all of the assets, undertakings and properties of 1033803 Ontario Inc. operating as Forma-Con Construction and Forma Finishing ("**Forma-Con**") and 1087507 Ontario Limited (together with Forma-Con, the "**Debtors**") acquired for, or used in relation to a business carried on by the Debtors, (ii) the specific assets of Bondfield

Construction Company Limited and Bondfield Construction Equipment Ltd. listed on Schedule A hereto (the "**Forma-Con Related Assets**"), and (iii) the real property known municipally as 131 Saramia Crescent in Vaughan, Ontario ("**131 Saramia Crescent**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Brian Champ sworn November 15, 2018, and the Exhibits thereto and on hearing the submissions of counsel for the Applicant, the Debtors and their affiliates, Zurich Insurance Company Ltd. and Canada Revenue Agency, no one else appearing although duly served as appears from the affidavit of service of Loren Cohen sworn November 15, 2018, and on reading the consent of KSV to act as the Receiver,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. **THIS COURT ORDERS** that pursuant to section 243(1) of the BIA and section 101 of the CJA, KSV is hereby appointed Receiver, without security, of: (i) all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof; (ii) the Forma-Con Related Assets; and (iii) 131 Saramia Crescent, the details of which are specified on Schedule B hereto (collectively, the "**Property**").

RECEIVER'S POWERS

3. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of any Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform or disclaim any contracts of a Debtor;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors or in respect of the Property and to exercise all remedies of a Debtor or the owner of the Property in collecting such monies, including, without limitation, to enforce any security held by a Debtor or in respect of Property;

(g) to settle, extend or compromise any indebtedness owing to the Debtors;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of a Debtor, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors (or any one of them), the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or

applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to file an assignment in bankruptcy on behalf of any Debtor, or to consent to the making of a bankruptcy order against a Debtor;

(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $500,000, provided that the aggregate consideration for all such transactions does not exceed $2,000,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

(m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

(q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;

(r) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have; and

(s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. **THIS COURT ORDERS** that (i) the Debtors, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records,

and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

7. **THIS COURT ORDERS** that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured

creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days' notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

8. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

9. **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. **THIS COURT ORDERS** that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any of the Debtors, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtors or in respect of the Property or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors or in respect of the Property are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

14. **THIS COURT ORDERS** that all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on a Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such

amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. **THIS COURT ORDERS that**, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be

deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $2,000,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule C hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

24. **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

25. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List

website) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: http://www.ksvadvisory.com/insolvency-cases/Forma-Con.

26. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

CRITICAL PAYMENTS

27. **THIS COURT ORDERS** that the Receiver may, with the written consent of the Applicant, make payments owing by the Debtors to subcontractors and other creditors on account of amounts owing prior to the date of this Order.

GENERAL

28. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

29. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of any Debtor.

30. **THIS COURT HEREBY 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 and to assist the Receiver 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 Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. **THIS COURT ORDERS** that the Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtors' estates with such priority and at such time as this Court may determine.

33. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver, the Applicant and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

34. **THIS COURT ORDERS** that the style of cause for this Application be and is hereby amended as set forth in this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

NOV 19 2018

PER / PAR:

HAINEY J.

SCHEDULE A

FORMA-CON RELATED ASSETS

[ATTACHED]

Forma - Con Construction; Crane location log Sep.10, 2018

MAKE	MODEL	YEAR	SERIAL #	CURRENT LOCATION
Comedil	CTL160-A Luffer	2006	SN-G8706022	WATERWORKS
Comedil	CTL160-A Luffer	2006	SN-G8706030	MASSEY TOWER
Comedil	CTL160-A Luffer	2006	SN-G8706041	CITY LIGHTS
Comedil	CTL160-A Luffer	2007	SN-G8707026	CITY LIGHTS
Comedil	CTL160-A Luffer	2007	SN-G8707050	AXIS CONDO
Comedil	CTL250-A Luffer	2005	SN-G1005004	YC CONDO
Comedil	CTL250-A Luffer	2006	SN-G1006005	21 AVENUE ROAD
Comedil	CTT 331-16-m	2005	SN-G5906001	DTEM C&D
Comedil	CTT 331-16-m	2005	SN-G5905025	WATERLOO SLC-PAC
Comedil	CTT 331-16-m	2005	SN-G5905049	YARD
Comedil	CTT 331-16-m	2005	SN-G5905031	Mills Square
Pecco	PC 1600		SN-0710	EAST UNITED
Pecco	PC 1600/2003	1976	SN-0603	VANGUARD
Pecco	PC 2000		SN-0307	YARD
Pecco	PC 2000		SN-1103	YARD
Pecco	PC 3000		SN-0107	BLUEDIAMOND
Pecco	PC 3600	1980	SN-304	Yard
Peiner	SK- 200	1981	SN-0803	YARD
Peiner	SK-140		SN-0915	YARD
Peiner	SK-315	2004	SN-25125	YARD
Peiner	SK-315	2004	SN-25127	RENTED
Peiner	SK-315	1999	SN-105	YARD
Peiner	SK-315	2005	SN-25143	St Josephs Morrow
Peiner	SK-315	2000	SN-059	YARD
Peiner	SK-415	2004	SN-26028	YARD
Peiner	SN 166 Luffing	1999	SN-006	671 Prince Edward
Potain	MR405-Luffing	1999	SN-67069	WATERWORKS
Manitowoc	8000 - CRAWLER	2007	SN-8501037	VISTA CONDO
Manitowoc	8000 - CRAWLER	2011	SN-8501202	ST JOSEPH MORROW
Grove	RT540E MOBILE	2011	SN-231627	ST JOSEPH MORROW
Grove	RT540E MOBILE	2011	SN-227154	Massey Hall
Grove	RT745 TON		SN-70178	Yard
ashun	GUY80A	2007	SN-1128	Yard

Sold

3~~3~~ Cranes
32

[illegible] SCHEDULE OF CRANES

#	Bondfield Owner	Type	Year	Make / Model	Serial Number	Additional Info / Notes	Acquisition Date	Disposal	Change Date	Project / Location
0.01	Bondfield Construction Co Ltd.	Crane (Mobile)	TBA	Grove RT [illegible] Ton Rough Terrain Crane	70173		2002			Coptic Church
0.02	Bondfield Construction Co Ltd.	Crane (Mobile)	2007	Manitowoc Crawler Crane, Model 8000 ([illegible] attachments, as per bill of sale - on file with [illegible])	8801037	Location - Women's College PH-2	13-Nov-12			Women's College PH-2
0.03	Bondfield Construction Co. Ltd.	Crane (Mobile)	2011	Manitowoc Crawler Crane, Model 8000-1	8801202	Purchased - Bill of Sale on file	20-Feb-13			Laurentian University
0.04	Bondfield Construction Co. Ltd.	Crane (Mobile)	2011	Grove RT540E, 40 Ton 4X4 Rough Terrain Crane	231627	Purchased - Bill of Sale on file (USED from an Auction - Orlando, FL, USA)	25-Feb-13			TTC Subway
0.05	Bondfield Construction Co. Ltd.	Crane (Mobile)	2011	Grove RT540E, 40 Ton 4X4X4 Rough Terrain Crane	227164	Purchased - Bill of Sale on file (USED from an Auction - Orlando, FL, USA)	25-Feb-13			TTC Wilson
1	Bondfield Construction Co Ltd.	Crane (Tower)	2005	Comedil Model GTT [illegible] Tower Crane ([illegible] jib, 10 [illegible] tower sections, counter jib, operators cabin, counter weights for all jib lengths, 2/4 part trolley, new trolley, hoist rope)	G5905019		15-Mar-05			Coptic Church
2	Bondfield Construction Co Ltd.	Crane (Tower)	2005	Comedil Model GTT [illegible] Tower Crane ([illegible] jib, 10 [illegible] tower sections, counter jib, operators cabin, counter weights for all jib lengths, 2/4 part trolley, new trolley, hoist rope)	G5905031		15-Mar-05			University of Waterloo
3	Bondfield Construction Co Ltd.	Crane (Tower)	2005	Comedil Model GTT [illegible] Tower Crane ([illegible] jib, 10 [illegible] tower sections, counter jib, operators cabins, counter weights for all jib lengths, 2/4 part trolley, new trolley, hoist rope)	G5905025		15-Mar-05			TTC Subway
4	Bondfield Construction Co Ltd.	Crane (Tower)	2005	Comedil Model GTT [illegible] Tower Crane ([illegible] jib, [illegible] tower sections, counter jib, operators cabin, counterweights for all jib lengths, 2/4 part trolley, new trolley, hoist rope)	G5906001		15-Mar-05			155 Davenport
5	Bondfield Construction Co Ltd.	Crane (Tower)	2004	Potain [illegible] Tower Crane [illegible] [illegible], 1 [illegible] tower sections, 1 TSK, 1 Davit Crane, 2 part trolley, 250' [illegible], 100 HP hoist motor and 1 set of bolted counterweights.	26125	Purchased - Bill of Sale on file	25-Apr-08			#2 Old Mill
6	Bondfield Construction Co Ltd.	Crane (Tower)	2008	Comedil Model GTL 260-A Luffer Tower Crane (with attachments / accessories as per invoice on file with [illegible])	G1008004		04-Apr-11			Neon Condominium
7	Bondfield Construction Co Ltd.	Crane (Tower)	2008	Comedil Model GTL 260-A Luffer Tower Crane (with attachments / accessories as per invoice on file with [illegible])	G1008005		04-Apr-11			Yorkville Condos
8	Bondfield Construction Co Ltd.	Crane (Tower)	1980	Pecco [illegible] Tower Crane	334		TBA			Markham Southeast
9	Bondfield Construction Co Ltd.	Crane (Tower)	1978	Pecco PG 1500 / 2000 Tower Crane	11603		TBA			X2 Condominiums
10	Bondfield Construction Co Ltd.	Crane (Tower)	TBA	Pecco PG 2000 Free Standing Tower Crane (with accessories and attachments as per bill of sale - on file with [illegible])	0907		24-Jul-12			117 Peter Street

BONDFIELD CONSTRUCTION COMPANY LIMITED

#	Registered Owner	Type	Year	Make / Model	Serial Number	Additional Information / Notes	Acquisition Date	Change	Change Date	Project / Location
[illegible] SCHEDULE OF CRANES										
11	Bondfield Construction Co Ltd.	Crane (Tower)	[illegible]	[illegible] Self Standing Tower Crane (with accessories and attachments as per bill of sale - on file with [illegible])	0710		24-Jul-12			Q2 [illegible]
12	Bondfield Construction Co Ltd.	Crane (Tower)	2004	Potain SK415 Tower Crane CL Unit [illegible], includes: [illegible] 1 TSK, 1 Davit Crane, 2 pad [illegible], 100 HP hoist motor and 1 set of [illegible] counter weights.	26127	Purchased - Bill of Sale on file	28-Apr-08			Women's College PH-2
13	Bondfield Construction Co Ltd.	Crane (Tower)	1990	Potain Model SK415 Tower Crane	105		05-Apr-05			GIB Laurier University - Crane #1
14	Bondfield Construction Co Ltd.	Crane (Tower)	2005	Potain SK415 Tower Crane (with accessories and attachments as per bill of sale - on file with [illegible])	25145		27-Apr-12			York Community Center
15	Bondfield Construction Co Ltd.	Crane (Tower)	2006	Potain SK415 Tower Crane (with accessories and attachments as per bill of sale - on file with [illegible])	050		11-Jul-12			McMaster University
16	Bondfield Construction Co Ltd.	Crane (Tower)	1991	Potain SK-200 Tower Crane	0503		TBA			1 Old Mill Trail
17	Bondfield Construction Co Ltd.	Crane (Tower)	1980	Potain SN 155 Luffing Tower Crane	000		TBA			Yard
18	Bondfield Construction Co Ltd.	Crane (Tower)	1994	Potain SK-140 Tower Crane Includes Internal Climbing Equipment including all hydraulics - see Bill of Sale for details	0518	Purchased - Bill of Sale on file	02-Feb-05			Forest Hill Synagogue
19	Bondfield Construction Co Ltd.	Crane (Tower)	2005	Potain SK-415 Tower Crane CL Unit #0757, includes: [illegible] 1 TSK, 1 Davit Crane, 2 pad [illegible], 100 HP hoist motor and 1 set of [illegible] counter weights.	20078	Purchased - Bill of Sale on file	28-Apr-08			GIB Laurier University - Crane #2
20	Bondfield Construction Co Ltd.	Crane (Tower)	1999	Potain MR405 Luffing Tower Crane BL Unit #8088, includes: [illegible] 1 KMAST Adaptor, [illegible] power [illegible], 1 [illegible] PIN puller and 1 set of [illegible] counter weights	67089	Purchased - Bill of Sale on file	28-Apr-08			On Rental
21	Bondfield Construction Co Ltd.	Crane (Tower)	2006	Terex Comedil CTL 180-A Luffer	G8708928	Per Crane Schedule Rochelle sent Oct. 1st, 2015 - ESTIMATED VALUE - TO BE ADJUSTED BY INSURED Purchased - Invoice on File (Aug. 20, 2014)				Kampta Condo
22	Bondfield Construction Co Ltd.	Crane (Tower)	2006	Terex Comedil CTL 180-A Luffer	G8708080	Per Crane Schedule Rochelle sent Oct. 1st, 2015 - ESTIMATED VALUE - TO BE ADJUSTED BY INSURED Purchased - Invoice on File (Aug. 20, 2014)				Slate Condo
23	Bondfield Construction Co Ltd.	Crane (Tower)	2005	Terex Comedil CTL 180-A Luffer	G8708014	Per Crane Schedule Rochelle sent Oct. 1st, 2015 - ESTIMATED VALUE - TO BE ADJUSTED BY INSURED Purchased - Invoice on File (Aug. 20, 2014)				Bond Condo

BONDFIELD CONSTRUCTION COMPANY LIMITED

2013-2018 SCHEDULE OF CRANES

#	Registered Owner	Type	Year	Make / Model	Serial Number	Additional Information / Notes	Acquisition Date	Change	Change Date	Project / Location
34	Bondfield Construction Co. Ltd.	Crane (Tower)	2007	[illegible] Tower Crane, Terex CTL 140.16 [illegible] [illegible]	G0507025 Chair No. G022-2014	Purchased - Bill of Sale on file (EVOLUT? - Italy) *Value is converted from Euro's into Canadian dollars	17-Apr-14			Yard - Available
35	Bondfield Construction Co. Ltd.	Crane (Tower)	TBA	Pecco PG 3000 Tower Crane	1103		20-Jul-14			Yard - Available
36	Bondfield Construction Co. Ltd.	Crane (Tower)	TBA	Pecco PG 3000 Tower Crane	107		28-Jul-14			Parkway E2
37	Bondfield Construction Co. Ltd.	Crane [illegible]	2007	[illegible] Crawler Crane [illegible] with all Attachments and Accessories	1128	Purchased	06-Jun-15			
38	Bondfield Construction Co. Ltd.	Crane (Tower)	2008	Terex CTL 180 - [illegible] 40 meter [illegible] tower, fully [illegible] cable, 45KW and lifting motor	G4707050	Purchased from Lavit Cranes. Crane is stamped 2008 serial number reflects 2007	06-Jun-17			
39	Bondfield Construction Co. Ltd.	Crane (Tower)	2007	Comedil CTL 180 Tower Crane	TBA	Waiting on more information from Rochelle & [illegible]	17-18 Term			

BONDFIELD CONSTRUCTION COMPANY LIMITED
407 BASALTIC ROAD
CONCORD, ONTARIO, CANADA

Department Evaluation Summary

Effective Date: July 23, 2018

Departments:
Cranes - Basaltic Yard
Cranes - Off Site
Concrete Forming & Shoring Equipment

407 BASALTIC ROAD
CONCORD, ONTARIO, CANADA

Description		
CONTRACTOR'S EQUIPMENT		
Item #1 Qty:(1) Comedil Model CTL180-A 16-Ton Luffing Tower Crane, S/N G8706022, (2006); 55 Meter Radius, 92.5 Meter Under Hook; with (9) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams		
Item #2 Qty:(1) Comedil Model CTT 331-16-M 16-Ton Tower Crane, S/N G5905031, (2005); 75 Meter Radius, 92.5 Meter Under Hook; with (12) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams		
Item #3 Qty:(1) Comedil Model CTT 331-16-M 16-Ton Tower Crane, S/N G5905049, (2005); 75 Meter Radius, 92.5 Meter Under Hook; with (12) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams		
Item #4 Qty:(1) Pecco Model PC-2000 22,000-Lb. Tower Crane, S/N 1103; 50 Meter Radius, 48 Meter Under Hook; with (7) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams		
Item #5 Qty:(1) Peiner Model SK-200 6.25-Ton Tower Crane, S/N 0803, (1981); 55 Meter Radius, 48 Meter Under Hook; with (11) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams		
Item #6 Qty:(1) Peiner Model SK-140 6.25-Ton Tower Crane, S/N 0515; 55 Meter Radius, 48 Meter Under Hook; with (6) Tower Sections; (3) Outer Sections; and Apex Jib Section		
Item #7 Qty:(1) Peiner Model SK-315 16-Ton Tower Crane, S/N 26125, (2004); 70 Meter Radius, 72 Meter Under Hook; with (11) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams		
Item #8 Qty:(1) Peiner Model SK-315 16-Ton Tower Crane, S/N 105, (1999); 70 Meter Radius, 72 Meter Under Hook; with (11) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams		

Description		
Item #9		
Qty:(1)	Peiner Model SK-315 16-Ton Tower Crane, S/N 060, (2000); 70 Meter Radius, 72 Meter Under Hook; with (11) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams	
Item #10		
Qty:(1)	Peiner Model SK-415 20-Ton Tower Crane, S/N 26078, (2004); 75 Meter Radius, 65 Meter Under Hook; with (11) Tower Sections, (5) Top Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams	
Item #11		
Qty:(1)	Grove Model RT745-45-Ton Wheel Rough Terrain Crane, S/N 70173, (1988); with Outriggers; (New Engine 2015)	
Item #12		
Qty:(1)	Lot of Miscellaneous and Large Quantity of Tower Crane Parts and Components, To Include But Not Limited To: Beams; Adaptors; Brackets; Panels; Corner Units; Braces; Frames; Jacks; Extensions; Screws; Bases; Decks; Racks; Clips; Tube; Planks; Stairways; Hooks; Baskets; etc.	
[redacted]		
[redacted]		
Item #13		
Qty:(1)	Comedil Model CTL180-A 16-Ton Luffing Tower Crane, S/N G8706030, (2006); 55 Meter Radius, 92.5 Meter Under Hook; with (9) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected) (Asset Documentation in Photograph Section)	
Item #14		
Qty:(1)	Comedil Model CTL180-A 16-Ton Luffing Tower Crane, S/N G8706011, (2005); 55 Meter Radius, 92.5 Meter Under Hook; with (9) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)	
Item #15		
Qty:(1)	Comedil Model CTL180-A 16-Ton Luffing Tower Crane, S/N G8707026, (2007); 55 Meter Radius, 92.5 Meter Under Hook; with (9) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)	

Description		
Item #16 Qty:(1)	Comedil Model CTL180-A 16-Ton Luffing Tower Crane, S/N G8707060, (2007); 55 Meter Radius, 92.5 Meter Under Hook; with (9) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)	
Item #17 Qty:(1)	Comedil Model CTL250-A 16-Ton Luffing Tower Crane, S/N G1006004, (2006); 55 Meter Radius, 92.5 Meter Under Hook; with (10) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)	
Item #18 Qty:(1)	Comedil Model CTL250-A 16-Ton Luffing Tower Crane, S/N G1006005, (2006); 55 Meter Radius;,92.5 Meter Under Hook; with (10) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)	
Item #19 Qty:(1)	Comedil Model CTT 331-16-M 16-Ton Tower Crane, S/N G5906001, (2005); 75 Meter Radius, 92.5 Meter Under Hook; with (12) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)	
Item #20 Qty:(1)	Comedil Model CTT 331-16-M 16-Ton Tower Crane, S/N G5905025, (2005); 75 Meter Radius, 92.5 Meter Under Hook; with (12) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)	
Item #21 Qty:(1)	Pecco Model PC-1600 22,000-Lb. Tower Crane, S/N 0710; 50 Meter Radius, 48 Meter Under Hook; with (7) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)	
Item #22 Qty:(1)	Pecco Model PC-1600/2000 (Hybrid) 22,000-Lb. Tower Crane, S/N 0603, (1976); 50 Meter Radius, 48 Meter Under Hook; with (7) Tower Sections; Apex & (4) Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams	
Item #23 Qty:(1)	Pecco Model PC-2000 22,000-Lb. Tower Crane, S/N 0907; 50 Meter Radius, 48 Meter Under Hook; with (7) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams	
Item #24 Qty:(1)	Pecco Model PC-3600 28,000-Lb. Tower Crane, S/N 304, (1980); 60 Meter Radius, 35 Meter Under Hook; with (7) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)	

Description		
Item #25 Qty:(1) Pecco Model PC-3000 22,000-Lb. Tower Crane, S/N 0107/109; 55 Meter Radius, 42 Meter Under Hook; with (6) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)		
Item #26 Qty:(1) Peiner Model SK-315 16-Ton Tower Crane, S/N 25127, (2004); 70 Meter Radius, 72 Meter Under Hook; with (11) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)		
Item #27 Qty:(1) Peiner Model SK-315 16-Ton Tower Crane, S/N 25148, (2005); 70 Meter Radius, 72 Meter Under Hook; with (11) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)		
Item #28 Qty:(1) Peiner Model SN166 12-Ton Luffing Tower Crane, S/N 006, (1999); 50 Meter Radius, 98 Meter Under Hook; with (4) Single, (1) Double Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)		
Item #29 Qty:(1) Potain Model MR405 24-Ton Luffing Tower Crane, S/N 87069-M, (1999); 60 Meter Radius, 125 Meter Under Hook; with (11) Tower Sections; Heel & Jib Sections; Heated/AC Enclosed Operator's Cab, (Broken Window); Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)		
Item #30 Qty:(1) Manitowoc Model 8000 80-Ton Crawler Crane, S/N 8501037, (2007); (Not Inspected)		
Item #31 Qty:(1) Manitowoc Model 8000 80-Ton Crawler Crane, S/N 8501202, (2011); with Proface Touch Screen Monitor; Counter Weights; Model J60024RTC Hook, S/N 11-7238, 60-Ton Load, 7/8" Rope, 54.41 MT; and 160' Main Lattice Boom; (Not Inspected) (Asset Documentation in Photograph Section)		
Item #32 Qty:(1) Grove Model RT540E 40-Ton Rough Terrain Crane, S/N 231527, (2011); with 4-Section 102' Main Telescopic Boom; and 45' Swing Away Jib, with Stinger; (Not Inspected) (Asset Documentation in Photograph Section)		
Item #33 Qty:(1) Grove Model RT540E 40-Ton Rough Terrain Crane, S/N 227154, (2011); 12,569 Hours Indicated; with 4-Section 102' Main Telescopic Boom; and 45' Swing Away Jib, with Stinger		

Description
Item #34
Qty:(1) Fushun Yongmao Model QUY80A 80-Ton Crawler Crane, S/N 1126, (2007); with LSI Load System Monitor
Item #35
Qty:(1) Grove Model RT85S 35-Ton Rough Terrain Crane, S/N 33378, (1975); 1,583.9 Hours Indicated; with 4-Section Telescopic Boom; (Not Inspected) (Asset Documentation in Photograph Section)
[redacted]
[redacted] Concrete Forming & Shoring Equipment
Item #36
Qty:(1) Lot of Concrete Forming & Shoring Rental Equipment; (Note: Based On Information Supplied By The Company; Complete Detailed List Located in Appendix)
[redacted]
[redacted]

QTY	Year Make & Model or Equipment Description
20	2014 Ford F150 XLT Pickup truck
1	2013 Kenworth T800B Boom Truck with 30 Tonne Manitex Crane
1	2015 Kenworth T880B Roll-Off Truck
4	Roll-Off Deck for 2015 Kenwoth T880B Roll-Off Truck
1	2006 Kenworth T800 Roll-Off truck
4	Roll-Off Deck for 2006 Kenworth Roll-Off
1	2012 Milano 32 Ft Trailer (Accompanies 2013 Kenworth Boom Truck)
1	2015 JC 34 Ft Trailer (Accompanies 2015 Kenworth T880 Roll-Off
2	2015 Doosan C185 Diesel Compressor
3	2012 Cat 100 KW Diesel Generator
1	2010 Cat TH360B 10,000 lb Capacity Telehandler
1	2016 Putzmeister Thom-Katt TK60HP Shotcrete Pump-Trailer Mounted
15	Knaack Job Box 4830 complete with tools : skilsaws,rotary hammers,
	extension cords, impact guns , hand tools *(ALL USED)
5	20 Ft Storage Container
4	Mobile Office Trailer 8' x 16'

1	Schwing SP500 Concrete Pump Trailer Mounted
40	Used Concrete Buckets
4	Used Office furniture, filing cabinets, digitizer, computers
	Perl Mp480 Aluminum Multiprops for forming
	Perl MP350 Aluminum Multiprops for forming
	Perl Panels and Accessories for forming Value including Multiprops

OK.

Schedule C

BONDFIELD CUSTOMER OWNED
Material List at Current List Price
Sep 6 2018

txtDMatNumber	txtDMatDescription	Quantity
SR10483	ALUMA ALUPROP TOP PLATE ADAPTER	260
SR11	BEAM ALUMA 18FT (5.49M)	2761
SR119	SOCKET POST ALUMINUM	200
SR12	BEAM ALUMA 16ft (4.88M)	3279
SR122	STRONGBACK CHANNEL 55K 2.59M 8FT6	120
SR123	STRONGBACK CHANNEL 55K 3.87M 12FT6	430
SR124	STRONGBACK CHANNEL 55K 4.88M 16FT	18
SR127	CHANNEL SPLICE STEEL	500
SR128	BAR STRONGBACK SPLICE	500
SR130	PLATE TIE (SK)	1600
SR131	BRACKET BOLTED CATWALK	200
SR132	SHOE STRONGBACK	200
SR14	BEAM ALUMA 14FT (4.27M)	4516
SR144	LOG WALL LIFTING ASSEMBLY	200
SR15	BEAM ALUMA 10FT 6IN (3.2M)	2035
SR16	BEAM ALUMA 12FT (3.66M)	3195
SR163	CHANNEL STRONGBACK 55K 9.83FT(3M)	400
SR17	BEAM ALUMA 21FT (6.40M)	3406
SR1861094	ORMA WALKWAY BRACKET	31
SR1870629	BEAM GC 2.62	1400
SR1870631	BEAM GC 1.57	660
SR1870640	TRANSVERSAL GC TE 0.75	200
SR1870642	TRANSVERSAL GC TE 1.5	712
SR1870650	TRANSVERSAL GC TR 0.75	220
SR1870660	HEAD GC FD	84
SR1870696	PANEL GC 1.5x0.75	3136
SR1870698	PANEL GC 0.75x0.75	186
SR1870705	BEAM GC W 1.5	272
SR1870750	BEAM GC W 0.75	196
SR1870765	PANEL GC 1.5x0.375	134
SR1870800	TRANSVERSAL GC TE 1.5 ALU	1521
SR1870805	TRANSVERSAL GC TE .75 ALUM	78
SR1870840	DROPHEAD SH	3416
SR1870862	EDGE BEAM 2.62	100
SR1870865	EDGE BEAM 1.57	58
SR1870900	UNIVERSAL HEAD GC (NEW STYLE)	120
SR1870916	SUPPLY HEAD	937
SR1900002	PANEL 2.7x2.4(6.48m2)	10
SR1900005	PANEL 2.7x1.2(3.24m2)	10
SR1900008	PANEL 2.7x0.90(2.43m2)	10
SR1900011	PANEL 2.7x0.6(1.62m2)	5
SR1900020	PANEL 2.7x0.45(1.21m2)	5
SR1900029	PANEL 2.7x0.30(0.81m2)	5
SR1900032	PANEL 1.2x1.2(1.44m2)	16
SR1900035	PANEL 1.2x0.9(1.08m2)	10
SR1900038	PANEL 1.2x0.6(0.72m2)	10
SR1900047	PANEL 1.2x0.45(0.54m2)	5
SR1900056	PANEL 1.2x0.3(0.36m2)	10
SR1900089	ORMA INSIDE CORNER 2.7	8
SR1900119	HEAD 60	60

(2) OK

SR1900123	PUSH-PULL PROP 2,4-3,5	60
SR1900134	PUSH-PULL PROP 1,1-1,7	60
SR1900144	PUSH PULL PROP SHOE	60
SR1900178	ORMA CLAMP	600
SR1900179	ORMA LIFTING HOOK	16
SR1900193	ORMA WALER 0,9	90
SR1900217	COMPENSATION TUBE 1,2 (0,08 m2)	16
SR1900445	ORMA WALER 1,55	50
SR1900448	WALER HOOK	260
SR1900932	ORMA OUTSIDE CORNER 2,7	8
SR1908168	PUSH-PULL PROP 3,3-4,8	30
SR1908247	PANEL 3,3x2,4(7,92m2)	40
SR1908250	PANEL 3,3x1,2(3,96m2)	20
SR1908253	PANEL 3,3x0,9(2,97m2)	40
SR1908256	PANEL 3,3x0,75(2,475m2)	25
SR1908259	PANEL 3,3x0,6(1,98m2)	30
SR1908262	PANEL 3,3x0,45(1,485m2)	20
SR1908265	PANEL 3,3x0,3(0,99m2)	20
SR1908271	ORMA INSIDE CORNER 3,4 (1,98m2)	8
SR1908273	ORMA OUTSIDE CORNER 3,3	16
SR1908460	COMPENSATION TUBE 3,3	16
SR1908750	ORMA LIFTING BRACKET/CHAIN	2
SR1908770	N-ORMA RETRACTABLE CORNER 3,3	40
SR1908771	N-ORMA RETRACTABLE CORNER 2,7	8
SR1908772	N-ORMA RETRACTABLE CORNER 1,2	32
SR2049	BASKET WIRE W-GATE	1
SR2050	RACK LARGE 3 X 6	3
SR2054	RACK SMALL 3 X 3	11
SR215	FRAME ALUMA 5x6 18kip Nom/Leg ASM	920
SR216	FRAME ALUMA 6X5 18KIP NOM/LEG ASM	1010
SR2186	BRACE 3ft-4ft X 7ft SP	1600
SR2200	BRACE 5W X 4H	3009
SR2203	BRACE 4W X 4H	2150
SR2205	BRACE 4W X 2H	876
SR2211003	DOUBLE VR HEAD (TWO WAY)	280
SR2212	BRACE COMBINATION 7X4-7X2	1000
SR2213	BRACE 6W X 2H	475
SR2220010	ALUPROP 1,65-2,6	2120
SR2220020	ALUPROP 2,2-3,7	2113
SR2220030	ALUPROP 3,3-4,8	1000
SR2220090	UNIVERSAL TRIPOD CC4	33
SR2220120	BRACE FRAME 2,33m	652
SR2220125	BRACE FRAME 1,5m	696
SR2220130	BRACE FRAME 1,57m	228
SR2220140	BRACE FRAME 0,75m	208
SR238	J HEAD 5" X 8"	12400
SR245	FRAME ALUMA ASSEMBLED 6X8	105
SR257	FRAME ALUMACS 4x4 10kip Nom/Leg	2278
SR258	FRAME ALUMACS 4x6 10kip Nom/Leg	2956
SR259	FRAME ALUMACS 4x8 10kip Nom/Leg	1652
SR261	CONNECTOR INTERFRAME ALUMACS	6080
SR265	PLATE BASE	10900
SR347	TRUSS JACK 12-18 MOD MKII	680
SR352	TRUSS EXTENSION LEG INNER 8FT	690
SR369	TRUSS CROSS BRACE 7ft (2.15M)	180

New.

SR370	TRUSS CROSS BRACE 10ft (3.04M)	250	$	105.00	$	26,250.00
SR3991	RIVET	3388	$	2.00	$	6,776.00
SR4045	PIN HITCH	3388	$	0.25	$	847.00
SR4354	TRUSS JACK RETAINER	600	$	6.00	$	3,600.00
SR513	SCREWJACK UNIV, ALUMA FRAME	3000	$	60.00	$	180,000.00
SR5160	J HEAD FOR 1M JACK	60	$	25.00	$	1,500.00
SR521	SCREWJACK UNIV, ALUMACS FRAME	21364	$	70.00	$	1,495,480.00
SR60	ALUM DROPHEAD BEAM 10'6"(3.20M)	11	$	262.00	$	2,882.00
SR6161	HEAVY DUTY GALV. SHORE 6'6" TO 11'	6885	$	155.00	$	1,067,175.00
SR62	BEAM ALUMA 10FT (3.04M)	1200	$	160.00	$	192,000.00
SR6406	POST SHORE EXTENSION 2'	1064	$	50.00	$	53,200.00
SR7436	SCREWJACK 1M W/HANDLE MKII ASS'Y	188	$	80.00	$	15,040.00
SR7551	PLATE BASE FOR 1M SCREW	128	$	16.00	$	2,048.00
SR85	BEAM ALUMA 9FT (2.75M)	1812	$	144.00	$	260,928.00
SR9310	TRUSS W OUTER 30ft (9.14M) #6E	200	$	3,098.00	$	619,600.00
SR9317	ALUMA DEK RACK	1	$	472.00	$	472.00
SR9361	4'X5' ALUMACS FRAME	1000	$	319.00	$	319,000.00
SR9466	1M BASEPLATE SCREWJACK MARK II ASS'Y	2782	$	118.00	$	328,276.00
SR9467	1M JHEAD SCREWJACK MARK II ASS'Y	2850	$	119.00	$	339,150.00
SRALT16	16' ALUMINUM TUBE	8	$	78.30	$	626.40
SRALT4	4' ALUMINUM TUBE	185	$	19.60	$	3,626.00
SRB104	CROSS BRACE 10X4	1800	$	42.80	$	77,040.00
SRBCSSV	BEAM CLIP SCAF SPEC V C/W BT	11	$	6.50	$	71.50
SRBP1	BASE PLATE (FIXED)	18	$	16.20	$	291.60
SRC8R	8" RUBBER WHEEL CASTER	4	$	215.00	$	860.00
SRK870001	ADJUSTABLE CC HEAD (3 WAY)	10	$	151.00	$	1,510.00
SRK870002	PANEL PALLET CC4 LARGE (5'X8'X7.25')	30	$	1,040.00	$	31,200.00
SRLVAC-S	LAYHER ADAPTER SWIVEL	181	$	53.80	$	9,737.80
SRRACW	RIGHT ANGLE WEDGE CLAMP 2" X 2"	11	$	21.50	$	236.50
SRSJB	SCREWJACK W/BASEPLATE 24"	34	$	42.70	$	1,451.80
SRSLB10	SURELOCK BRACE 10FT (3.05M)	22	$	96.75	$	2,128.50
SRSLB7	SURELOCK BRACE 7' (2.13M)	175	$	81.38	$	14,241.50
SRSLBC	SURELOCK BASE COLLAR	45	$	24.83	$	1,117.35
SRSLDH10	SURELOCK DBL LEDGER 10FT 3.05M	2	$	154.05	$	308.10
SRSLH10	SURELOCK LEDGER 10FT (3.05M)	17	$	77.83	$	1,323.11
SRSLH22	SURELOCK LEDGER 2FT 2 (0.65M)	3	$	37.41	$	112.23
SRSLH310	SURELOCK LEDGER 3FT 10 (1.15M)	280	$	44.72	$	12,521.60
SRSLH36	SURLOCK LEDGER STRWY 3FT61.07M	72	$	63.32	$	4,559.04
SRSLH52	SURELOCK LEDGER 5FT 2IN(1.57M)	10	$	51.60	$	516.00
SRSLH70	SURELOCK LEDGER 7FT (2.13M)	480	$	60.63	$	29,102.40
SRSLSB2B	SURELOCK SIDE BRKT 21IN(0.65M)	2	$	77.08	$	154.16
SRSLSB3B	SURELOCK SIDE BRKT 3 BRD .81M	1	$	150.50	$	150.50
SRSLSP70	PLANK STEEL(SPII)7' 2.13M W/HR	89	$	109.11	$	9,710.79
SRSLSS70	STAIRWAY STRINGER 7FT (2.13M)M	69	$	477.84	$	32,970.96
SRSLST	TREAD STAIR SCAFD. 8 X 3 MK3	253	$	69.88	$	17,679.64
SRSLVP33	SURELOCK STANDARD 3FT 3IN(1M)	26	$	42.25	$	1,098.50
SRSLVP411	SURELOCK STANDARD 4FT 11 1.5M	30	$	57.73	$	1,731.90
SRSLVP67	SURELOCK STANDARD 6FT 7IN(2M)	58	$	71.06	$	4,121.48
SRSLVP910	SURELOCK STANDARD 9FT 10IN(3M)	201	$	106.32	$	21,370.32
SRSSP10	10' STL/PLANK GALVW/HOOKS	12	$	138.40	$	1,660.80
SRSSP5	5' STL/PLANK GALV.W/HOOKS	5	$	86.30	$	431.50
SRSSP7	7' STL/PLANK GALV.W/HOOKS	80	$	108.00	$	8,640.00
SRSSRS	SYSTEM RACK SMALL	5	$	411.80	$	2,059.00
SRSSX562	GOOSER 10'	6	$	-	$	-
SRU043006	METAL BASKET 4'X3'X2'	20	$	307.00	$	6,140.00

As of 8/10/2016

Summary ReRent Report

Parameters: Vendor=100842

Material #	Description	Quantity
Yard Number: 151001 - TORONTO CG		
Vendor Number: 100842 - HONDURHEL COAST CO LTD		
PO Number: K152010034		
SR10494	ALUMA ALU PROP TOP PLATE ADAPTER	280
SR10	BEAM ALUMA 18FT (5.49M)	2781
SR1487	GUARDRAIL POST GALV. W/LOCK	3
SR119	SOCKET POST ALUMINUM	200
SR12	BEAM ALUMA 16FT (4.88M)	3279
SR122	STRONGBACK CHANNEL 65K 2.44M 8FT	120
SR123	STRONGBACK CHANNEL 65K 3.66M 12FT	430
SR124	STRONGBACK CHANNEL 65K 4.88M 16FT	18
SR126	STRONGBACK SPLICE CHANNEL	0
SR127	CHANNEL SPLICE STEEL	800
SR128	BAR STRONGBACK SPLICE	800
SR130	PLATE TIE (UK)	1600
SR131	BRACKET BOLTED CATWALK	200
SR136	SHOE STRONGBACK	200
SR14	BEAM ALUMA 14FT (4.27M)	4518
SR144	BIG WALL LIFTING ASSEMBLY	200
SR15	BEAM ALUMA 10FT 6IN (3.2M)	2085
SR16	BEAM ALUMA 12FT (3.66M)	8135
SR163	CHANNEL STRONGBACK 65K 9.83FT (3M)	400
SR17	BEAM ALUMA 21FT (6.40M)	8108
SR1610084	ORMA WALKWAY BRACKET	31
SR1670020	BEAM CC 2.52	1400
SR1670021	BEAM CC 1.57	850
SR1670035	TRANSVERSAL CC TE 1.5	8
SR1670040	TRANSVERSAL CC TE 0.75	280
SR1670045	TRANSVERSAL CC TR 1.5	712
SR1670050	TRANSVERSAL CC TR 0.75	220
SR1670060	DROPHEAD CC	4
SR1670080	HEAD CC FD	84
SR1670090	PANEL CC 1.5x0.75	3450
SR1670095	PANEL CC 0.75x0.75	186
SR1670105	BEAM CC W 1.5	272
SR1670150	BEAM CC W 0.75	136
SR1670155	DROPHEAD CCT	0
SR1670165	PANEL CC 1.5x0.875	134
SR1670400	TRANSVERSAL CC TE 1.5 ALU	1521
SR1670405	TRANSVERSAL CC TE .75 ALUM	78
SR1670410	DROPHEAD SH	1448

As of 8/10/2016

Summary ReRent Report

Parameters: Vendor: 106842

Material #	Description	Quantity
SR1870464	EDGE BEAM 2.52	100
SR1870468	EDGE BEAM 1.57	60
SR1870500	UNIVERSAL HEAD [illegible] (NEW STYLE)	120
SR1870516	SB-[illegible] HEAD	987
SR1900002	PANEL 2.7x2.4(6.48m2)	10
SR1900005	PANEL 2.7x1.2(3.24m2)	10
SR1900008	PANEL 2.7x0.9(2.43m2)	10
SR1900011	PANEL 2.7x0.6(1.62m2)	5
SR1900020	PANEL 2.7x0.45(1.21m2)	6
SR1900029	PANEL 2.7x0.30(0.81m2)	5
SR1900032	PANEL 1.2x1.2(1.44m2)	16
SR1900035	PANEL 1.2x0.9(1.08m2)	10
SR1900038	PANEL 1.2x0.6(0.72m2)	16
SR1900047	PANEL 1.2x0.45(0.54m2)	8
SR1900050	PANEL 1.2x0.3(0.36m2)	10
SR1900089	ORMA INSIDE CORNER 2.7	8
SR1900119	HEAD 60	60
SR1900123	PUSH PULL PROP 2.4-3.5	60
SR1900164	PUSH PULL PROP 1-1.7	60
SR1900174	PUSH PULL PROP SHOE	160
SR1900170	ORMA CLAMP	600
SR1900179	ORMA LIFTING HOOK	16
SR1900193	ORMA WALER 0.9	80
SR1900217	COMPENSATION TUBE 1.2 (0.06m2)	16
SR1900445	ORMA WALER 1.55	50
SR1900448	WALER HOOK	250
SR1900932	ORMA OUTSIDE CORNER 2.7	8
SR1908168	PUSH PULL PROP 3.4-4.8	30
SR1908247	PANEL 3.3x2.4(7.92m2)	40
SR1908250	PANEL 3.3x1.2(3.96m2)	20
SR1908253	PANEL 3.3x0.9(2.97m2)	40
SR1908256	PANEL 3.3x0.75(2.475m2)	25
SR1908259	PANEL 3.3x0.6(1.98m2)	30
SR1908262	PANEL 3.3x0.45(1.485m2)	20
SR1908265	PANEL 3.3x0.3(0.99m2)	20
SR1908271	ORMA INSIDE CORNER 3.3(1.98m2)	8
SR1908274	ORMA OUTSIDE CORNER 3.3	16
SR1908275	ORMA RETRACTABLE CORNER 3.3M	0
SR1908276	ORMA RETRACTABLE CORNER 2.7M	0
SR1908480	COMPENSATION TUBE 3.3	16
SR1908530	ORMA LIFTING BRACKET CHAIN	2
SR1908770	N.ORMA RETRACTABLE CORNER 3.3	40
SR1908771	N.ORMA RETRACTABLE CORNER 2.7	8

As of 3/10/2016

Summary ReRent Report

Parameters: Vendor: 106842

Item Code	Description	Quantity
SR1008722	NORMA RETRACTABLE CORNER 1-2	32
SR2049	BASKET W/HEW GATE	1
SR2050	RACK LARGE 3 X 6	5
SR2051	RACK SMALL 3 X 3	11
SR215	FRAME ALUMA 6X6 10Kip Norm Leg ASM	920
SR216	FRAME ALUMA 6X5 10KIP NORM LEG ASM	1010
SR2186	BRACE 8X4ft X 7.5 SR	1600
SR2200	BRACE 6W X 4H	3850
SR2203	BRACE 4W X 4H	2150
SR2205	BRACE 4W X 2H	375
SR2211003	DOUBLE YR HEAD (TWO WAY)	280
SR2212	BRACE COMBINATION 7X4-7X2	1600
SR2213	BRACE 6W X 2H	475
SR2220010	ALUPROP 1.50/2.5	2120
SR2220020	ALUPROP 2.2-3.7	2113
SR2220030	ALUPROP 3.3-4.8	1060
SR2220090	UNIVERSAL TRIPOD CD4	33
SR2220120	BRACE FRAME 2.50m	652
SR2220125	BRACE FRAME 1.5m	538
SR2220130	BRACE FRAME 1.02m	228
SR2220140	BRACE FRAME 0.75m	208
SR239	J HEAD 8" X 8"	12400
SR248	FRAME ALUMA ASSEMBLED 6X6	195
SR257	FRAME ALUMAGS 4X4 10Kip Norm Leg	2274
SR258	FRAME ALUMAGS 4X6 10Kip Norm Leg	2958
SR259	FRAME ALUMAGS 4X8 10Kip Norm Leg	1952
SR261	CONNECTOR INTER FRAME ALUMAGS	6000
SR265	PLATE BASE	10868
SR337	TRUSS JACK 12-18 MOD MKII	800
SR352	TRUSS EXTENSION LEG INNER 5FT	600
SR369	TRUSS CROSS BRACE 7ft (2.13M)	160
SR370	TRUSS CROSS BRACE 10ft (3.05M)	250
SR3991	RIVET	3998
SR4049	PIN PITCH	3900
SR4354	TRUSS JACK RETAINER	600
SR513	SCREWJACK UNIV. ALUMA FRAME	3000
SR5160	U HEAD FOR TM JACK	60
SR521	SCREWJACK UNIV. ALUMAGS FRAME	21364
SR60	ALUM DROPHEAD BEAM 10'6" (3.20M)	15
SR6161	HEAVY DUTY GALV SHORE 6'6" TO 11'	6805
SR62	BEAM ALUMA 10FT (3.04M)	1200
SR6406	POST SHORE EXTENSION 2'	1084
SR7438	SCREWJACK 1M W/HANDLE MK II ASSY	188

As of 8/10/2010

Summary ReRent Report

Parameters: Vendor: 105842

Material #	Description	Quantity
SR7551	PLATE BASE FOR IM SCREW	128
SR7853	PRIMARY DEK BEAM 8	0
SR7855	PRIMARY DEK BEAM 6	0
SR7857	PRIMARY DEK BEAM 7	0
SR7865	DROP HEAD DEK PANEL	0
SR7867	DEK QUICK BRACE FRAME 6	0
SR7868	DEK QUICK BRACE FRAME 8	0
SR8361	SECONDARY BEAM 6' ALUMA DEK	0
SR8471	SECONDARY BEAM 4' ALUMA DEK	0
SR85	BEAM ALUMA 9FT (2.75M)	1512
SR9310	TRUSS W OUTER COIL (9.1M) 40E	200
SR9317	ALUMA DEK BASK	1
SR9351	4X6 ALUMACS FRAME	1000
SR9466	IM BASEPLATE SCREWJACK MARK II ASSY	2782
SR9467	IM UHEAD SCREWJACK MARK II ASSY	2860
SRALT16	16' ALUMINUM TUBE	8
SRALT4	4' ALUMINUM TUBE	185
SRALT6	6' ALUMINUM TUBE	0
SRB104	CROSS BRACE 10X4	1800
SRB74	CROSS BRACE 7X4	0
SRBCSSU	BEAM CLIP SCAF SPEC U CW BT	11
SRBP1	BASE PLATE (FIXED)	10
SRC8R	8" RUBBER WHEEL CASTER	4
SRK870001	ADJUSTABLE CO HEAD (SWAY)	10
SRK870002	PANEL PALLET CO LARGE (5X10X7.2ft)	80
SRLVAC-S	LATHER ADAPTER SWIVEL	181
SRRAC-W	RIGHT ANGLE WEDGE CLAMP 2" X 2"	11
SRSJB	SCREWJACK W/ BASE PLATE 24"	84
SRSJS	SURELOCK SCREWJACK SWIVEL BASE	3
SRSLB10	SURELOCK BRACE 10FT (3.05M)	22
SRSLB54	SURELOCK BRACE 5'4" (1.64M)	11
SRSLB7	SURELOCK BRACE 7' (2.13M)	131
SRSLBC	SURELOCK BASE COLLAR	45
SRSLDH10	SURELOCK DBL LEDGER 10FT 3.05M	2
SRSLH10	SURELOCK LEDGER 10FT (3.05M)	17
SRSLH22	SURELOCK LEDGER 2ft 2 (0.66M)	3
SRSLH310	SURELOCK LEDGER SET 10ft (1.5M)	280
SRSLH36	SURLOCK LEDGER STEWY 3FT6 1.07M	72
SRSLH52	SURELOCK LEDGER SET 2ft (1.57M)	10
SRSLH70	SURELOCK LEDGER 7ft (2.13M)	480
SRSLSB28	SURELOCK SIDE BRKT 2' 1IN (0.65M)	2
SRSLSB36	SURELOCK SIDE BRKT 3' 6IN 1.07M	1
SRSLSP70	PLANK STEEL (SBH) 7' 2.13M W/HR	80

As of 8/10/2016

Summary ReRent Report

Parameters: Vendor: 106842

Material #	Description	Quantity
SGSLSS70	STAIRWAY STRINGER 7FT (2.13M)	69
SRSCST	TREAD STAIR SCAFF 3 X 3 MIC	253
SRSLVR33	SURELOCK STANDARD 3FT 4IN(1M)	28
SRSLVR41	SURELOCK STANDARD 4FT 11 1.5M	30
SRSLVP67	SURELOCK STANDARD 6FT 7IN(2M)	88
SRSLVR910	SURELOCK STANDARD 9FT 10IN(3M)	201
SRSSP10	10' STL/PLANK GALV W/HOOKS	12
SRSSP5	5' STL/PLANK GALV W/HOOKS	5
SRSSP7	7' STL/PLANK GALV W/HOOKS	60
SRSSRS	SYSTEM RACK SMALL	6
SRSSSS	STAIR SECTION SCAF STEEL	10
SRSSX002	GOOSER 10'	8
SRUD48008	METAL BASKET 4X8X2	20
	PO Totals:	145346
	Vendor Totals:	145346
	Yard Totals:	145346
	Report Totals:	145346

SCHEDULE B

SARAMIA CRESCENT PROPERTY DETAILS

PIN: 03276 - 0174 LT

Description: PCL 11-1 SEC 65M2724; BLK 11 PL 65M2724; S/T LT590331; S/T LT579695 VAUGHAN

Address: 131 Saramia Crescent, Vaughan, Ontario

SCHEDULE C

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that [RECEIVER'S NAME], the receiver (the "Receiver") of the assets, undertakings and properties [DEBTOR'S NAME] acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the ___ day of _____, 20__ (the "Order") made in an action having Court file number __-CL-_____, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

[RECEIVER'S NAME], solely in its capacity as Receiver of the Property, and not in its personal capacity

Per: _____

Name:

Title:

BRIDGING FINANCE INC., as agent for 2665405 ONTARIO INC. Applicant	**1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED** Respondents	Court File No.: CV-18-608978-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER
(Receivership Application)

Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7

Howard Wise (LSO#: 25190F)
Christopher G. Armstrong (LSO#: 55148B)

Tel: 416.979.2211
Fax: 416.979.1234

Lawyers for the Applicant

TAB2

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
J. T. Morin, Q.C. , for Air Canada.
L.A.J. Barnes and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
S.F. Dunphy and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
W.G. Horton , for Ontario Express Limited.
N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Conduct and liability of receiver — General conduct of receiver

Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

Held:

The appeal was dismissed.

Per Galligan J.A.: 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. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.

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

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

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

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

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

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

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

> (c) to negotiate and do all things necessary or desirable to complete a sale of Air Toronto to Air Canada and, if a sale to Air Canada cannot be completed, to negotiate and sell Air Toronto to another person, subject to terms and conditions approved by this Court.

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should

also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

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

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) , at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

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

2. It should consider the interests of all parties.

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

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

17 I intend to discuss the performance of those duties separately.

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

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

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable. After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

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

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by

the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

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

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

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

[Emphasis added.]

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

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

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

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10 months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account.

While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

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

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

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

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

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

44 In *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

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

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

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith,

bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

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

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

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

4. Was there unfairness in the process?

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

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

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

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

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

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

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

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

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

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

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

The second is at p. 111 [O.R.]:

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

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

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

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

I agree.

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

II. The effect of the support of the 922 offer by the two secured creditors.

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

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

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

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

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

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

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

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

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

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

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

McKinlay J.A. :

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

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

***Goodman J.A.* (dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

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

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at p. 30 [C.B.R.]:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

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

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

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

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

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

> was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

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

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

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

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

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

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

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

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

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

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

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

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

> On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

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

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

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

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

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

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April

30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

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

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

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

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

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

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

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

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

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

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

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions

of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

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

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

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

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

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

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept

an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

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

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

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

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

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

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

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

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to

be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

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

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

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

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

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

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

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March

8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

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

Appeal dismissed.

TAB3

1999 CarswellOnt 3641
Ontario Superior Court of Justice [Commercial List]

Skyepharma PLC v. Hyal Pharmaceutical Corp.

1999 CarswellOnt 3641, [1999] O.J. No. 4300, [2000] B.P.I.R. 531, 12 C.B.R. (4th) 87, 92 A.C.W.S. (3d) 455, 96 O.T.C. 172

Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant

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

Headnote

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.

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 Receiver 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.

2000 CarswellOnt 466
Ontario Court of Appeal

Skyepharma PLC v. Hyal Pharmaceutical Corp.

2000 CarswellOnt 466, [2000] O.J. No. 467, 130 O.A.C. 273,
15 C.B.R. (4th) 298, 47 O.R. (3d) 234, 95 A.C.W.S. (3d) 90

Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant

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

Headnote

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.

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. [1] 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 approval 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.[2]

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 debenture 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 interests 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.

Footnotes

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

2 The rule as presently worded is not.

TAB4

1989 CarswellAlta 347
Alberta Court of Appeal

Integrated Building Corp. v. Bank of Nova Scotia

1989 CarswellAlta 347, [1989] A.W.L.D. 699, 16 A.C.W.S. (3d) 66, 71 Alta. L.R. (2d) 320, 75 C.B.R. (N.S.) 158

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

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

Headnote

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.

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.

TAB5

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

TAB6

2010 QCCS 1742
Quebec Superior Court

AbitibiBowater, Re

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

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

Clément Gascon, J.C.S.

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

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

Subject: Insolvency; Civil Practice and Procedure

Headnote

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

Pulp and paper corporation experienced financial problems and placed itself under protection of Companies' Creditors Arrangement Act (CCAA) — In context of its restructuring, it contemplated sale of four closed mills to American bidder — While most parties supported and recommended contemplated sale, including monitor, unsuccessful bidder objected to it — Corporation brought motion seeking approval of sale — Motion granted — Court had jurisdiction to approve sale of assets in course of CCAA proceedings — Criteria for determining whether sale should be approved were established in previous decision of Ontario Court of Appeal — Here, evidence showed that over sixty potential purchasers were contacted and provided with bid package during sale process — Evidence also showed that proposed transaction reflected current fair market value of assets — Court was of view that sale process was beyond reproach and that corporation sought to achieve best possible results — Therefore, nothing justified refusing corporation's request and setting aside monitor's recommendation.

Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous

Pulp and paper corporation experienced financial problems and placed itself under protection of Companies' Creditors Arrangement Act (CCAA) — In context of its restructuring, it contemplated sale of four closed mills to American bidder — While most parties supported and recommended contemplated sale, including monitor, unsuccessful bidder objected to it — Corporation brought motion seeking approval of sale — Motion granted — As was decided by previous decision of Ontario Court of Appeal, when deciding upon sale approval motion, court should consider best interests of parties who have direct interest in proceeds of sale, i.e. creditors — Author recently confirmed validity of that precedent in both CCAA and US proceedings — Here, none of creditors supported unsuccessful bidder's contestation — As such, unsuccessful bidder's interest was merely commercial and its contestation actually delayed sale process — Therefore, unsuccessful bidder's legal standing appeared to be most probably inexistent.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Divers

Société papetière a connu des difficultés financières et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Dans le cadre de sa restructuration, elle a considéré la possibilité de vendre quatre usines désaffectées à un soumissionnaire américain — Tandis que la plupart des parties intéressées, y compris le contrôleur, étaient en faveur de la vente en question et la recommandaient, un soumissionnaire déçu s'y est opposé — Société a déposé une requête visant à obtenir l'approbation de la vente — Requête accueillie — Tribunal avait la compétence pour approuver la vente des actifs dans le cadre de procédures entamées sous le régime de la Loi — Test servant à déterminer si une vente devrait être approuvée a été établi dans une décision antérieure de la Cour d'appel de l'Ontario — En l'espèce, la preuve démontrait qu'on avait contacté plus de soixante acheteurs potentiels et qu'on leur avait fourni une trousse d'appel d'offres au cours du processus de la vente — Preuve démontrait également que l'opération proposée reflétait la juste valeur marchande des actifs — Tribunal était d'avis que le processus de vente était sans reproche et que la société visait à obtenir les meilleurs résultats possibles — Par conséquent, rien ne justifiait que l'on refuse la demande de la société et que l'on fasse fi de la recommandation du contrôleur.

Faillite et insolvabilité --- Procédure devant les tribunaux — Divers

Société papetière a connu des difficultés financières et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Dans le cadre de sa restructuration, elle a considéré la possibilité de vendre quatre usines désaffectées à un soumissionnaire américain — Tandis que la plupart des parties intéressées, y compris le contrôleur, étaient en faveur de la vente en question et la recommandaient, un soumissionnaire déçu s'y est opposé — Société a déposé une requête visant à obtenir l'approbation de la vente — Requête accueillie — Tel que l'a décidé la Cour d'appel de l'Ontario dans une décision antérieure, lorsqu'il s'agit de rendre une décision concernant une requête visant l'autorisation d'une vente, le tribunal devrait prendre en considération les meilleurs intérêts des parties qui ont un intérêt direct dans le produit de la vente, soit les créanciers — Auteur a récemment confirmé la validité de ce précédent dans le cadre des procédures instituées sous le régime de la Loi ainsi que sous le régime américain — En l'espèce, aucun créancier n'appuyait l'opposition du soumissionnaire déçu — Comme tel, l'intérêt du soumissionnaire déçu était purement commercial et sa contestation avait en fait retardé le processus de la vente — Par conséquent, l'intérêt pour agir du soumissionnaire déçu était probablement inexistant.

MOTION by corporation seeking Court's approval of sale.

Clément Gascon, J.C.S:

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

Introduction

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

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

The Motion at Issue

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis and Discussion

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

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

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

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

31 The Court's brief reasons follow.

The Sale Approval

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

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

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

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

- whether any unfairness resulted from the process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

59 A reading of clauses 4 and 5 of the "funding commitment" initially provided by Arctic Beluga [14] did raise some question as to its adequate and irrevocable nature. It did not satisfy the Petitioners that Arctic Beluga had the ability

to pay the proposed purchase price and did not adequately demonstrate that it had the funds to fulfill, satisfy and fund future environmental obligations.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Standing Issue

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

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

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

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

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

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

> 24 [...] If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.

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

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

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

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

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

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

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

For these Reasons, The Court:

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

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

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

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

5 **ORDERS** the Land Registrar of the Land Registry Office for the Registry Division of Montmorency, upon presentation of the Monitor's First Closing Certificate, in the form appended as Schedule "D", and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser as the absolute owner in regards

to the First Closing Purchased Assets located at Beaupré, in the Province of Quebec, corresponding to an immovable property known and designated as being composed of lots 3 681 089, 3 681 454, 3 681 523, 3 681 449, 3 682 466, 3 681 122, 3 681 097, 3 681 114, 3 681 205, 3 682 294, 3 681 022 and 3 681 556 of the Cadastre of Quebec, Registration Division of Montmorency, with all buildings thereon erected bearing civic number 1 du Moulin Street, Beaupré, Québec, Canada, G0A 1E0 (the "*Beaupré Assets*"); and (ii) proceed with the cancellation of any and all First Closing Assets Encumbrances on the Beaupré Assets, including, without limitation, the following registrations published at the said Land Registry:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) for the Registry Division of Thunder Bay of a Vesting Order in the form prescribed by the *Land Registration Reform Act* (Ontario), (and including a law statement confirming the filing of the Second Closing Monitor's Certificate, as set out in section 4 above, has been made) the Land Registrar is hereby directed to record such

Vesting Order in respect of the subject real property identified in *Schedule "I", Section 2* (the "*Fort William Registry Assets*");

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

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

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

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

15 **ORDERS** that notwithstanding:

(i) the proceedings under the CCAA;

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

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

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

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

17 **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order, including without limitation, the United States Bankruptcy

Court for the District of Delaware, and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order;

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

19 **WITHOUT COSTS.**

Schedule "A" — Abitibi Petitioners

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

Schedule "B" — Bowater Petitioners

1. *BOWATER CANADIAN HOLDINGS INC.*

2. *BOWATER CANADA FINANCE CORPORATION*

3. *BOWATER CANADIAN LIMITED*

4. *3231378 NOVA SCOTIA COMPANY*

5. *ABITIBIBOWATER CANADA INC.*

6. *BOWATER CANADA TREASURY CORPORATION*

7. *BOWATER CANADIAN FOREST PRODUCTS INC.*

8. *BOWATER SHELBURNE CORPORATION*

9. *BOWATER LAHAVE CORPORATION*

10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*

11. *BOWATER TREATED WOOD INC.*

12. *CANEXEL HARDBOARD INC.*

13. *9068-9050 QUÉBEC INC.*

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

15. *BOWATER BELLEDUNE SAWMILL INC.*

16. *BOWATER MARITIMES INC.*

17. *BOWATER MITIS INC.*

18. *BOWATER GUÉRETTE INC.*

19. *BOWATER COUTURIER INC.*

Schedule "C" — 18.6 CCAA Petitioners

1. *ABITIBIBOWATER INC.*

2. *ABITIBIBOWATER US HOLDING 1 CORP.*

3. *BOWATER VENTURES INC.*

4. *BOWATER INCORPORATED*

5. *BOWATER NUWAY INC.*

6. *BOWATER NUWAY MID-STATES INC.*

7. *CATAWBA PROPERTY HOLDINGS LLC*

8. *BOWATER FINANCE COMPANY INC.*

9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*

10. *BOWATER AMERICA INC.*

11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

Schedule "D" — First Closing Monitor's Certificate

CANADA

PROVINCE OF QUEBEC DISTRICT OF MONTRÉL

No.: 500-11-036133-094

SUPERIOR COURT

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

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

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

CERTIFICATE OF THE MONITOR

Recitals:

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

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

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

the transactions contemplated therein (the "*Sale Transactions*") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.

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

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

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

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

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

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

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

Name: _____

Title: _____

Schedule "E" — Permitted First Closing Assets Encumbrances

1. Beaupré Mill

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Dalhousie Mill

None

3. Donnacona Mill

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

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

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

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

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

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

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

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

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

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

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

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

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

Schedule "F" — Second Closing Monitor's Certificate

CANADA

PROVINCE OF QUEBEC DISTRICT OF MONTRÉL

No.: 500-11-036133-094

SUPERIOR COURT

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

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

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

CERTIFICATE OF THE MONITOR

Recitals:

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

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

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

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

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

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

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

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

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

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

Name: _____

Title: _____

Schedule "G" — Permitted Fort William Assets Encumbrances

Section 1 Permitted Fort William Land Titles Assets Encumbrances

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

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

Section 2 Permitted Fort William Registry Assets Encumbrances

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

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

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

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

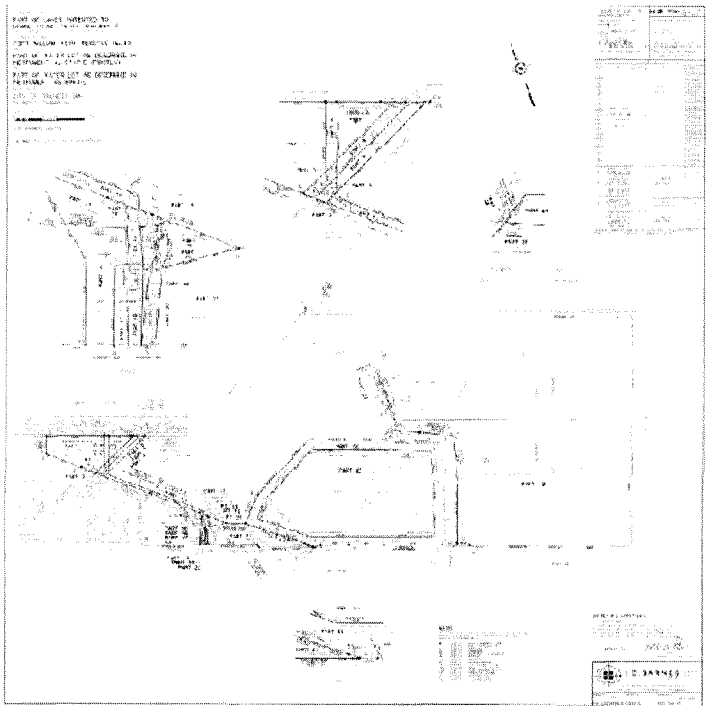
7. Agreement registered as Instrument #403730 on July 14, 1999

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

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

Motion granted.

Annex A



Graphic 1

Schedule "H" — Dalhousie Assets

Municipal address:

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

Legal description (Property Identifier No.):

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

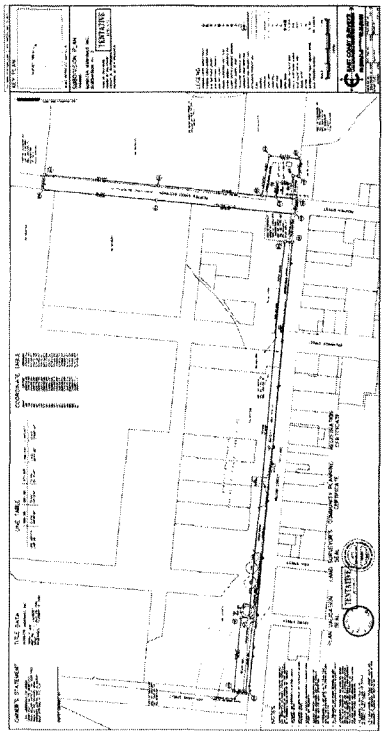
Save and Except for

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

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

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

Annex A — Dalhousie Plan



Graphic 2

Schedule "I" — Fort William Assets

Municipal address:

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

Legal description:

Section 1 Fort William Land Titles Assets

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

Section 2 Fort William Registry Assets

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

Footnotes

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

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

3 Exhibits VB-1 and I-5.

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

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

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

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

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

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

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

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

12 See Exhibit I-7.

13 See Exhibit I-2.

14 See Exhibit I-6.

15 See Exhibit I-9.

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

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

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

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

20 Exhibits AIM-1 and AIM-2.

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

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

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

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

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

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

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

28 *Ibid.*

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

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

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

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

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

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

TAB7

2010 ONSC 1846
Ontario Superior Court of Justice [Commercial List]

Grant Forest Products Inc., Re

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

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

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

Headnote

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.

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") [1] 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")[2] 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 enable 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.[3]

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*[4], 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."[5]

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. [6]

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.*, [7] *Re Madill Equipment Canada*, [8] *Re ROL Manufacturing (Canada) Ltd.*, [9] *Re Biltrite Rubber Inc.* [10] and *Re Pope and Talbot, Inc. et. al.* [11]

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)] [12] 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." [13]

77 In the cross-border case of *Muscletech Research & Development Inc., Re*, [14] 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 *1 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., 47*1* F. Supp. 1255, 1259 (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) [15]

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. [16] 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.

Footnotes

1 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.

2 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.

3 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

4 [1990] 3 S.C.R. 1077 (S.C.C.) at 1096

5 Ibid.

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

7 *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.

8 *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.

9 *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.

10 *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.

11 *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.

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

13 *Metcalfe* at 18

14 (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*)

15 See footnote 12, *supra*.

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

TAB8

CARSWELL

THE 2018-2019 ANNOTATED BANKRUPTCY AND INSOLVENCY ACT

Including
General Rules under the Act
Orderly Payment of Debts Regulations
Companies' Creditors Arrangement Act
CCAA Regulations and Forms
Farm Debt Mediation Act
Wage Earner Protection Program Act
Directives and Circulars

Dr. Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.
of University of British Columbia
Faculty of Law and the Ontario Bar

The Honourable Geoffrey B. Morawetz, B.A., LL.B.
of the Superior Court of Justice

The Honourable L. W. Houlden, B.A., LL.B.
1922-2012, formerly a Judge of the Court of Appeal for Ontario

STATUTES OF CANADA ANNOTATED

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[CURRENCY OF INFORMATION: The statutes and regulations in this annotated book are current to Canada Gazette: Vol. 152:16 (August 8, 2018).]

the present case entailed the enforcement of a U.S. judgment where the defendants had been found to have engaged in a pattern of fraud and in contempt of financial disclosure orders. The primary objective of investigative receivers is to gather information and ascertain the true state of affairs concerning the financial dealings and assets of the debtor. Justice Morgan vacated the stay; the endorsement providing that in the event that the U.S. Supreme Court grants *certiorari* to hear the case in the future, the defendants were at liberty to move to re-impose the stay pending the outcome of that appeal. The plaintiff had met the burden of establishing the need for an investigative receiver: *Continental Casualty Co. v. Symons*, 2016 CarswellOnt 10913, 39 C.B.R. (6th) 65, 2016 ONSC 4555 (Ont. S.C.J.); additional reasons 2016 CarswellOnt 11989, 39 C.B.R. (6th) 76, 2016 ONSC 4750 (Ont. S.C.J.); additional reasons 2016 CarswellOnt 12195, 39 C.B.R. (6th) 80, 2016 ONSC 4789 (Ont. S.C.J.); additional reasons 2016 CarswellOnt 16189, 41 C.B.R. (6th) 307, 2016 ONSC 6451 (Ont. S.C.J.).

L§19 — Advance of Funds to Debtor to Defend Receivership Proceedings

If the court appoints a receiver and the debtor wishes to defend the proceedings and the defence is not frivolous or vexatious, the court may authorize the receiver to pay a reasonable amount to the solicitors for the debtor to defend the action, even though it may reduce the amount available for the secured creditor who appointed the receiver: *Royal Bank v. West-Can Resources Finance Corp.* (1990), 3 C.B.R. (3d) 55, 77 Alta. L.R. (2d) 43 (Q.B.).

Directors of a company in receivership have the authority during the receivership to agree on behalf of the company to pay for legal services, but only to the extent that such services relate to residual powers that remain with the directors during the receivership and have not been given to a receiver-manager. Although a receiver-manager is generally given the power to prosecute and defend actions, it would be a conflict of interest where the litigation was between the security holder and the company in respect of which the receiver-manager was appointed: *Lang Michener v. American Bullion Minerals Ltd.* (2006), 2006 CarswellBC 753, 21 C.B.R. (5th) 118 (B.C. S.C.).

L§20 — Sale of Assets by a Receiver and Manager

Section 247(b) provides that a receiver shall deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

Unlike a privately appointed receiver and manager, where a court-appointed receiver and manager is selling assets, a secured creditor loses the power to dictate the terms of the sale; in these circumstances, the court has the discretion and power to determine the terms and conditions of the sale: *Royal Bank v. Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 230, 244 A.R. 93, 209 W.A.C. 93 (C.A.).

The receiver's duty is not to obtain the best price but to do everything reasonably possible in the circumstances to obtain the best price: *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.).

The duties of the court in reviewing a proposed sale of assets by a receiver or receiver-manager that is opposed by other interested parties are as follows:

1. it should consider whether the receiver has made a sufficient effort to obtain 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 have been obtained; and

4. it should consider whether there has been unfairness in the working out of the process: *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.); *National Bank of Canada v. Global Fasteners & Clamps Ltd.* (2001), 24 C.B.R. (4th) 228, 2001 CarswellOnt 945 (Ont. S.C.J. [Commercial List]); *Textron Financial Canada Ltd. v. Beta Ltée/Beta Brands Ltd.* (2007), 2007 CarswellOnt 89, 27 C.B.R. (5th) 1 (Ont. S.C.J.); *Bank of Montreal v. Dedicated National Pharmacies Inc.* (2011), 2011 CarswellOnt 7972, 83 C.B.R. (5th) 155 (Ont. S.C.J. [Commercial List]).

Where a receiver calls for tenders and accepts the highest tender but for some reason the transaction does not close, although the receiver can retender, it is not essential that it does so. In these circumstances, there is nothing unfair or improper in the receiver negotiating with the second highest tender to see if an agreement of purchase and sale is possible on the same terms as contained in its original tender or better terms: *Engrais Chaleur Ltée-Chaleur Fertilizers Ltd. v. Mega Bleu Inc./Mega Blue Inc. (Receiver of)* (2003), 42 C.B.R. (4th) 194, 2003 CarswellNB 257 (N.B. Q.B.).

Where a receiver solicited offers based on a proposed sale agreement that required the purchaser to assume substantial environmental cleanup costs for a property in a deplorable condition, the requirement of the assumption of cleanup costs was neither unreasonable nor improvident. The court will be loathe to interfere with the business judgment of a receiver: *Morganite Canada Corp. v. Wolfhollow Properties Inc.* (2003), 47 C.B.R. (4th) 89, 2003 CarswellOnt 4083 (Ont. S.C.J.).

Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another bidder since 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 by the sale: *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J.). See also *Re Shape Foods Inc. (Receiver of)* (2009), 2009 CarswellMan 312, 54 C.B.R. (5th) 224 (Man. Q.B.). The receiver, after a reasonable analysis of the risks, advantages and disadvantages of each offer, may decide to recommend to the court the acceptance of an unconditional offer rather than a higher offer that contains conditions. If there are conditions in the offer, the receiver must analyze them to determine whether they are within the receiver's control or if they appear, in the circumstances, to be minor and very likely to be fulfilled. The alternatives should be gridded with a view to maximizing the return and minimizing the risk: *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, *supra*.

The Court held that a licensee under a Master Licence Agreement with the debtor licensor did not have an interest that was sufficiently connected with the sale process so as to warrant standing in the sale proceedings: *BDC Venture Capital Inc. v. Natural Convergence Inc.* (2009), 2009 CarswellOnt 5535, 57 C.B.R. (5th) 186 (Ont. C.A.).

The Ontario Superior Court of Justice considered the issue of when a party should be entitled to a success fee in the context of a sale of assets in a receivership. Campbell J. concluded that the success fee was payable on the basis that the marketing process was pursuant to court direction, which included the involvement of the investment advisor. The engagement letter was entered into with the knowledge and support of the creditors that it would be a binding and enforceable contract. The definition of "transaction" is a broad one and the purchaser is properly regarded as a third party since it received information under a confidentiality agreement. The fact that the term of the transaction involved assumption of debt rather than sale of assets should not defeat the reasonable expectation of payment of the success fee

out of the receiver's administration charge: *Re Hemosol Corp.* (2007), 2007 CarswellOnt 6511, 37 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]).

The receiver's primary task was to ensure that the highest value was received for the assets so as to maximize the return to creditors; and its duty of fairness required that it maximize the return to the debtors, but such a return is not always commercially feasible. Without the sale, it would have been impossible for the senior lender to otherwise recover any significant portion of the debt: *National Trust Co. v. 1117387 Ontario Inc.* (2010), 2010 CarswellOnt 2869, 67 C.B.R. (5th) 204; additional reasons at (2010), 2010 CarswellOnt 4839, 74 C.B.R. (5th) 178 (Ont. C.A.).

In considering whether to approve a receiver's motion to approve a "quick flip" transaction, the court will consider the impact on various parties and whether the proposed treatment that they would receive in the transaction would realistically be any different if an extended sales process were followed. Morawetz J. was satisfied that the proposed sale transaction was reasonable; there was a risk to the business if there was a delay; and there was no realistic scenario under which the employees and suppliers in one division of the debtor would have any prospect of recovery. Under the proposed offer, the purchaser would acquire substantially all of the assets of the debtor; assume or notionally repay outstanding obligations to secured lenders; would hire all current employees and assume employee liabilities, and would assume the obligations of the debtor company to trade creditors related to the mould business. The court approved the transaction and issued a vesting order: *Re Tool-Plas Systems Inc.* (2008), 2008 CarswellOnt 6257 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice held that a contractual licence confers no interest or property in the thing and thus the presence of an exclusive licence did not preclude the receiver from selling the underlying property. Morawetz J. held that the process by which the property was transferred was conducted in accordance with the provisions of s. 47(1) of the *BIA* and s. 101 of the *Courts of Justice Act* and at best, the applicant had an exclusive licence to use the technology. However, even if established, a licence agreement only creates a contractual agreement as between the parties, and even if the grant to market and sell were construed as a traditional licence, it did not acquire a property interest in such a right. The remedy, if any, was contractual in nature and the exercise of that remedy had been impacted by the approval and vesting order, which was a final judicial determination of the rights of the parties. The objective of providing a mechanism for the efficient restructuring of corporations that encounter financial difficulty would be seriously undermined if parties who failed to assert or protect their rights at the time of the restructuring were permitted subsequently to return to court to undo past transactions: *Royal Bank v. Body Blue Inc.* (2008), 2008 CarswellOnt 2445, 42 C.B.R. (5th) 125 (Ont. S.C.J. [Commercial List]).

The Court approved a sale of assets in a receivership but declined to approve a provision in the vesting order that would vest out the rights of a lessee in the property. The purchaser had actual notice of the lease and had waived the protection originally negotiated for in the agreement. Where a receiver takes the position that a party has entered into an agreement of purchase and sale subject to court approval, that party has an interest sufficient to warrant standing. Here, the receiver did not disclaim the lease; it did not terminate the lease; and it did not affirm the lease. Although unregistered, the purchaser had notice of the lease and waived the protection it originally negotiated in the agreement. The court granted the vesting order, but on the basis that it did not extend to vest out the lease: *Winick v. 1305067 Ontario Ltd.* (2008), 2008 CarswellOnt 900, 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]).

The British Columbia Supreme Court held that a receiver was not bound by an agreement of purchase and sale entered into by the debtor in a court approved sales process that was part of a *CCAA* proceeding. No consensus between the parties had been reached prior to the

appointment of the receiver, and after its appointment, the receiver made its position clear that it was expressly disclaiming or terminating the agreement, and the receiver notified the purchaser that it was not obliged to close the transaction: *Re Pope & Talbot Ltd.* (2008), 2008 CarswellBC 1726, 46 C.B.R. (5th) 34 (B.C. S.C. [In Chambers]).

The Court permitted a receiver to reopen a sales process. The court held that giving consideration to a new offer submitted after the terms of the agreement recommended by the receiver had become a matter of public record would discourage parties from bidding in the sales process. However, in this situation, the successful bidder in the initial sale process agreed on terms to reopening the sales process and all parties agreed to the reopening on those terms, on the basis that the initial successful bidder's offer would be converted to a "stalking horse" offer, there would be a further week given for new offers, with a break fee being paid to the bidder subject to certain conditions. Cumming J. was of the view that this approach of a one-week extension to the sales process was a "win-win" situation for all concerned and was met by agreement of all the parties. The court held that the receiver had properly and diligently followed the court-approved sales process; had not acted improvidently; and had considered the interests of all stakeholders, including the creditors and prospective purchasers in recommending approval of the bid in the first instance and a different bidder through the reconstituted sales process: *ICICI Bank Canada v. 1539304 Ontario Ltd.* (2009), 2009 CarswellOnt 6114, 57 C.B.R. (5th) 300 (Ont. S.C.J.).

The Court granted a receiver's application for an order approving the sale of two properties. The approved sales process was followed; and while offers may not have been received within the first month as was wanted, there were offers received and there was no evidence that a further listing would have resulted in any further offers being obtained: *Re 1730960 Ontario Ltd.* (2009), 2009 CarswellOnt 6178, 60 C.B.R. (5th) 318 (Ont. S.C.J.).

A receiver moved for approval of an agreement of purchase and sale of real and personal property in the face of opposition from four parties. The receiver concluded that the purchaser's terms and price represented the best offer in the circumstances and that acceptance of the offer avoided the downside risk of accepting a slightly higher conditional offer and/or engaging in a longer sales process. Pepall J. of the Ontario Superior Court of Justice held that the receiver was authorized and empowered to take each step it did in the sale process; and that notices under the *PPSA* and the *Mortgages Act* were not required. It would be inappropriate to permit redemption by a mortgagee at this stage of the proceedings, as a receiver would spend time and money securing an agreement to purchase and sale, subject to court approval, only for there to be a redemption by a mortgagee at the last minute. The court reaffirmed that an unsuccessful purchaser did not have standing and that the *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1 (Ont. C.A.) tests should be applied; specifically, whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers are obtained; and whether there has been unfairness in the working out of the process: *Ron Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 2009 CarswellOnt 4257, 55 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]).

Where a party submitted a higher bid for assets after the deadline for offers had passed and after the terms of the offer were accepted by the receiver had been made public, the higher bid was not accepted. Justice Cumming of the Ontario Superior Court of Justice was satisfied that the principles applicable to the sale of assets in receivership set forth in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1 (Ont. C.A.) were met. The receiver had properly and diligently considered the interests of all stakeholders, including the creditors and prospective purchasers, in recommending approval of the agreement. There was no real evidence of any unfairness or lack of integrity in the working

out and approval of the sales process. Cumming J. held that the court should not foster uncertainty in the bid process, which would only discourage bids from prospective purchasers and lessen the objective of obtaining the highest possible price in the marketplace. It was unfair and objectionable for a party to wait until another bid was made and accepted by the receiver, and then to make a bid that was marginally higher and ask the court to not approve the agreement of purchase and sale resulting from the accepted bid. The motion of the receiver was granted and the sale approved: *Re 1730960 Ontario Ltd.* (2009), 2009 CarswellOnt 4235, 55 C.B.R. (5th) 265 (Ont. S.C.J. [Commercial List]). See also *Lee v. Geolyn Inc.*, 2009 CarswellAlta 631, 54 C.B.R. (5th) 301, 2009 ABQB 261 (Alta. Q.B.).

The Court held that neither a court-appointed receiver nor secured creditor was a vendor within the meaning of the *New Home Warranties Plan Act* as a receiver is not acting as principal or agent in any ordinary sense. Any sale to purchasers of units would be effected by court order and the definition of vendor contained in the *New Home Warranties Plan Act* does not extend to such a sale. An order was made granting appointment of a receiver on the basis that it was necessary for protection of the interests of creditors and that it was just and convenient to do so: *Romspen Investment Corp. v. 6176666 Canada Ltée* (2009), 2009 CarswellOnt 7318, 60 C.B.R. (5th) 101 (Ont. S.C.J. [Commercial List]).

The Court declined to approve a proposed sale by a receiver on the basis that the bidding procedure had been flawed as there was never a precise agreement between the parties as to the bidding terms, nor was there a court order that mandated precise terms. The previous endorsement of another judge was clear that counsel to the applicant was to have input on the terms and for reasons that are unclear, this did not take place. Campbell J. concluded that it was appropriate to set aside the sale order approving the applicant's bid. Had all the facts, including the lack of notice to the moving party, been brought to his attention, Campbell J. would not have made the order without the opportunity for submissions. Campbell J. did not agree that the relief sought in part in the applicant's cross motion be accepted, namely that it be permitted by lifting the stay to realize on its security, on the basis that the applicant did not seek to bid earlier, did not advise the moving party of its position before the earlier hearing, and did not file any opposition to the relief sought by the receiver. In the circumstances, the court ordered that it was appropriate to reopen the bidding process on specified terms: *CTJI LLC v. Ship Shape Refinishing Ltd.* (2009), 2009 CarswellOnt 4450, 55 C.B.R. (5th) 261 (Ont. S.C.J. [Commercial List]).

Where a receiver and manager was appointed and the estate included four pieces of equipment secured by a PMSI and the bank sought to sell the equipment, the court approved the bank's sale of three pieces of the equipment, but not the fourth, which was a skid office that was attached to a building and would result in damage to the value of the rest of the property if removed. The court held that the receiver should have the opportunity to market the property, including the skid office, and the receiver was to devise a process that would ensure that the bank received its fair share of the proceeds of the sale process: *Royal Bank v. Ramco Sales Inc.* (2010), 2010 CarswellAlta 102, 64 C.B.R. (5th) 48 (Alta. Q.B.).

The Court authorized a receiver to take steps to sell two properties and to borrow money to expand the premises on a leased property. The order was granted over the objections of the second mortgagee. Newbould J. held that orders made should be tailored to meet the practical demands of the situation encountered in any given case. It would be preferable for the property to be marketed and sold through a court-supervised process that would ensure that the property was properly priced, marketed and sold in an open process. In weighing the interests of the parties, one must take into account that the creditor had obtained a covenant that no subsequent encumbrances would be permitted without its consent and no consent had been obtained. Here, the receiver had considered the interests of all parties and recom-

mended that the sale be an open process conducted by the receiver. The receiver had been balanced, measured and fair to all parties. Newbould J. found that the recommendations should be accepted. One week after the release of the decision, an order reflecting the endorsement of Newbould J. had not yet been taken out, and notice of appeal was delivered. In a subsequent decision, in the face of an appeal of the first decision, the court ordered that the first decision was subject to provisional execution: *Computershare Trust Co. of Canada v. Beachfront Developments Inc.* (2010), 2010 CarswellOnt 6813, 70 C.B.R. (5th) 284 (Ont. S.C.J. [Commercial List]).

In litigation proceedings where one party entered into receivership, a bidding process to buy the debtor's interest in the litigation was challenged. The court held that the receiver had acted reasonably in conducting the sale and in finding a referential bid to be invalid. The parties had been aware that they were to submit final and best offer bids by a specified date and it was open to the motion judge to find that an auction was not contemplated: *Fifth Third Bank v. MPI Packaging Inc.* (2010), 2010 CarswellOnt 3884, 68 C.B.R. (5th) 110 (Ont. C.A.).

In a sale of the debtor's assets, the New Brunswick Court of Appeal granted standing to certain parties in an appeal, noting that this case was not one of a "bitter bidder", but rather, a case in which a prospective purchaser had acquired a legal right or interest that could be adversely affected by a court order. The court also granted standing to certain secured note holders, notwithstanding the language in the trust indenture that provided that the trustee could only act on the authorization of a fixed percentage of the secured creditors. The court then denied leave to appeal as the issues on appeal were not of significance to the practice and were not *prima facie* meritorious: *Re Blue Note Caribou Mines Inc.* (2010), 2010 CarswellNB 388, 2010 CarswellNB 389, 69 C.B.R. (5th) 298 (N.B.C.A.).

The appellant owned property on which contamination had earlier been discovered. The owner of the adjoining land admitted responsibility and the parties entered into a remediation agreement under which the responsible party would pay for the remediation and damages for contamination. The remediation did not proceed as planned and the company sued to enforce the obligations under the remediation agreement and for damages. The mortgage fell into arrears and the court ordered the appointment of a receiver. The receiver sought and received court approval for a sale and settlement. On appeal, the Court of Appeal held that a court-appointed receiver has a fiduciary duty to act honestly and fairly on behalf of all who have an interest in the property. The court will rely on the receiver's expertise in arriving at its recommendations and is entitled to assume that the receiver is acting properly unless the contrary is clearly shown. In this case, where the receiver is dealing with an "unusual or difficult asset", the court will only interfere in special circumstances. The receiver must act "with meticulous correctness, but not to a standard of perfection". The Court held that the orders appealed from were more discretionary in nature, and it will only interfere where the judge has erred in law, seriously misapprehended the evidence, or exercised discretion based on irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations. The Court held that the same factors identified in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) could be applied in considering the providence of this settlement, where the values of both a property and claim for damages are in issue: (a) whether the receiver has made a sufficient effort to get the best price and has not acted improperly; (b) the interests of all parties; (c) the efficacy and integrity of the process by which offers are obtained; and (d) whether there has been unfairness in the sale process. Here, the receiver's appraisal and actions were sound. The receiver's primary task was to ensure that the highest value was received for the assets so as to maximize the return to creditors; and its duty of fairness required that it maximize the

return to the debtors, but such a return is not always commercially feasible: *National Trust Co. v. 1117387 Ontario Inc.* (2010), 2010 CarswellOnt 2869, 67 C.B.R. (5th) 204 (Ont. C.A.).

A court-appointed receiver is an officer of the court with fiduciary obligations to the estate. Section 247 of the *BIA* specifies that a receiver must act honestly and in good faith and deal with the property of the insolvent company in a commercially reasonable manner. The court held that there are many ways that a receiver can go about selling an asset. Where, as here, the asset is an unusual one, the court should be open to creative processes to maximize recovery for the estate. In ascertaining whether a suggested process is appropriate, the court's concern should be whether the process is reliable, transparent, efficient, fair and one that guards the parties' interests: *Bank of Montreal v. Calgary West Hospitality Inc.* (2011), 2011 CarswellAlta 698, 78 C.B.R. (5th) 287 (Alta. Q.B.).

The Ontario Court of Appeal held that a receiver acted prudently and reasonably in its efforts to secure sale of some of the debtor company's assets, and the sale process and proposed sale and technology licence agreements satisfied the criteria for approval. Sale of all the assets en bloc was not realistic in the circumstances; the debtors lacked the cash to fund an extensive round of marketing; the receiver had used sufficient efforts to pursue the sale of assets; and the price was reasonable when measured against the valuations. The appeal was dismissed: *Canrock Ventures LLC v. Ambercore Software Inc.* (2011), 2011 CarswellOnt 4170, 78 C.B.R. (5th) 97 (Ont. C.A.).

The Ontario Superior Court of Justice approved a sale of assets by a receiver to a party related to the debtor. In such circumstances, it is incumbent on the receiver to review and report on the activities of the debtor. The receiver, in conducting a sales process, was expected to follow the *Soundair* principles and the process should be transparent and should enable the court to make an informed decision as to whether the sale could be considered fair and reasonable in the circumstances. Justice Morawetz was not satisfied that the first report of the receiver provided enough detail to allow the court to make an informed decision. It was not sufficient to accept information provided by the debtor, where a related party is purchaser, without taking steps to verify the information. A sale approval order, if granted, provides a degree of comfort to a receiver and other parties that the court has considered the issues and has concluded that circumstances are such that the sale can be said to be fair and reasonable. The receiver provided a supplemental report that addressed the above referenced concerns and Morawetz J. was satisfied that the sale was reasonable in the circumstances: *Toronto Dominion Bank v. Canadian Starter Drives Inc.* (2011), 2011 CarswellOnt 15140, 90 C.B.R. (5th) 152, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice approved a sales/auction process and priority of receiver's charges. The reasonableness and adequacy of a sales process proposed by a receiver must be assessed in light of factors that the Ontario Court of Appeal identified in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.). The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable element of a sales process. The court must balance the need to move quickly to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process. In light of the financial circumstances of the debtor and the lack of funding available to support operations during a sales process, Brown J. accepted the receiver's recommendation that a quick sales process was required in order to optimize the prospects of securing the best price for the assets. Reasonable notice had been provided to affected persons and the requested relief was granted: *CCM Master Qualified Fund Ltd. v. blutip Power*

Technologies Ltd. (2012), 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice dismissed an application to appoint a receiver and manager and to approve a "quick flip" where the applicant secured creditor, debtor and purchaser were related entities, sharing common ownership. The court held that the circumstances typically necessitating the appointment of a receiver were not present in this case and the applicant did not lead evidence identifying the need for a court order in order to ensure that the receiver could do its job. Justice Brown concluded that the reason for the sought after court appointment of a receiver had more to do with the terms of the proposed sale, effectively dispensing with the requirement to comply with Part V of the Ontario *PPSA*, which would apply in the case of an appointment of a private receiver. A court will consider (i) whether the receiver has made a sufficient effort to get the best price and has not act improvidently, (ii) the interests of all parties, (iii) the efficacy and integrity of the process by which offers are obtained, and (iv) whether there has been unfairness in the working out of the process. The duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to related party, the overall fairness of the proposed related-party transaction. Brown J. was not satisfied that there was evidence demonstrating that close scrutiny had been made by the proposed receiver of the validity of the security. The lack of such evidence was particularly troublesome because a proposal under the *BIA* was reported as not a viable option because that creditor was unwilling to compromise its secured debt. Finally, the court was concerned that no valuation of the assets was filed, and concluded that there was a lack of evidence to assess whether the proposed receiver acted to get the best price and did not act improvidently.The dismissal was on a without prejudice basis to the ability of the applicant to reapply on better evidence: *9-Ball Interests Inc. v. Traditional Life Sciences Inc.*, 2012 CarswellOnt 5829, 89 C.B.R. (5th) 78, 2012 ONSC 2788 (Ont. S.C.J. [Commercial List]).

The court confirmed a bid submitted prior to the deadline in a receivership sale. The court observed that if a receiver's decision to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances, it should not be set aside simply because a later and higher bid is made. To do so would create chaos in the commercial world and purchasers would never be sure they had a binding agreement. The court and the administration of justice have an abiding interest in maintaining commercial probity and reasonableness in any sale directed by the court. Here, if the higher bid were to prevail, any reasonable observer would not regard the process as fair, reasonable or having integrity. The late bidder, through a court application for disclosure, placed itself in a situation where it knew precisely the bid it had to better, and to allow it to defeat the successful bidder would not yield a principled result: *MNP Ltd. v. Mustard Capital Inc.*, 2012 CarswellSask 593, 97 C.B.R. (5th) 165, 2012 SKQB 325 (Sask. Q.B.).

The Ontario Superior Court of Justice appointed a receiver and approved a sale of assets, reviewing the test for approval of a "quick flip" transaction. Justice Morawetz held that where court approval is being sought for a so-called "quick flip" or immediate sale, which involves an already negotiated purchase agreement sought to be approved on or immediately after the appointment of a receiver without any further marketing process, the court is still to consider the *Soundair* principles, but with specific consideration to the economic realities of the business and specific transactions in question. He noted that courts had approved the sales where: (a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and (b) delay of the transaction will erode the realization of the security of the creditor having the sole economic interest. Morawetz J. also referenced *Re Tool-Plas Systems Inc.*, 2008 CarswellOnt

6258, 48 C.B.R. (5th) 91, [2008] O.J. No. 4218 (Ont. S.C.J. [Commercial List]) where he stated: "A "quick flip" transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a "quick flip" transaction, the court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the "quick flip" transaction would realistically be any different if an extended sales process were followed." Morawetz J. found that the sales process was fair and reasonable, and that the transactions were the only means of providing the maximum realization under the current circumstances. Morawetz J. was satisfied that no party was prejudiced by the form of the transaction. A sale to a party related to the debtor is not precluded, but will subject the proposed sale to greater scrutiny to ensure transparency and integrity in the marketing and sales process and require that the receiver verify information provided to it to ensure the process was performed in good faith. Morawetz J. accepted the recommendations of the receiver that the market for the assets had been sufficiently canvassed through the sales and marketing processes and that the purchase prices under the APA were fair and reasonable in the current circumstances: *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, 2013 CarswellOnt 16849, 7 C.B.R. (6th) 25, 2013 ONSC 7009 (Ont. S.C.J. [Commercial List]).

Following an auction approval order, the receiver entered into an auction services agreement. Subsequently, the receiver was presented with an offer for the property; the receiver's report did not explain how the offer had come about. The receiver met with the offerors, as a result of which the receiver was sent an enhanced offer. The receiver recommended approval of the transaction on the basis that (i) the offer price was at the high end of the valuation range; (ii) the offer was unconditional; (iii) a significant deposit accompanied the offer; and (iv) the auction services stated that while a higher price is possible at a "live" auction, it is not a likely outcome. Justice Brown of the Ontario Superior Court referenced the Court of Appeal decision in *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 46 O.A.C. 321 (Ont. C.A.), where the court held that while the primary concern of a receiver is the protection of the interests of creditors, a secondary and very important consideration is the integrity of the process by which the sale is effected. In this case, the receiver sought and obtained approval to conduct a sales auction process because of the inability to attract adequate offers for the property through a listing process. The auctioneer had put in place the infrastructure necessary to conduct an auction and had conducted 131 tours of the property. The auction was only four business days away. While Brown J. acknowledged that the inclination of the receiver to take the "bird in the hand" was understandable, given the poor marketing history for the property, he concluded that deviating from the court-approved auction process at this stage would damage the integrity of the sales process: *HSBC Bank Canada v. Lechier-Kimel*, 2013 CarswellOnt 15938, 2013 ONSC 7241 (Ont. S.C.J. [Commercial List]). In the same proceeding, the Ontario Court of Appeal dismissed the receiver's appeal of a partial denial of its requested fees. The receiver brought a motion seeking approval of its fees and legal expenses, including fees incurred in negotiating a sale that was not approved by the court and in bringing an unsuccessful motion to abandon the auction. The Court of Appeal held that while courts will show deference regarding the business decisions of receivers, the procedure for reviewing a receiver's conduct of a receivership is not the same as that for reviewing the reasonableness of its fees. While the objecting party bears the burden of showing that a receiver's business decisions are unreasonable, the receiver bears the burden of proving that its fees are fair and reasonable. Thus the deference to which the receiver's business decisions are owed does not insulate its accounts from review to determine if they are fair and reasonable. The Court of Appeal also noted that there was nothing in the motion judge's reasons indicating he was not cognizant of, and did not take into account, the factual context in which the receiver was operating. The motion judge had

been involved in the receivership from the outset, and receiver reports had been filed detailing the activities of the receiver. Finally, the Court of Appeal rejected the submission that the motion judge overemphasized the integrity of the auction process and failed to give sufficient consideration to the need for flexibility. The court held that a number of circumstances led the motion judge to conclude that safeguarding the integrity of the sale process was paramount, including: the receiver's representations that an auction was the best method to sell the property; the receiver's deviation from the approved sale format almost immediately after the court order was issued and undertaking significant work without seeking court approval; the proposed sale price was only 20 per cent above the reserve price; and the receiver's pursuit of a course of action that would likely only benefit the first mortgagee. In the result, the appeal was dismissed with costs payable by the receiver, and not from the estate: *HSBC Bank Canada v. Lechier-Kimel*, 2014 CarswellOnt 14539, 2014 ONCA 721 (Ont. C.A.).

The Nova Scotia Supreme Court approved a sale of property by a receiver over the objections of the debtor. The Court reviewed the *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 46 O.A.C. 321 (Ont. C.A.) tests: whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers are obtained; and whether there has been unfairness in the working out of the process. Justice Duncan held that when a property is put on the market in a forced sale, it is not unreasonable to expect that the marketplace may see an opportunity to get a bargain and pressure the price down. Justice Duncan also observed that a further factor that impacts on sale price is the value and length of leases already in place. Here, there was no evidence to suggest that prospective purchasers had come forward to express an interest in the property in the months since the offer period closed. The process adopted for sale of the property was akin to a tender, which requires that the receiver, among other duties, fulfill a duty of fairness to bidders. Justice Duncan was satisfied that the receiver had made a sufficient effort to get the best price for the property and had not acted improvidently, observing that the courts place a high degree of reliance on the business judgment of the receiver: *Business Development Bank of Canada v. Devine Brokers & Appraisal Ltd.*, 2013 CarswellNS 1058, 9 C.B.R. (6th) 163, 2013 NSSC 435 (N.S. S.C.).

The Ontario Superior Court of Justice declined a debtor's request for disclosure of commercially sensitive information in a motion to approve a sale of real property. In order to disclose that information to the debtor, the receiver asked the debtor to sign a confidentiality agreement. A dispute arose between the receiver and the debtor about the terms of that proposed agreement. Justice Brown noted that in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 CarswellNat 822, 2002 CarswellNat 823, [2002] 2 S.C.R. 522, 2002 SCC 41, the Supreme Court of Canada sanctioned the making of a sealing order in respect to material filed with a court when: (i) the order was necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonably alternative measures would not prevent the risk, and (ii) the salutary effects of the order outweighed its deleterious effects. Justice Brown noted that, as applied in the insolvency context, courts have sealed those portions of a report from a court-appointed officer filed in support of a motion to approve a sale of assets that disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought. Justice Brown held that the purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids. To achieve that purpose, a sealing order typically

remains in place until the closing of the proposed sales transaction. In this case, Brown J. concluded that the receiver had acted in a reasonable fashion in requesting the debtor to sign the confidentiality agreement before disclosing information about the transaction price and the other bids received; and he was satisfied that the provisions of the confidentiality agreement were tailored to address the concerns surrounding the disclosure of sensitive commercial information in the context of an insolvency asset sale: *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 CarswellOnt 2113, 2014 *ONSC 1173 (Ont. S.C.J. [Commercial List])*.

The Ontario Superior Court of Justice held that a defendant was liable to a plaintiff for fraudulent misrepresentation. The defendant had purchased a building from a receiver for $6 million and had resold the building to "Y" company prior to closing for approximately $9 million. Had it known, the receiver would not have recommended approval of the sale to the court in the receivership proceeding. The receiver assigned its cause of action to the creditor who held the first mortgage on the property, as it did not recover the full amount owing to it in the receivership. Justice Myers noted that to obtain court approval of a sale, a receiver must establish that it engaged in a fair and commercially reasonable process to try to obtain fair market value for the property to maximize realization for the creditors. If a receiver learns that it has undersold property, it can be in a very difficult position in which it is contractually bound to seek court approval for sale, but it must, at the same time, disclose to the creditors and to the court that it has not maximized realizations. In order to carry out the land transfer tax plan without alerting the receiver to the resale, the respondent's counsel advised counsel for the receiver that title was to be directed to Y on closing. Myers J. found that a distinction must be made between a failure to disclose, which in effect renders what has been stated a misrepresentation, and a failure to disclose that leaves anything said or written as true, but results in some misconception since the whole truth has not been told. The former kind of nondisclosure, if done fraudulently, is fraudulent misrepresentation. Here, Myers J. was satisfied that the creditor had made out an express case of fraudulent misrepresentation. Although the defendant had no duty to disclose his flip, once his lawyers knowingly made misleading disclosures misrepresenting Y under the agreement with receiver, the failure to correct the misimpression created amounts to fraudulent misrepresentation. In the result, an order was issued finding the respondent liable to the creditor for fraudulent misrepresentation in an amount to be determined by the court: *Meridian Credit Union Ltd. v. Baig*, 2014 CarswellOnt 11251, 16 C.B.R. (6th) 291, 2014 ONSC 4717 (Ont. S.C.J.); additional reasons 2014 CarswellOnt 17207, 20 C.B.R. (6th) 153, 2014 ONSC 7127 (Ont. S.C.J.).

The Alberta Court of Queen's Bench approved the receiver's application to sell the debtor's assets over the objection of a party who had expressed an interest in the assets. Justice Veit found that the receiver had met its obligations under the *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) tests; the receiver had made sufficient efforts to get the best price and had not acted improvidently; the receiver's proposal considered the interests of all parties; all interested parties supported the proposal; and the offers were obtained by a process that was efficient and had integrity: *Royal Bank of Canada v. Wapiti Waste Management Inc.*, 2014 CarswellAlta 1007, 20 C.B.R. (6th) 24, 2014 ABQB 361 (Alta. Q.B.).

The Ontario Superior Court of Justice approved the receiver's motion for approval to sell a residential property. The order was made over the objections of the mortgagor. The court relied on the tests set out in *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 46 O.A.C. 321, [1991] O.J. No. 1137 (Ont. C.A.). Justice Tzimas found there was nothing to question or doubt the sufficiency of the receiver's efforts to sell

the property. Justice Tzimas was satisfied that the receiver had considered the interests of all the parties, had consulted with the mortgagees on the identification of a particular listing agent, had listed the price above the appraised value to reflect the wishes of the mortgagees, and had given the applicants the opportunity to bring forward their own buyer. Tzimas J. concluded that the receiver's proposal was reasonable and legally sound, it had acted in a provident manner, had considered all of the parties' interests, and that it had done so with integrity and with fairness: *Stanbarr Services Ltd. v. Reichert*, 2014 CarswellOnt 15507, 20 C.B.R. (6th) 99, 2014 ONSC 6435 (Ont. S.C.J.).

The British Columbia Supreme Court dismissed the receiver's application for a bidding procedures order approving a stalking horse bid. Justice Weatherill noted that the use of stalking horse bids to set a baseline for a bidding process in receivership proceedings has been recognized by Canadian courts as a legitimate means of maximizing recovery in a bankruptcy or receivership sales process. The factors to be considered when determining the reasonableness of a stalking horse bid are those used by the court when determining whether a proposed sale should be approved: whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; the efficacy and integrity of the sale process by which offers were obtained; whether there has been unfairness in the working out of the process; and the interests of all parties. The sale process must allow sufficient opportunity for potential purchasers to come forward with offers, recognizing that interested parties must move relatively quickly in order that the value of the project was preserved. Justice Weatherill held that no course of action other than a stalking horse bidding process appeared to have been considered; there was no evidence that the receiver had attempted to market the development beyond discussions with three developers, and no evidence from which the court could assess the fairness and reasonableness of the process. While Weatherill J. accepted the concept of the termination fee, the mere fact that the proposed termination fee was within the "range of reasonableness" as determined in other cases did not mean that it was reasonable in this case. The court has a gatekeeping function to ensure that the fee is reasonable in each case. In this case, there was no evidence regarding how the termination fee was arrived at or how the fee compared with the expenses incurred in respect of its due diligence. Such evidence was required: *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, 2014 CarswellBC 2916, 17 C.B.R. (6th) 41, 2014 BCSC 1855 (B.C. S.C.).

See Stuart Brotman and Dylan Chochla, "What's the "Deference"? Sale of Assets by Receivers 2014 in Review", in Janis Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2014* (Toronto: Carswell, 2015) at 447–468.

The Ontario Superior Court of Justice approved an agreement of purchase and sale from a stalking horse bid process that included an auction for all of the assets of the companies, except certain excluded assets, over the objections of subordinate secured creditors. The stalking horse offer contained no break fee or payment for the purchaser's expenses. Justice Pattillo noted that a stalking horse offer combined with a court-approved bidding procedure is commonly used in insolvency situations to facilitate the sale of businesses and assets. The Court relied on *Re Brainhunter Inc.*, 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), applying four factors that the court should consider in exercising its discretion to authorize a stalking horse process, observing that the same considerations applied in a receivership: Is the sale transaction warranted at this time? Will the sale benefit the economic community? Do any of the creditors have a *bona fide* reason to object to the sale of the business? Is there a better viable alternative? Justice Pattillo found that the receiver's report made clear that the sale was warranted; the best realization of the assets would be achieved by the sale of an operating business; and the proposed sale would benefit the "economic community", including the preservation of jobs, contracts and business relationships

The Court also noted that in reaching its conclusion that the interests of the creditors and stakeholders were best served by accepting the stalking horse offer, the receiver had considered the fact that the allocated purchase price for the properties would likely provide for less value than the charges registered against them by the objecting creditors. Justice Pattillo approved the sales process, the offer and authorized the receiver to enter into the agreement of purchase and sale. The process was transparent and the proposed timeline was fair and reasonable in the circumstances: *Re Crate Marine Sales Ltd.*, 2015 CarswellOnt 2248, 23 C.B.R. (6th) 202, 2015 ONSC 1062 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice granted a receiver's motion to approve the sale of a golf course. The approval motion was opposed by the respondent first mortgagee of the property, who wanted to redeem the first mortgage. The order appointing the receiver authorized it to market the property, and the receiver determined that if it marketed the property quickly, it might be able to complete an early sale of the assets, allowing a purchaser to operate the course during the busiest summer months. Newbould J. was satisfied that the receiver conducted a reasonable sales process and that the property was sufficiently exposed to the market for a reasonable period of time to enable prospective bidders to assess the property and bid for it. Justice Newbould held that the sales process in the circumstances was reasonable and appropriate and met the test of the *Soundair* principles in *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.). Newbould J. declined to permit the first mortgage to be redeemed, stating that the essential reason was that it would upset the integrity of the sales process undertaken by the receiver: *Business Development Bank of Canada v. Marlwood Golf & Country Club Inc.*, 2015 CarswellOnt 9453, 27 C.B.R. (6th) 166, 2015 ONSC 3909 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench dismissed the application of a receiver and secured creditor, who had sought an order directing a pharmacy to pay to the receiver the fair value of prescriptions conveyed to the pharmacy on the eve of insolvency of another pharmacy (the "debtor"). Justice Romaine held that it was clear that the physical medical records of patients belong to the physician, citing *McInerney v. MacDonald*, 1992 CarswellNB 63, [1992] 2 S.C.R. 138, [1992] S.C.J. No. 57 (S.C.C.); and the principles with respect to this issue apply likewise to pharmacists. Justice Romaine concluded that the debtor company and its pharmacist/principal held an interest in patient files and records that they were able to pledge as long as a pledge could be accomplished in a manner compatible with their professional responsibilities. The Court held that given the regulatory regime and the interests of patients involved in the transfer of records and prescriptions, the application to transfer patient records and prescriptions to the receiver or the secured creditor was not feasible. The secured creditor submitted that the pharmacy receiving the records and prescriptions should be liable to pay the receiver an amount equal to the fair value of the prescriptions because it was unjustly enriched by the wrongful transfer of the prescriptions. Justice Romaine observed that a cause of action of unjust enrichment has three elements: (1) an enrichment of the respondent; (2) a corresponding deprivation of the applicant; and (3) an absence of juristic reason for the enrichment; and in this case, the most difficult issue was whether there was an absence of juristic reason for the enrichment. Justice Romaine held that the approach to the juristic reason analysis has two parts. The applicant must show that no juristic reason exists in any established category of such reasons that would deny recovery. The established categories include contract, a disposition of law, a donative intent and other valid common law, equitable or statutory obligations. If there is no juristic reason that can be identified from an established category, the applicant has made out a *prima facie* case. This *prima facie* case is rebuttable, however, where the respondent can show that there is another reason to deny recovery. At this point, the court should have regard to two factors: the reasonable

expectations of the parties and public policy considerations. Justice Romaine found that the receiving pharmacy's acceptance of the transfer of patient records and files in order to facilitate compliance with the debtor's statutory and regulatory obligations and to ensure continuity of care for the patients involved fell within one of the established categories of juristic reasons to deny recovery in unjust enrichment: *Maximum Financial Services Inc. v. 1144517 Alberta Ltd.*, 2015 CarswellAlta 1934, 31 C.B.R. (6th) 146, 2015 ABQB 646 (Alta. Q.B.).

The Manitoba Court of Queen's Bench held that the receiver had made a sufficient effort to get the best price and had not acted improvidently. The court should consider the interests of all parties, and here, Chartier J. concluded that there had been no unfairness in the working out of the process. Chartier J. held that the sales process satisfied the principles set out in the *Soundair* decision. The receiver had acted reasonably, prudently and fairly; the sale agreement was approved and the requested vesting order was granted: *Royal Bank of Canada v. Keller & Sons Farming Ltd.*, 2016 CarswellMan 346, 39 C.B.R. (6th) 29, 2016 MBQB 77 (Man. Q.B.). In dismissing an appeal from this judgment, the Manitoba Court of Appeal held that when reviewing a sale by a court-appointed receiver, among other duties, the court should be concerned primarily with protecting the interests of the creditors. However, it is also an important consideration that the sale process should be fair and equitable, and the interests of all parties be taken into account; this includes the interests of the unsecured creditors. There is no question that it is the responsibility of the court to ensure the efficacy and integrity of the process by which offers are obtained, and to ensure that there has been no unfairness in the working out of that process. In this case, given the outstanding amounts owing to the secured creditors, and the amounts that would be generated from the sale of assets, there was inevitably a significant shortfall, and as a result, the secured creditors were the only parties with a material and direct commercial interest in the proceeds of the sale. Thus, it was reasonable for the receiver not to take into account the portion of the offer dealing with unsecured creditors: *Royal Bank of Canada v. Keller & Sons Farming Ltd.*, 2016 CarswellMan 147, 39 C.B.R. (6th) 219, 2016 MBCA 46 (Man. C.A.).

The receiver moved for approval of a sale of five-acres and a warehouse. The receivership and power of sale were to enforce security for bank debts. The only known encumbrancer, besides the plaintiff, a builder's lienholder, had been joined as a party. The priority between the bank's security and the builder's lien was in dispute. The proposed order provided for proceeds of sale to be paid into court and for the proceeds to stand in the place of the property pending determination of the priorities. Moir J. noted that an appointment of a receiver to enforce security is now usually made under both the national receivership provisions and provincial law, both statutory and common law. Given the amount of secured debt and the appraisals, the purchase price was disappointing. However, the property had been exposed to the market for over 20 months while it was the subject of a professional marketing effort. Moir J. found the sale was commercially reasonable. The court order provided for payment into court and specified that the terms concerning foreclosure had to be amended so that they did not include an order that appeared to end unascertained or unknown rights: *Royal Bank of Canada v. 2M Farms Ltd.*, 2017 CarswellNS 272, 47 C.B.R. (6th) 157, 2017 NSSC 105 (N.S. S.C.).

The Ontario Court of Appeal held that an appellant had not demonstrated that there was an arguable case that the receiver could have obtained a better deal: *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 CarswellOnt 11087, 49 C.B.R. (6th) 173, 2017 ONCA 611 (Ont. C.A.).

Justice Romaine of the Alberta Court of Queen's Bench approved a sale of assets by a receiver, including include specific provisions sought by the receiver in the order, given the

conduct of the Alberta Energy Regulator ("AER") leading up to the sale application. Justice Romaine held that s. 11(d) of the *Redwater* order (*Re Redwater Energy Corporation*, 2016 CarswellAlta 994, 37 C.B.R. (6th) 88, 2016 ABQB 278 (Alta. Q.B.) and *Orphan Well Assn. v. Grant Thornton Ltd.*, 2017 CarswellAlta 695, 47 C.B.R. (6th) 171, 2017 ABCA 124 (Alta. C.A.); leave to appeal to S.C.C. granted 2017 CarswellAlta 2352, 2017 CarswellAlta 2353, [2017] S.C.C.A. No. 231 (S.C.C.)) and s. 19(d) of the proposed order, did not give the AER the authority to consider the compliance record of the debtor, its officers or security holders in determining their eligibility for future license grants or transfers if such compliance record refers to debts discharged or assets renounced through bankruptcy. She held that Directive 006, which appears to allow the AER to do so, was inoperative by reason of the decisions in *Redwater* and *Alberta (Attorney General) v. Moloney*, 2015 CarswellAlta 2091, 2015 CarswellAlta 2092, [2015] 3 S.C.R. 327, 29 C.B.R. (6th) 173, 2015 SCC 51 (S.C.C.). The AER's discretion to review transfer applications must be exercised in accordance with the law in force in Alberta. Justice Romaine observed that the current environmental regulatory regime in Alberta allows oil and gas companies to defer financial consequences of addressing environmental liabilities relating to individual wells as long as their portfolio of assets is able to achieve a positive liability management rating. In approving the new sale agreement, the Court applied the *Soundair* factors (*Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.)): the receiver made a sufficient effort to get the best price and did not act improvidently; the receiver acted with integrity in the interests of all parties; and there was unfairness in the working out of the process. Romaine J. found that it both reasonable and prudent for the receiver to seek to include the specific declarations set out in the *Redwater* order in this approval and vesting order. The relationship between the AER, the receiver and the new bidder had also been fraught with conflict and uncertainty over the AER's position and its stated intentions: *Re Sydco Energy Inc*, 2018 CarswellAlta 157, 57 C.B.R. (6th) 73, 2018 ABQB 75 (Alta. Q.B.).

L§21 — Vesting Orders in Receivership with Respect to Real Estate

In receivership proceedings, the court can grant a vesting order to purchasers of real estate from the receiver. A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served on the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process: *Clarkson Co. v. Credit foncier franco canadien* (1984), 55 C.B.R. (N.S.) 206 (Sask. Q.B.); affirmed (1985), 57 C.B.R. (N.S.) 283 (Sask. C.A.).

A vesting order is in the ordinary course subject to appeal. In Ontario, however, the filing of a notice of appeal does not automatically stay the order, and in the absence of a stay, the vesting order remains effective and may be registered on title under the land titles system. If no stay is obtained and the order has been registered, the vesting order is effective as a registered instrument and its characteristics as an order are overtaken by its characteristics as a registered conveyance on title. The vesting order cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. It cannot be attacked by an appeal unless a stay order has been obtained staying the registration of the vesting order: *Re Regal Constellation Hotel Ltd.* (2004), 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258 (Ont. C.A.).

TAB9

2014 ONSC 1531
Ontario Superior Court of Justice [Commercial List]

Royal Bank of Canada v. Atlas Block Co.

2014 CarswellOnt 2780, 2014 ONSC 1531, 238 A.C.W.S. (3d) 373

Royal Bank of Canada, Applicant and Atlas Block Co. Limited, Atlas Block (Brockville) Ltd. and 1035162 Ontario o/a Atlas Block Trucking, Respondents

D.M. Brown J.

Heard: February 13, 2014
Judgment: March 10, 2014
Docket: CV-13-10201-00CL

Counsel: S. Babe, for Applicant, Royal Bank of Canada
R. Fisher, for Business Development Bank of Canada
S. Friedman, for Receiver, KPMG Inc.

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

Headnote

Debtors and creditors --- Miscellaneous

Respondent debtors manufactured various brick and concrete building and landscaping supplies at three facilities — Largest facility built and equipped with loans of $17.5 million from creditor BDC, $4.8 million from provincial government and $2.2 million from creditor RBC — BDC and RBC also provided other financing — In October 2013, receiver appointed over all of debtors' assets and undertakings — Receiver sold most assets through two agreements in which purchaser allocated purchase price between real property, equipment leases, equipment and inventory — Receiver accepted purchaser's allocations and proposed to distribute some $8.2 million to BDC and $3.46 million to RBC, deducting fees and expenses pro rata — BDC, owed approximately $17.39 million — Receiver brought motion for court approval of distribution of net sales proceeds from certain of debtors' assets between two main secured creditors — Motion granted — Nothing inappropriate in purchaser's assumption of equipment leases from RBC on undiscounted basis — BDC's objection to allocation of only $1 million to real property previously valued significantly higher weakened by failure to advance objection at earlier time — Evidence did not establish allocation inappropriate in any event — Receiver's proposed distribution reasonable in circumstances.

MOTION by receiver for court approval of distribution of net sales proceeds from certain of debtors' assets between two main secured creditors.

***D.M. Brown J.*:**

I. Receiver's motion to allocate sales proceeds and its costs between two secured creditors

1 By order made October 4, 2013, KPMG Inc. was appointed receiver of all of the assets and undertakings of Atlas Block Co. Limited, Atlas Block (Brockville) Ltd. and 1035162 Ontario Inc. o/a Atlas Block Trucking (the "Debtors"). Pursuant to orders of this Court the Receiver has sold most of the Debtors' assets. The Receiver moved for the approval of the distribution of the net sales proceeds from certain of the Debtors' assets between the two main secured creditors, the Royal Bank of Canada and the Business Development Bank of Canada, as well as the approval of its allocation of fees and costs as between RBC and BDC.

II. Background

2 The Debtors manufactured a range of brick and concrete building and landscaping products for sale to industrial and commercial construction contractors. The head office of Atlas Block was located in Midland, Ontario, at what was called the Victoria Harbour Plant. Atlas operated manufacturing facilities at (i) the Victoria Harbour Plant, (ii) the Hillsdale Plant, and (iii) the Brockville Plant.

3 The Hillsdale Plant was the major asset of Atlas Block. Its construction and equipping was financed with $17.5 million in loans from BDC, $4.8 million from the Ontario government, and $2.2 million in equipment financing from RBC.

4 RBC and BDC provided other financing to Atlas Block.

5 Production at the Brockville Plant ceased about two weeks prior to the appointment of the Receiver. The Receiver continued production at the Hillsdale and Victoria Habour Plants for a short period of time until the end of November, 2013.

6 As a result of a sales and marketing process, the Receiver entered into two asset purchase agreements to sell the equipment, inventory and real estate of Atlas Block to Brampton Brick Limited ("BBL"). Those agreements received court approval on December 20, 2013. In my endorsement approving the BBL sale I wrote, in part:

> This motion is not opposed, however BDC reserves its rights with respect to distribution and my order is made subject to that reservation...

7 The sales to BBL were completed on January 6, 2014, however they did not include the sale of the real property at the Victoria Harbour Plant. On January 14, 2014, BBL informed the Receiver it that it would not be acquiring the real property at Victoria Harbour.

III. The BBL Asset Purchase Agreement

8 Under the November 29, 2013 Asset Purchase Agreement (the "Atlas Block APA") BBL purchased the following land and equipment:

> (i) Hillsdale: (a) the Hillsdale Real Property, (b) certain molds and forklift equipment; (c) manufacturing equipment; and (d) inventory;
>
> (ii) Victoria Harbour: (a) office furniture and equipment; (b) certain manufacturing equipment; and, (c) inventory; and,
>
> (iii) The interest of Atlas Block in RBC Equipment Leases, which included some leased equipment at the Hillsdale Plant, as well as at the Brockville Plant.

9 Section 2.7 of the Atlas Block stated that the purchase price would be allocated amongst the purchased assets as set forth on Schedule "K" to the APA, in part, as follows:

Asset	*Allocated Amount*
Hillsdale Real Property	$1,000,000
RBC Equipment Leases	$2,611,539
Hillsdale and Victoria Harbour Equipment	$7,638,458

10 In the Atlas APA BBL agreed to assume the obligations under the RBC Equipment Leases and the allocated $2.61 million represented the remaining obligations due under those leases.

11 Under the December 12, 2013 Asset Purchase Agreement (the "Brockville APA"), BBL agreed to purchase from the Receiver (i) the Brockville Real Property, (ii) the Brockville Equipment, (iii) the Brockville office furniture and

equipment, and (iv) the Brockville Inventory. The purchase price of $600,000 was allocated pursuant to section 2.6 of the Brockville APA amongst the purchased assets, in part, as follows:

Asset	*Allocated Amount*
Brockville Real Property	$100,000
Brockville Equipment and office equipment	$100,000
Brockville Inventory	$400,00

IV. The Receiver's proposed distribution of the sales proceeds

A. The Receiver's proposal

12 In its Third Report dated January 31, 2014 the Receiver stated that under the two APAs BBL had allocated about $8.2 million of the purchase price to assets subject to the security held by BDC. It continued:

> The Receiver has no basis on which to consider the allocation by BBL to be unreasonable and therefore has used the BBL allocation set out in the Purchase and Sale Agreements as the basis for determining the proceeds to be paid to BDC and RBC.

Observing that it had incurred certain costs and fees on behalf of BDC during the Receivership, the Receiver proposed to deduct those costs from the Gross BDC Proceeds to arrive at a net figure payable to BDC. Appendix "O" to the Third Report set out the Receiver's calculations. Based on those calculations, the Receiver proposed to distribute to BDC proceeds of $7.7 million.

13 The Receiver reported that the majority of the remaining funds in its receivership accounts related to proceeds from RBC's security. The Receiver proposed to make a distribution to RBC of $3.46 million.

14 RBC supported the distribution proposed by the Receiver.

B. BDC's position

15 BDC objected to the Receiver's proposed distribution on the grounds set out in the February 5, 2014 affidavit of Lori Matson, Director, BDC Business Restructuring Unit. As of October, 2013, the Debtors owed BDC approximately $17.39 million.

16 Matson confirmed that BDC had received from the Receiver a draft of the Atlas APA as early as November 7, 2013, some three weeks prior to its execution, and BDC had understood at that time that part of the purchase price involved BBL assuming about $2.6 million in RBC Equipment Leases. According to Matson, BDC did not take issue with the BBL purchase price, but did have concerns about the allocation of the purchase price:

> (i) Matson alleged that RBC had engaged in discussions with BBL before the execution of the APAs which had influenced the allocation of the purchase price;
>
> (ii) BDC contended that by assuming the remaining obligations under the RBC Equipment Leases, BBL was "factoring in the transaction structure (i.e.: assumption of capital leases), into its allocation rather than the value of the assets being obtained thereunder. The result is a purchase price allocation that is not reflective of the value of the various assets being acquired based upon appraisals...the allocation becomes arbitrary as it does not distinguish the financing aspect from the underlying value of the assets being acquired". BBL allocated the purchase price based on the amount of the debt being assumed which bore no relationship to the value of the underlying assets. Matson described the situation as an "over-allocation relative to the capital leased assets"; and,
>
> (iii) BBL's allocation of the purchase price did not reflect historic appraised values of the purchased assets.

It was Matson's evidence that the Receiver should distribute $10,644,360 to BDC based upon appraised values, not the $7.7 million it proposed based on the purchase price allocation in the APAs.

17 At my request, the Receiver filed a supplementary document which compared the calculation of its proposed distributions to the distributions proposed by BDC.

V. Analysis: Allocation of sales proceeds

A. Allegation of pre-execution discussions between BBL and RBC

18 Matson alleged that "negotiations took place between the Purchaser and RBC as part of the Purchaser's due diligence process in advance of the bidding that had the effect of creating an opportunity for the Purchaser to finance part of this purchase and as well creating expectations relative to the allocation of the sale proceeds on the part of RBC".

19 Matson did not disclose in her affidavit any source or basis for her allegation.

20 Mark Swanson, a Manager in RBC's Special Loans and Advisory Services Department, deposed, in his February 6, 2014 affidavit, that RBC had no communication with BBL prior to being told by the Receiver that BBL's offer included, amongst its terms, the assumption of the RBC Equipment Leases on an undiscounted basis. Swanson stated that the Receiver had asked RBC whether it would support a motion to approve a transaction under which BBL assumed the leases, rather than paying cash for them, but Swanson deposed that there had been no discussion between RBC and the Receiver of a discount or reduction of payments under the leases.

21 In the Second Supplement to its Third Report the Receiver responded to Matson's allegations:

> ...BDC suggests that negotiations took place between BBL and RBC prior to the submission of BBL's offer. The Receiver provided all potential purchasers who signed the Receiver's confidentiality agreement with information on Atlas' various leases and fixed assets through the Receiver's online data room so that they could perform their due diligence. BDC was also provided access to the Receiver's data room and was therefore aware of the information available to all purchasers. The Receiver is not aware of any other information supplied to BBL nor any negotiations between RBC and BBL prior to the submission of BBL's offer. The Receiver notes that BDC has not provided any evidence to support their allegations.

22 Given the failure of BDC to disclose the evidence upon which it based its allegation of the pre-execution negotiations between BBL and RBC and in light of the strong direct evidence to the contrary from the Receiver and RBC, I give no effect whatsoever to BDC's allegation that RBC had engaged in discussions with BBL before the execution of the APAs which had influenced the allocation of the purchase price. BDC's allegation was without any evidentiary foundation foundation.

B. The RBC Equipment Leases

23 There was no dispute that part of the consideration offered by BBL under the Atlas APA was its agreement to assume the obligations of Atlas Block under the RBC Equipment Leases. The amount allocated for that consideration under the Atlas APA was the amount of the remaining obligations under those leases.

24 I do not accept BDC's submission that such an allocation of consideration was somehow arbitrary or unfair. To the contrary, the consideration allocated for BBL's assumption of that liability corresponded exactly to the monetary amount of the remaining obligations under those leases. There was nothing arbitrary about such an allocation. The crux of BDC's complaint really related to the amount of the purchase price allocated to other assets, in particular the Hillsdale Real Property, so I turn now to that issue.

C. The relationship between allocations of the purchase price to the Hillsdale Real Property and the appraised values of that asset

C.1 The positions of the parties

25 The crux of BDC's complaint about the proposed distribution of sales proceeds was that in the APAs BBL's allocation of the purchase price did not reflect historic appraised values of some of the purchased assets, in particular the Hillsdale Real Property.

26 In section 1.1.7 of its Second Report dated December 12, 2013, the Receiver observed that "the construction of the Hillsdale Plant unfortunately coincided with the start of the 2008/2009 economic downturn..." Schedule "K" to the Atlas APA allocated $1 million of the purchase price to the Hillsdale Real Property. BDC submitted that $3 million should have been allocated to that property.

27 Matson attached to her affidavit extracts from two appraisals of the Hillsdale Real Property performed in 2008 and 2011. The first extracts were from a June, 2008 appraisal that had been prepared by Katchen Appraisals Inc. for BDC. By its terms the Katchen Appraisal was intended to assist for financing purposes only and was "to serve as a benchmark for establishing the projected value of the property *as improved with a completed concrete block manufacturing facility*, in fee simple, assuming a market exposure of twelve months prior to sale under forced sale conditions on June 17, 2008..." Katchen valued the property at $4.5 million.

28 Matson also attached extracts from a second appraisal, one prepared by Appraisers Canada Inc. with an effective date of December, 2011. The appraisal stated that it was intended only "for an accounting function and for no other use" and that its purpose was "to estimate a current hypothetical market value of the subject property, as if unimproved, as at the effective date". Appraisers estimated that value as in a range between $2.162 to $2.883 million, with a "value tendency" of $2.5 million.

29 Pointing to the extracts from both appraisals, Matson deposed that BBL's price allocation "seriously undervalues the land and building" and "allocating $1,000,000 to the real property is not reasonable".

30 In its Second Supplement to the Third Report the Receiver noted that the appraisals relied upon by BDC were prepared at different dates and used different appraisal assumptions:

> The Receiver does not believe that this amalgamation of estimated values is a superior method of allocating the purchase price as compared to the allocation of a third party purchaser of assets.

The Receiver also observed that the Hillsdale Plant was a special purpose asset, remotely located, which was difficult and perhaps cost prohibitive to relocate.

31 Although RBC did not comment directly on the valuations, Swanson did depose that back in August, 2013, just after RBC had commenced this application, it had been asked by the Debtors' financial advisor to adjourn the application to enable the Debtors to work out a refinancing with BDC. A signed memorandum of understanding between the Debtors and BDC provided to RBC disclosed that BDC's existing loan in excess of $17 million would be replaced by a $5 million loan to a Newco which would acquire the Debtors' assets and business. Newco would issue preferred shares to BDC. In the result, that transaction did not proceed and a receiver was appointed. Swanson deposed:

> The history of this matter therefore shows that the Receiver, who RBC drove to appoint, successfully increased BDC's anticipated recovery by over $3 million and reduced BDC's risk by even more. The Receiver has therefore significantly reduced the shortfall that BDC was otherwise willing to incur.

C.2 Analysis

32 In *Bank of America Canada v. Willann Investments Ltd.* [1] Farley J. commented that when examining a receiver's proposed sale of assets in light of the principles set out in *Royal Bank v. Soundair Corp.*, [2] a court might well refrain from approving a sale that proposed an allocation of the purchase price which was significantly different from the latest valuation of the assets because such an allocation would not fairly consider the interests of all creditors. [3] From that it follows that the time for objecting to an allocation of the purchase price in a proposed sale is when the sale is brought before the Court for approval. If the Court agrees with the objection, it can decline to approve the sale, which may or may not result in further negotiations with the proposed purchaser, depending upon the significance to it of the purchase price allocation.

33 Once a court approves a sale agreement, however, as occurred here, it becomes more difficult for a creditor to advance an objection about the fairness of the term of the sales agreement allocating the purchase price because such an objection, in essence, constitutes an objection to a material term of the now-approved sale agreement. Put another way, not having opposed the approval of a sales transaction, thereby securing the benefit of that sale of the debtor's assets, a creditor faces difficulty in objecting subsequently to a material term of the agreement which it did not oppose.

34 In the present case BDC did not oppose the approval of the BBL APAs - no doubt because the BBL offers were far, far superior to any other offer obtained by the Receiver - but BDC did put a "reservation of rights" on the record, without filing evidence at the time about the nature of its objections. A receiver's distribution motion should not turn into a debate about the fairness of the term in the approved sale agreement which allocates the purchase price to particular assets. The proper time for such a debate is at the hearing of the approval motion. I will consider the objections made by BDC, but their timing weakens the weight to be given to them.

35 Turning to the submission of BDC that the allocated purchase price for the Hillsdale Real Property was far below its appraised value, I have five comments. First, any appraisal must be read in its entirety to understand the methodology used and the assumptions employed. On this motion BDC only filed portions of the reports from which it was not possible to ascertain the methodologies and information used by the appraisers to arrive at their estimates. Failing to file the entire reports significantly undermined their evidentiary value. Second, the reports gave opinion values as of June, 2008 and December, 2011. The reports therefore were quite dated, the last expressing a value some two years prior to the appointment of the Receiver. Since the actions of the Receiver must be assessed at the time taken, stale valuation reports are of little assistance in ascertaining how the market perceived the value of the Hillsdale Real Property as of November, 2013, the date of the Atlas APA.

36 Which leads me to my third point. In the December 12, 2013 Supplement to its Second Report the Receiver stated:

> BDC also has a mortgage on the real property at Hillsdale...Both the Receiver and BDC agreed that an appraisal of the Hillsdale Real Property would not be cost beneficial as the value of the Hillsdale Real Property is intrinsic to the manufacturing plant and could not be separately assessed. It was agreed that an appraisal of the market value of the Hillsdale Real Property on a standalone basis would be theoretical at best, and not provide useful information in assessing offers.

It is difficult to understand how BDC now relies on stale valuation reports to support its submissions on the allocation of net sale proceeds in light of that agreement.

37 Fourth, the material deficiencies in the evidentiary utility of the two appraisal reports referred to by Matson brings one back, then, to the general principle that where a receiver markets a property, appraisals cease to have much significance in the valuation process [4] - a sale is always a better indication of value of a particular property than a valuation. In the present case, the Receiver contacted 83 different interested parties, 36 of which signed confidentiality agreements, and 8 of which submitted offers. The BBL offer accepted by the Receiver was far, far superior to any other offer.

38 Fifth, and finally, in the Second Supplement to its Third Report the Receiver provided the following evidence:

> [T]he Hillsdale building was a sole purpose building, built for the purpose of block production only. Accordingly, it is likely that the building would only have value in a going concern sale. If the assets were liquidated and removed, the building would at best have scrap value and may have been a liability for a purchaser of the real property as it would likely have to be demolished. Therefore, the allocation of the $1.0 million to the real property is likely superior to liquidation value.

I accept that evidence.

39 Accordingly, I see no reason to interfere with the Receiver's recommendation to distribute the net sales proceeds using a methodology based on the allocation of the purchase price found in the approved Atlas APA and Brockville APA. I therefore grant the relief sought in paragraph (g) of the Receiver's February 3, 2014 notice of motion.

VI. Allocation of the Receiver's costs

40 The Receiver sought approval of its fees and disbursements of $196,882.73 for the period December 1, 2013 to January 15, 2014, as well as for those of its counsel for the same period in the amount of $147,503.13. Recognizing the competing security interests in the receivership, the Receiver and its counsel had tracked their time and expenses in three separate categories: (i) those directly related to BDC asset realization activities; (ii) those directly related to RBC asset realization activities; and, (iii) those shared between BDC and RBC realization activities.

41 BDC took no issue with the direct expenses attributed by the Receiver to BDC assets ($67,598). The Receiver tracked shared expenses totaling $510,782. It proposed allocating $357,159 of those expenses to BDC on the basis that BDC recovered 69.92% of the total sales proceeds. RBC supported the Receiver's proposed allocation. BDC objected to the amount of the fees and to their allocation, contending that only 50% of the shared costs should be allocated to it, or the sum of $255,391. BDC complained that "a significant portion of these costs were expended in the collection of accounts receivable and the production and sale of inventory which clearly solely benefitted RBC. In addition, there are significant Receiver and legal fees relative to the trust claims of Holcim and Tackaberry".

42 This Court approved the Receiver's fees and legal fees for the period up to November 30, 2013 in its December 20, 2013 order. As to the fees incurred after that date, in paragraph 21 of her affidavit Matson "sought clarification" of certain work performed by the Receiver and its counsel. In section 3.1 of the Second Supplement to its Third Report the Receiver provided detailed clarification. In light of that clarification, I conclude that the fees for which the Receiver sought approval were reasonable in the circumstances.

43 As to the allocation of the fees, the general principles governing the allocation of receiver's costs can be briefly stated:

> (i) The allocation of such costs must be done on a case-by-case basis and involves an exercise of discretion by a receiver or trustee;
>
> (ii) Costs should be allocated in a fair and equitable manner, one which does not readjust the priorities between creditors, and one which does not ignore the benefit or detriment to any creditor;
>
> (iii) A strict accounting to allocate such costs is neither necessary nor desirable in all cases. To require a receiver to calculate and determine an absolutely fair value for its services for one group of assets vis-à-vis another likely would not be cost-effective and would drive up the overall cost of the receivership;
>
> (iv) A creditor need not benefit "directly" before the costs of an insolvency proceeding can be allocated against that creditor's recovery;

(v) An allocation does not require a strict cost/benefit analysis or that the costs be borne equally or on a *pro rata* basis;

(vi) Where an allocation appears *prima facie* as fair, the onus falls on an opposing creditor to satisfy the court that the proposed allocation is unfair or prejudicial. [5]

44 The Receiver responded to BDC's complaint about the allocation of certain time by reporting that it had only charged time for accounts receivable collections and the Holcim/Tackaberry claims to RBC. That addressed that complaint.

45 As to the allocation methodology for shared fees, the Receiver reported that as early as October 18, 2013, it had provided BDC with its allocation method for professional fees and expenses incurred in the estate. Its email to RBC of that date stated:

> The shared time will be allocated on realizations of the secured creditor assets so the exact breakdown of those fees will not be known until the assets are realized.

The Receiver provided BDC with requested weekly reports allocating those fees amongst the three time categories. The Receiver responded to periodic inquiries about the fees and their allocation from BDC, and it was not aware that BDC took issue with the allocation until February 4, 2014.

46 I find it difficult to place must credence in an "11 th hour" objection by a creditor to the receiver's proposed allocation of fees when the Receiver disclosed the proposed methodology at the start of the administration of the receivership estate, the creditor did not object, and the Receiver provided on-going, transparent reporting to the creditor of the fees incurred.

47 The Receiver also stated:

> The Receiver believes that BDC derived a significant benefit from the Receiver's operations and eventual sale to BBL. As discussed previously the DSL Appraisal makes it clear that the realizable values of Atlas' assets would have been significantly impaired absent a going concern sale when one compares the appraised value of $6.5 million in a going concern type sale versus a value of $1.5 million in a liquidation sale...The Receiver agrees with BDC that BBL paid more for all of the Atlas assets, and most notably the Hillsdale Equipment (as the Hillsdale plant is the only plant of the two sold in the First BBL Sale that BBL is operating), because of the Receiver's preservation of the Atlas customer base through continued operations during the receivership. This was of great benefit to BDC, perhaps more so than to RBC.

48 The allocation methodology proposed by the Receiver for shared costs based *pro rata* on realizations was *prima facie* reasonable in the circumstances of this case. The Receiver disclosed that methodology to BDC at the start of its administration, and BDC did not object until the 11 th hour. BDC has not demonstrated any unfairness in the methodology proposed by the Receiver.

49 Consequently, I grant the orders sought by the Receiver in paragraphs (h) and (i) of its notice of motion dated February 3, 2014.

VII. Costs

50 I would encourage the parties to try to settle the costs of this motion. If they cannot, any party seeking costs may serve and file with my office written cost submissions, together with a Bill of Costs, by March 21, 2014. Any party against whom costs are sought may serve and file with my office responding written cost submissions by March 28, 2014. The costs submissions shall not exceed three pages in length, excluding the Bill of Costs.

Motion granted.

Footnotes

1 1992 CarswellOnt 1743 (Ont. Gen. Div. [Commercial List])

2 (1991), 4 O.R. (3d) 1 (Ont. C.A.)

3 *Bank of America Canada v. Willann Investments Ltd.*, *supra.*, para. 5.

4 *B & M Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 56 C.B.R. (5th) 313 (Ont. S.C.J.), para. 13; *Bank of America Canada v. Willann Investments Ltd.*, 1992 CarswellOnt 1743 (Ont. Gen. Div. [Commercial List]), para. 5.

5 See the cases cited by C. Campbell J. in *Hunjan International Inc., Re* (2006), 21 C.B.R. (5th) 276 (Ont. S.C.J.) and Cameron J. in *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp.* (2006), 25 C.B.R. (5th) 156 (Ont. S.C.J.).

End of Document

TAB10

COURT FILE NO.: CV-08-7672-00CL
DATE: 20090728

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WINDSOR MACHINE & STAMPING LIMITED, LIPEL INVESTMENTS LTD., WMSL HOLDINGS LTD., 442260 ONTARIO LTD., WINMACH CANADA LTD., PRODUCTION MACHINE SERVICES LTD., 538185 ONTARIO LTD., SOUTHERN WIRE PRODUCTS LIMITED, PELLUS MANUFACTURING LTD., TILBURY ASSEMBLY LTD., ST. CLAIR FORMS INC., CENTROY ASSEMBLY LTD., PIONEER POLYMERS INC., G&R COLD FORGING INC., WINDSOR MACHINE DE MEXICO, WINMACH INC., WINDSOR MACHINE PRODUCTS, INC. WAYNE MANUFACTURING INC. AND 383301 ONTARIO LIMITED

Applicants

BEFORE: MORAWETZ J.

COUNSEL: Tony Reyes and Evan Cobb, for RSM Richter Inc., Monitor

Raong Phalavong, for Saginaw Pattern

Andrew Hatnay, Andrea McKinnon and D. Youkaris, for U.A.W. Local 251

Joseph Marin, for Windsor Machine & Stamping Ltd.

D. Dowdall and J. Dietrich, for Bank of Montreal

J. Archibald, for Magna

John D. Leslie, for Ford Motor Company

P. Shea, for Johnson Controls Inc.

Jackie Moher, for Ryder Finance Corporation

HEARD &
DECIDED: **MARCH 11, 2009**

ENDORSEMENT

[1] On March 11, 2009, the motion of RSM Richter Inc. was heard and granted with reasons to follow. These are those reasons.

[2] RSM Richter Inc., in its capacity as Monitor, brought this motion for:

(a) an Approval and Distribution Order;

(b) a Vesting Order relating to the sale of personal property assets from WMSL to the Canadian Purchaser;

(c) a Vesting Order relating to the sale of real property from Lipel Investments Ltd. to the Canadian Purchaser;

(d) a Vesting Order relating to the sale of real property from 383301 to the Canadian Purchaser;

(e) an Order approving the fees and disbursements of the Monitor and its counsel.

[3] The motion has the support of the Applicants, Bank of Montreal (the "Bank"), Magna, Ford and Johnson Controls. The Union was not opposed to the sale. An unsecured creditor, Saginaw Pattern, objected. Ryder Finance, an unaffected party did not oppose.

[4] I am satisfied that the record supports the requested relief. During these CCAA proceedings, the Applicants explored a number of restructuring alternatives. The Monitor also ran a sale process to identify a potential buyer or buyers for the business. The Applicants were unable to implement a restructuring within the current corporate entities and were unable to identify an arm's length buyer of the business that would pay an amount greater than the forced liquidation value of the business. The sale process conducted by the Monitor did not result in any offers being submitted to purchase the Applicants' assets.

[5] The Monitor is of the view that the Applicants could not carry on as currently structured. Both the Bank and EDC indicated that they would continue their support for the business and they have had negotiations with the Purchasers and the Applicants, with a view to financing the Purchasers and then working with the Applicants to complete a sale of the business to the Purchasers.

[6] The Monitor is of the view that the proposed transactions result in an outcome that preserves the business. The Monitor supports the approval of the transactions described in the Seventh Report.

[7] With respect to the Approval and Distribution Order and the three Vesting Orders, these transactions notionally result in the Bank's loans being repaid by the Purchasers (who are being financed by the Bank and EDC) and will permit the business to continue. A portion of the secured debt owing by WMSL to WMSL Holdings Ltd. will be paid by way of a promissory note from the Canadian Purchaser to WMSL Holdings Ltd. The Canadian Purchaser will not have the burden of the remaining secured debt owing to WMSL Holdings Inc., nor the burden of substantial unsecured debt.

[8] The Monitor is of the view that the holdbacks described in the Approval and Distribution Order are desirable and appropriate in the circumstances so that goods and services supplied post-filing can be paid, and so that the Union, if it is successful in its claims, can be paid.

[9] In addition to the three transactions for which the Vesting Orders are sought, a fourth transaction is covered by the Approval and Distribution Order. The fourth transaction is with respect to personal property owned by two U.S. companies. These companies operate in the State of Michigan. The Applicants did not seek formal recognition of the CCAA proceedings in the United States. The parties are of the view that the most cost efficient means of completing the transaction with respect to these assets would be for the Bank to take its remedies under the U.S. Uniform Commercial Code, ("UCC") and issue notices of sale under the UCC with respect to the personal property. The Monitor consented to this process and notices were issued by the Bank.

[10] It is specifically noted, that notwithstanding anything in the Approval and Distribution Order, Vesting Orders or purchase agreements referenced therein, the purchase orders or releases issued by Magna Structural Systems Inc. and/or Magna Seating of America, Inc. (collectively, "Magna") or Ford Motor Company ("Ford") to WMSL or any other Applicant will be assigned and vested in and to the purchaser, upon the consent of Magna or Ford, as the case may be, to the assignment of such purchase orders and releases being provided to WMSL and the Purchaser on Closing and the Certificate having been filed.

[11] Further, nothing in the Approval and Distribution Order or the Vesting Orders made in accordance with such Approval and Vesting Order shall, unless JCI consents, impact or terminate the IP licence or option to purchase assets granted to JCI pursuant to the Accommodation Agreement dated October 24, 2008 and approved by the Order dated October 29, 2008, and the vesting of assets pursuant to Approval and Distribution Order or the Vesting Orders shall, unless JCI otherwise consents, be subject to the IP licence and option in favour of JCI.

[12] Finally, it is noted that employee matters are specifically addressed at Article 2.13 of the Agreement of Purchase and Sale.

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

[14] As previously indicated, the record supports the requested relief in all respects. Orders have been signed and issued in the form requested.

MORAWETZ J.

DATE: Heard and Decided: March 11, 2009

Typed Reasons Released: July 28, 2009

TAB11

2009 QCCS 6461
Quebec Superior Court

AbitibiBowater, (Re)

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

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

Gascon J.C.S.

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

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

Subject: Insolvency

Gascon J.C.S.:

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

Introduction

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

2 More particularly, the Abitibi Petitioners seek:

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

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

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

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

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

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

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

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

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

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

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

The MPCo Sale Transaction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Ulc DIP Facility

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

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

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

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

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

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

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

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

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

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

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

(a) Substantial non-compliance with the Budget;

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

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

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

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

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

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

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

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

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

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

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

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

The Questions at Issue

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

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

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

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

Analysis and Discussion

1) The Approval of the DIP Financing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

g) The Monitor's report.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2) The Distribution to the SSNs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3) The Orders Sought

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

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

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

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

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

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

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

FOR THESE REASONS, THE COURT:

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

ULC DIP Financing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ACI DIP Agreement

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

Senior Secured Notes Distribution

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

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

Amendment to the Subrogation Provision

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

Subrogation to ACI DIP Charge

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

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

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

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

23 *WITHOUT COSTS.*

Schedule "A" — Abitibi Petitioners

1. *ABITIBI-CONSOLIDATED INC.*

2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*

3. *3224112 NOVA SCOTIA LIMITED*

4. *MARKETING DONOHUE INC.*

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

6. *3834328 CANADA INC.*

7. *6169678 CANADA INC.*

8. *4042140 CANADA INC.*

9. *DONOHUE RECYCLING INC.*

10. *1508756 ONTARIO INC.*

11. *3217925 NOVA SCOTIA COMPANY*

12. *LA TUQUE FOREST PRODUCTS INC.*

13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*

14. *SAGUENAY FOREST PRODUCTS INC.*

15. *TERRA NOVA EXPLORATIONS LTD.*

16. *THE JONQUIERE PULP COMPANY*

17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY*

18. *SCRAMBLE MINING LTD.*

19. *9150-3383 QUÉBEC INC.*

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

Schedule "B" — Bowater Petitioners

1. *BOWATER CANADIAN HOLDINGS INC.*

2. *BOWATER CANADA FINANCE CORPORATION*

3. *BOWATER CANADIAN LIMITED*

4. *3231378 NOVA SCOTIA COMPANY*

5. *ABITIBIBOWATER CANADA INC.*

6. *BOWATER CANADA TREASURY CORPORATION*

7. *BOWATER CANADIAN FOREST PRODUCTS INC.*

8. *BOWATER SHELBURNE CORPORATION*

9. *BOWATER LAHAVE CORPORATION*

10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*

11. *BOWATER TREATED WOOD INC.*

12. *CANEXEL HARDBOARD INC.*

13. *9068-9050 QUÉBEC INC.*

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

15. *BOWATER BELLEDUNE SAWMILL INC.*

16. *BOWATER MARITIMES INC.*

17. *BOWATER MITIS INC.*

18. *BOWATER GUÉRETTE INC.*

19. *BOWATER COUTURIER INC.*

Schedule "C" — 18.6 CCAA Petitioners

1. *ABITIBIBOWATER INC.*

2. *ABITIBIBOWATER US HOLDING 1 CORP.*

3. *BOWATER VENTURES INC.*

4. *BOWATER INCORPORATED*

5. *BOWATER NUWAY INC.*

6. *BOWATER NUWAY MID-STATES INC.*

7. *CATAWBA PROPERTY HOLDINGS LLC*

8. *BOWATER FINANCE COMPANY INC.*

9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*

10. *BOWATER AMERICA INC.*

11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

Footnotes

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

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

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

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

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

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

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

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

End of Document

TAB12

2002 CarswellOnt 3002
Ontario Court of Appeal

Confectionately Yours Inc., Re

2002 CarswellOnt 3002, [2002] O.J. No. 3569, 116 A.C.W.S. (3d) 871, 164 O.A.C. 84, 219 D.L.R. (4th) 72, 25 C.P.C. (5th) 207, 36 C.B.R. (4th) 200

IN THE MATTER OF THE PROPOSALS OFCONFECTIONATELY YOURS, INC., BAKEMATES INTERNATIONAL INC., MARMAC HOLDINGS INC., CONFECTIONATELY YOURS BAKERIES INC., and SWEET-EASE INC.

Catzman, Doherty, Borins JJ.A.

Heard: April 8, 2002
Judgment: September 19, 2002
Docket: CA C36486

Proceedings: reversing in part (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List])

Counsel: *Martin Teplitsky*, for Appellants, Barbara Parravano, Mario Parravano
Benjamin Zarnett, *David Lederman*, for Respondent, KPMG Inc.
Katherine McEachern, for Respondent, Laurentian Bank of Canada

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Remuneration of receiver — Accounts

Court-appointed receiver operated business of debtor companies pending going concern asset sale — Receiver presented report to court for approval — Report recommended that court approve receiver's fees and disbursements as well as fees and disbursements of receiver's solicitors — Shareholders of debtor companies objected to amount of fees and disbursements of receiver and solicitors — Motion judge refused to permit counsel for shareholders to cross-examine representative of receiver on report — Motion judge permitted counsel for shareholders as judge's "proxy" to ask questions of receiver's representative who was not sworn — Motion judge approved fees and disbursements of receiver and solicitors in amount submitted in report without any reduction — Shareholders appealed — Appeal allowed in part — Portion of order of motion judge approving accounts of receiver's solicitors set aside — Motion judge erred in failing to give accounts of receiver's solicitors separate consideration — Accounts of receiver's solicitors were ordered to be resubmitted, verified by affidavit and assessed by different judge — Shareholders had fair opportunity to challenge remuneration of receiver and questioning of receiver's representative was adequate substitute for cross-examining him, however receiver's representative could not speak to accuracy or reasonableness of solicitors' accounts — No representative of receiver's solicitors was available to question or cross-examine — Motion judge erred in equating procedure to be followed for approving receiver's conduct of receivership with procedure to be followed in assessing receiver's remuneration — Better practice is for receiver and its solicitors to each support claim for remuneration by way of affidavit.

APPEAL by shareholders of debtor companies from judgment reported at 2001 CarswellOnt 1784, 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]), assessing fees and disbursements of court-appointed receiver and its solicitors.

***Borins J.A.*:**

1 This is an appeal by Mario Parravano and Barbara Parravano from the assessment of a court-appointed receiver's fees and disbursements, including the fees of its solicitors, Goodmans, Goodman and Carr and Kavinoky and Cook,

consequent to the receiver's motion to pass its accounts. The motion judge assessed the fees and disbursements in the amounts presented by the receiver. The appellants ask that the order of the motion judge be set aside and that the receiver's motion to pass its accounts be heard by a different judge of the Commercial List, or that the accounts be referred for assessment, with the direction that the appellants be permitted to cross-examine both a representative of the receiver and of the solicitors in respect to their fees and disbursements.

Introduction

2 On October 3, 2000, on the application of the Laurentian Bank of Canada (the "bank"), Spence J. appointed KPMG Inc. ("KPMG") as the receiver and manager of all present and future assets of five companies ("the companies"). Collectively, the companies carried on a large bakery, cereal bar and muffin business that employed 158 people and generated annual sales of approximately $24 million. The companies were owned by Mario and Barbara Parravano (the "Parravanos") who had guaranteed part of the companies' debts to the bank. Upon its appointment, KPMG continued to operate the business of the companies pending analysis as to the best course of action. As a result of its analysis, KPMG decided to continue the companies' operations and pursue "a going concern" asset sale.

3 Paragraph 22 of the order of Spence J. reads as follows:

> **THIS COURT ORDERS** that, prior to the passing of accounts, the Receiver shall be at liberty from time to time to apply a reasonable amount of the monies in its hands against its fees and disbursements, including reasonable legal fees and disbursements, incurred at the standard rates and charges for such services rendered either monthly or at such longer or shorter intervals as the Receiver deems appropriate, and such amounts shall constitute advances against its remuneration when fixed from time to time.

4 The receiver was successful in attracting a purchaser and received the approval of Farley J. on December 21, 2000, to complete the sale of substantially all of the assets of the companies for approximately $6,500,000. The transaction closed on December 28, 2000.

5 The receiver presented two reports to the court for its approval. In the first report, presented on December 15, 2000, KPMG outlined its activities from the date of its appointment and requested approval of the sale of the companies' assets. The second report, which is the subject of this appeal, was presented on February 2, 2001. The second report contained the following information:

- an outline of KPMG's activities subsequent to the sale of the companies' assets;
- a statement of KPMG's receipts and disbursements on behalf of the companies;
- KPMG's proposed distribution of the net receipts;
- a summary of KPMG's fees and disbursements supported by detailed descriptions of the activities of its personnel by person and by day;
- a list of legal fees and disbursements of its solicitors supported by detailed billings.

In its second report, KPMG recommended that the court, *inter alia*, approve its fees and disbursements, as well as the fees and disbursements of Goodmans, calculated on the basis of hours multiplied the hourly rates of the personnel. The total time billed by KPMG was 3,215 hours from October 3, 2000 to December 31, 2000 at hourly rates that ranged from $175 to $550. Its disbursements included the fees and disbursements of its solicitors. Each report was signed on behalf of KPMG by its Senior Vice-President, Richard A. Morawetz.

6 In summary, KPMG sought approval of the following:

- receiver's fees and disbursements of $1,080,874.93, inclusive of GST.

- legal fees of Goodmans of $209,803.46, inclusive of GST.
- legal fees of Goodman and Carr of $92,292.32, inclusive of GST.
- legal fees of Kavinoky & Cook of $2,583.23.

7 The Parravanos objected to the amount of the fees and disbursements of KPMG and Goodmans. Their grounds of objection were that the time spent and the hourly rates charged by the receiver and Goodmans were excessive. They submitted that the fees of KPMG and Goodmans were not fair and reasonable. They also sought to cross-examine Mr. Morawetz with respect to their grounds of objection. The motion judge refused to permit Mr. Pape, counsel for the Parravanos, to cross-examine Mr. Morawetz on the ground that a receiver, being an officer of the court, is not subject to cross-examination on its report. However, the motion judge permitted Mr. Pape as the judge's "proxy" to ask questions of Mr. Morawetz, who was not sworn. The motion judge then approved the fees and disbursements of the receiver and Goodmans in the amounts as submitted in the receiver's report without any reduction.

8 The appellants appeal on the following grounds:

(1) The motion judge exhibited a demonstrable bias against the appellants and their counsel as a result of which the appellants were denied a fair hearing;

(2) The motion judge erred in holding that on the passing of its accounts a court-appointed receiver cannot be cross-examined on the amount of the fees and disbursements in respect to which it seeks the approval of the court; and

(3) The motion judge erred in finding that the receiver's fees and disbursements, and those of its solicitors, Goodmans, were fair and reasonable.

9 For the reasons that follow, the appellants have failed to establish that they were denied a fair hearing on the grounds that the motion judge was biased against them and their counsel and that they were not permitted to cross-examine the receiver's representative, Mr. Morawetz, on the receiver's accounts. As I will explain, the examination of Mr. Morawetz that was permitted by the motion judge afforded the appellants' counsel a fair opportunity to challenge the remuneration claimed. As well, the appellants have provided no grounds on which the court can interfere with the motion judge's finding that the receiver's accounts were fair and reasonable. However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. The motion judge failed to give these accounts separate consideration. I would, therefore, allow the appeal to that extent and order that there be a new assessment of Goodmans' accounts.

Reasons of the motion judge

10 The reasons of the motion judge are reported as *Bakemates International Inc. Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]).

11 In the first part of his reasons, the motion judge provided his decision on the request of the appellants' counsel to cross-examine Mr. Morawetz with respect to the receiver's accounts. He began his consideration of this issue at p. 25:

> Perhaps it is the height — or depth — of audacity for counsel for the Parravanos to come into court expecting that he will be permitted (in fact using the word "entitled") to cross-examine the Receiver's representative (Mr. Richard Morawetz) in this court appointed receivership concerning the Receiver's fees and disbursements (including legal fees).

After reviewing two of his own decisions — *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) and *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) — the motion judge concluded that because a receiver is an officer of the court who is required to report to the court in respect to the conduct of the receivership, a receiver cannot be cross-examined on its report.

12 In support of this conclusion, the motion judge relied on the following passage from his reasons for judgment in *Mortgage Insurance* at pp. 101-102:

> As to the question of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is *truly* needed [emphasis added].

13 As authority for the proposition that a receiver, as an officer of the court, is not subject to cross-examination on his or its report, the motion judge relied on *Avery v. Avery*, [1954] O.W.N. 364 (Ont. H.C.) and *Silver v. Kalen* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.). He went on to say at p. 26 that when there are questions about a receiver's compensation, "[t]he more appropriate course of action" is for the disputing party "to interview the court officer [the receiver] . . . so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions".

14 The motion judge noted on p. 26 that the appellants' counsel had "not provided any factual evidence/background to substantiate that there were unusual circumstances" in respect to the rates charged and the time spent by the receiver. Consequently, he concluded that it was not an appropriate case to exercise what he perceived to be his discretion to allow the Parravanos' counsel to cross-examine Mr. Morawetz on the passing of the receiver's accounts. At p. 27, he stated: "Mr. Pape has not established any grounds for doing that."

15 Nevertheless, the motion judge did permit Mr. Pape to question Mr. Morawetz. His explanation for why he did so, the conditions that he imposed on Mr. Pape's examination, and his comments on Mr. Pape's "interview" of Mr. Morawetz, are found at p. 27:

> Mr. Pape has observed that Mr. Morawetz is here to answer any questions that I may have as to the fees and disbursements. While Mr. Pape has no right or entitlement to cross-examine Mr. Morawetz with respect to the fees and disbursements — and he ought to have availed himself of any last minute follow-up interview/questions last week if he thought that necessary, I see no reason why Mr. Pape may not be permitted to ask appropriate questions to Mr. Morawetz covering these matters — in essence as my proxy. However, Mr. Pape will have to conduct himself appropriately (as I am certain that he will — and I trust that I will not be disappointed), otherwise the questioning will be stopped as I would stop myself if I questioned inappropriately. Mr. Morawetz is under an obligation already as a court appointed officer to tell the truth; it will not be necessary for him to swear another/affirm [sic] — he may merely acknowledge his obligation to tell the truth. It is redundant but I think necessary to point out that this is not the preferred route nor should it be regarded as a precedent.
>
> [There then followed the interview of Mr. Morawetz by Mr. Pape and submissions. I cautioned Mr. Pape a number of times during the interview that he was going beyond what was reasonable in the circumstances and that Mr. Morawetz was entitled to give a full elaboration and explanation.]

16 In the second part of his reasons, the motion judge considered the amount of the compensation claimed by the receiver and its solicitors, Goodmans. He began at p. 27 by criticizing Mr. Pape "for attempting to show that Mr. Morawetz was not truthful or was misleading" in the absence of any expert evidence from the appellants in respect to the time spent and the hourly rates charged by the receiver in the course of carrying out its duties.

17 In assessing the receiver's accounts, the motion judge made the following findings:

(1) This was an operating receivership in which the receiver operated the companies for three months so that the companies' assets could be sold as a going concern.

(2) Usually, an operating receivership will require a more intensive and extensive use of a receiver's personnel than a liquidation receivership.

(3) The receivership was difficult and "rather unique".

(4) Mr. Morawetz scrutinized the bills before they were finalized "so that inappropriate charges were not included".

(5) It was not "surprising" that the receiver was required to use many members of its staff to operate the companies' businesses given what he perceived to be problems created by the Parravanos.

(6) It was necessary to use the receiver's personnel to conduct an inventory count in a timely and accurate way for the closing of the sale of the companies' assets.

(7) Mr. Morawetz "had a very good handle on the work and the worth of the legal work".

18 The motion judge assessed, or passed, the receiver's accounts, including those of its solicitors, Goodmans, in the amounts requested by the receiver in its report. He gave no effect to the objections raised by the appellants. On a number of occasions, he empahsized that there was no contrary evidence from the appellants that, presumably, might have caused him to reduce the fees claimed by the receiver or its solicitors.

19 He referred to Spence J.'s order appointing KPMG as the receiver, in particular para. 22 of the order as quoted above, and observed at p. 30:

> While certainly not determinative of the issue, that order does contemplate in paragraph 22 a charging system based on standard rates (i.e. docketed hours × hourly rate multiplicand). That would of course be subject to scrutiny — and adjustment as necessary.

20 He also noted that the appellants had relied on his own decision in *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]) in which he had said:

> [An indemnity agreement] is not a licence to let the taxi meter run without check. The professional must still do the job economically. He cannot take his fare from the court house to the Royal York Hotel via Oakville.

As to the application of this observation to the circumstances of this case, the motion judge said at pp. 31-32:

> I am of the view that subject to the checks and balances of *Chartrand v. De la Ronde* (1999), 9 C.B.R. (4th) 20 (Man. Q.B.) a fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent. Further I am of the view that the market is the best test of the reasonableness of the hourly rates for both receivers and their counsel. There is no reason for a firm to be compensated at less than their normal rates (provided that there is a fair and adequate competition in the marketplace). See *Chartrand*; also *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.). No evidence was led of lack of competition (although I note that Mr. Pape asserts that legal firms and accounting firms had a symbiotic relationship in which neither would complain of the bill of the other). What would be of interest here is whether the rates presented are in fact sustainable. In other words are these firms able to collect 100 cents on the dollar of their "rack rate" or are there write-offs incurred related to the collection process?

Issues and Analysis

21 In my view, there are three issues to be considered. The first issue is the alleged bias of the motion judge against the appellants and their counsel. The second issue is the proper procedure to be followed by a court-appointed receiver on seeking court approval of its remuneration and that of its solicitor. This procedural issue arises from the second ground of appeal in which the appellants assert that the motion judge erred in precluding their lawyer from cross-examining the receiver in respect to the remuneration that it requested. The third issue is whether the motion judge erred in finding that the remuneration requested by the receiver for itself and its solicitor was fair and reasonable.

(1) Bias

22 I turn now to the first issue. If I am satisfied that the appellants were denied a fair hearing because the motion judge exhibited a demonstrable bias against the appellants and their counsel, it will be unnecessary to consider the other grounds of appeal since the appellants would be entitled to a new hearing before a different judge. As I will explain, I see no merit in this ground of appeal.

23 The appellants submit that the motion judge acted with bias against their counsel, Mr. Pape. They rely on the following circumstances as demonstrating the motion judge's bias:

- the motion judge took offence to Mr. Pape having arranged for a court reporter to be present at the hearing.
- the motion judge was affronted by Mr. Pape's request to cross-examine Mr. Morawetz on the receiver's accounts.
- the first paragraph of the motion judge's ruling with respect to Mr. Pape's request to cross-examine Mr. Morawetz (which is quoted in para. 11) demonstrates that the motion judge was not maintaining his impartiality.
- in his ruling the motion judge curtailed the scope of the questions Mr. Pape was permitted to ask Mr. Morawetz and admonished Mr. Pape that he would "have to conduct himself properly".
- Mr. Pape's examination of Mr. Morawetz was curtailed by multiple interjections by the motion judge favouring the receiver.
- the motion judge's ruling on the passing of the receiver's accounts disparaged the appellants and Mr. Pape, in particular, by commenting with sarcasm and derision on Mr. Pape's lawyering.

24 Public confidence in the administration of justice requires the court to intervene where necessary to protect a litigant's right to a fair hearing. Any allegation that a fair hearing was denied as a result of the bias of the presiding judge is a serious matter. It is particularly serious when made against a sitting judge by a senior and respected member of the bar.

25 The test for reasonable apprehension of bias on the part of a presiding judge has been stated by the Supreme Court of Canada in a number of cases. In dissenting reasons in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 (S.C.C.), at 735, which concerned the alleged bias of the chairman of the National Energy Board, Mr. Crowe, de Grandpré J. stated:

> The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal [at p. 667], that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?"

26 This test was adopted by a majority of the Supreme Court of Canada in *R. v. S. (R.D.)* (1997), 151 D.L.R. (4th) 193 (S.C.C.). Speaking for the majority, Cory J. expanded upon the test at pp. 229-230:

> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. . . . Further the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"[emphasis in original].

27 Cory J. concluded at pp. 230-31:

> Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. . . . Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

28 My review of the transcript of the proceedings and the reasons of the motion judge leads me to conclude that the appellants have failed to satisfy the test. The most that can be said about the motion judge's reaction to the presence of a court reporter, his interjections during the cross-examination of Mr. Morawetz and his reference to Mr. Pape's lawyering in his reasons for judgment, is that he evinced an impatience or annoyance with Mr. Pape. In the circumstances of this case, the motion judge's impatience or annoyance with Mr. Pape does not equate with judicial support for either Mr. Morawetz or the receiver. To the extent that the motion judge's interjections during the examination of Mr. Morawetz reveal his state of mind, they suggest only some impatience with Mr. Pape and a desire to keep the examination moving forward. They did not prevent counsel from conducting a full examination of Mr. Morawetz.

29 Considered in the context of the entire hearing, the circumstances relied on by the appellants do not come close to the type of judicial conduct that would result in an unfair hearing. I would not, therefore, give effect to this ground of appeal.

(2) The procedure to be followed on the passing of the accounts of a court-appointed receiver

30 In my view, the motion judge erred in equating the procedure to be followed for approving the receiver's conduct of the receivership with the procedure to be followed in assessing the receiver's remuneration. The receiver's report to the court contained information on its conduct of the receivership as well as details of items such as the fees the receiver paid to its solicitors during the receivership. Such details also relate to or support the receiver's passing of its accounts. However, it is one thing for the court to approve the manner in which a receiver administered the assets it was appointed by the court to manage, but it is a different exercise for the court to assess whether the remuneration the receiver seeks is fair and reasonable (applying the generally accepted standard of review).

31 Moreover, the rule that precludes cross-examination of a receiver was made in the context of a receiver seeking approval of its report, not in the context of the passing of its accounts. When a receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.

32 As I will explain, the problem in this case was that the receiver's accounts were not verified by an affidavit. They were contained in the receiver's report. As a matter of form, I see nothing wrong with a receiver including its claim for compensation in its final report, as the receiver has done in this case. However, as I will discuss, the receiver's accounts and those of its solicitors should be verified by affidavit. Had KPMG verified its claim for compensation by affidavit, and had its solicitors done so, the issue that arose in this case would have been avoided.

33 The inclusion of the receiver's accounts, including those of its solicitors, in the report had the effect of insulating them from the far-ranging scrutiny of a properly conducted cross-examination when the motion judge ruled that the receiver, as an officer of the court, was not subject to cross-examination on the contents of its report. Assuming, without

deciding, that the ruling was correct, its result was to preclude the appellants, and any other interested person or entity, that had a concern about the amount of the remuneration requested by the receiver, from putting the receiver to the proof that the remuneration, in the context of the duties it carried out, was fair and reasonable. When I discuss the third issue, I will indicate how the court is to determine whether a receiver's account is fair and reasonable.

34 A thorough discussion of the duty of a court-appointed receiver to report to the court and to pass its accounts is contained in F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 443 *et seq.* As Bennett points out at pp. 445-446:

> . . . the court-appointed receiver is neither an agent of the security holder nor of the debtor; the receiver acts on its own behalf and reports to the court. The receiver is an officer of the court whose duties are set out by the appointing order. . . . Essentially, the receiver's duty is to report to the court as to what the receiver has done with the assets from the time of the appointment to the time of discharge.

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.

35 The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it can in the passing of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

36 I accept as correct Bennett's discussion of the purpose of the passing of a receiver's accounts at pp. 459-60:

> One of the purposes of the passing of accounts is to afford the receiver judicial protection in carrying out its powers and duties, and to satisfy the court that the fees and disbursements were fair and reasonable. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct to date. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. The approval given is to the extent that the reports accurately summarize the material activities. However, where the receiver has already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts. The court will inquire into complaints about the calculations in the accounts and whether the receiver proceeded without specific authority or exceeded the authority set out in the order. The court may, in addition, consider complaints concerning the alleged negligence of the receiver and challenges to the receiver's remuneration. *The passing of accounts allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions* [footnotes omitted] [emphasis added].

37 As for the procedure that applies to the passing of the accounts, Bennett indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, *e.g.*, *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Assess. O.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (N.S. T.D.). The accounts should be in a form that can be easily understood by

those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

38 Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63). [1] I agree. This conclusion is supported by both case law and legal commentary. Nathanson J. in *Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd.* (1983), 46 C.B.R. (N.S.) 117 (N.S. T.D.), adopted the following statement from *Kerr on Receivers*, 15th ed. (London: Sweet & Maxwell, 1978) at 246: "It is the receiver's duty to make out his account and to verify it by affidavit." [2] In *Holmested and Gale on the Judicature Act of Ontario and rules of practice*, vol. 3, looseleaf ed. (Toronto: Carswell 1983) at 2093, the authors state: "[t]he accounts of a receiver and of a liquidator are to be verified by affidavit." In *In-Med Laboratories Ltd. v. Ontario (Director, Laboratory Services Branch)*, [1991] O.J. No. 210 (Ont. Div. Ct.). Callaghan C.J.O.C. held that the bill of costs submitted by a solicitor "should be supported by an affidavit . . . substantiating the hours spent and the disbursements". This court approved that practice in *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 (Ont. C.A.), at 52-53, in discussing the fixing of costs by a trial judge under rule 57.01(3) of the *Rules of Civil Procedure* (as it read at that time). In addition, I note that on the passing of an estate trustee's accounts, rule 74.18(1)(a) requires the estate trustee to verify by affidavit the estate accounts which, by rule 74.17(1)(i), must include a statement of the compensation claimed by the estate trustee. However, if there are no objections to the accounts, under rule 74.18(9) the court may grant a judgment passing the accounts without a hearing. Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.

39 The requirement that a receiver verify by affidavit the remuneration which it claims fulfils two purposes. First, it ensures the veracity of the time spent by the receiver in carrying out its duties, as provided by the receivership order, as well as the disbursements incurred by the receiver. Second, it provides an opportunity to cross-examine the affiant if the debtor or any other interested party objects to the amount claimed by the receiver for fees and disbursements, as provided by rule 39.02(1). In the appropriate case, an objecting party may wish to provide affidavit evidence contesting the remuneration claimed by the receiver, in which case, as rule 39.02(1) provides, the affidavit evidence must be served before the party may cross-examine the receiver.

40 Where the receiver's disbursements include the fees that it paid its solicitors, similar considerations apply. The solicitors must verify their fees and disbursements by affidavit.

41 In many cases, no objections will be raised to the amount of the remuneration claimed by a receiver. In some cases, however, there will be objections. Objecting parties may choose to support their position by tendering affidavit evidence. In some instances, it may be necessary for the court before whom the receiver's accounts are to be passed to conduct an evidentiary hearing, or direct the hearing of an issue before another judge, the master or another judicial officer. This situation would usually arise where there is a conflict in the affidavit evidence in respect to a material issue. The case law on the passing of accounts referred to by the parties indicates that evidentiary hearings are quite common. See, *e.g.*, *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 41 C.B.R. (3d) 251 (B.C. C.A.); *Hermanns v. Ingle*, *supra*; *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.); *Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd.* (1974), 19 C.B.R. (N.S.) 252 (Ont. S.C.); *Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc.* (1989), 40 C.P.C. (2d) 280 (Ont. H.C.); *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.) These and other cases also illustrate that courts employ careful scrutiny in determining whether the remuneration requested by a receiver is fair and reasonable in the context of the duties which the court has ordered the receiver to perform. I will now turn to a discussion of what is "fair and reasonable".

(3) Fair and reasonable remuneration

42 As I stated earlier, the general standard of review of the accounts of a court-appointed receiver is whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable. This

standard of review had its origin in the judgment of this court in *Atkinson Estate, Re* (1951), [1952] O.R. 685 (Ont. C.A.); aff'd [1953] 2 S.C.R. 41 (S.C.C.), in which it was held that the executor of an estate is entitled to a fair fee on the basis of *quantum meruit* according to the time, trouble and degree of responsibility involved. The court, however, did not rule out compensation on a percentage basis as a fair method of estimating compensation in appropriate cases. The standard of review approved in *Atkinson, Re* is now contained in s. 61(1) and (3) of the *Trustee Act*, R.S.O. 1990, c. T.23. Although *Atkinson Estate, Re* was concerned with an executor's compensation, its principles are regularly applied in assessing a receiver's compensation. See, *e.g.*, *Ibar Developments Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. H.C.). I would note that there is no guideline controlling the quantum of fees as there is in respect to a trustee's fees as provided by s. 39(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

43 Bennett notes at p. 471 that in assessing the reasonableness of a receiver's compensation the two techniques discussed in *Atkinson Estate, Re* are used. The first technique is that the quantum of remuneration is fixed as a percentage of the proceeds of the realization, while the second is the assessment of the remuneration claimed on a *quantum meruit* basis according to the time, trouble and degree of responsibility involved in the receivership. He suggests that often both techniques are employed to arrive at a fair compensation.

44 The leading case in the area of receiver's compensation is *Belyea*. At p. 246 Stratton J.A. stated:

> There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.

45 In considering the factors to be applied when the court uses a *quantum meruit* basis, Stratton J.A. stated at p. 247:

> The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

46 In an earlier case, similar factors were employed by Houlden J. in *West Toronto Stereo Center Limited, Re* (1975), 19 C.B.R. (N.S.) 306 (Ont. Bktcy.) in fixing the remuneration of a trustee in bankruptcy under s. 21(2) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. At p. 308 he stated:

> In fixing the trustee's remuneration, the Court should have regard to such matters as the work done by the trustee; the responsibility imposed on the trustee; the time spent in doing the work; the reasonableness of the time expended; the necessity of doing the work, and the results obtained. I do not intend that the list which I have given should be exhaustive of the matters to be considered, but in my judgment they are the more important items to be taken into account.

These factors were applied by Henry J. in *Hoskinson, Re* (1976), 22 C.B.R. (N.S.) 127 (Ont. S.C.).

47 The factors to be considered in assessing a receiver's remuneration on a *quantum meruit* basis stated in *Belyea* were approved and applied by the British Columbia Court of Appeal in *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.). They have also been applied at the trial level in this province. See, *e.g.*, *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 (Ont. Gen. Div.)

48 The *Belyea* factors were also applied by Farley J. (the motion judge in this case) in *BT-PR Realty Holdings, supra*, which was an application for the reduction of the fees and charges of a receiver. In that case the debtor had entered into the following indemnity agreement with the receiver:

> Guarantee payment of Coopers & Lybrand Limited's professional fees and disbursements for services provided by Coopers & Lybrand Limited with respect to the appointment as Receiver of each of the Companies. It is understood that Coopers & Lybrand Limited's professional fees will be determined on the basis of hours worked multiplied by normal hourly rates for engagements of this type.

In reference to the indemnity agreement, Farley J. made the comment referred to above that "[t]his is not a license to let the taxi meter run without check."

49 He went on to add at paras. 23 and 24:

> While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible: see *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B.C.A.). Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

50 Farley J. applied the list of factors set out in *Belyea* and *Nican Trading* and added "other material considerations" pertinent to assessing the accounts before him. He concluded at para. 24:

> In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

51 I am satisfied that in assessing the compensation of a receiver on a *quantum meruit* basis the factors suggested by Stratton J.A. in *Belyea* are a useful guideline. However, they should not be considered as exhaustive of the factors to be taken into account as other factors may be material depending on the circumstances of the receivership.

52 An issue that has arisen in this appeal has been the subject of consideration by the courts. It is whether a receiver may charge remuneration based on the usual hourly rates of its employees. The appellants take the position that the receiver's compensation based on the hourly rates of its employees has resulted in excessive compensation in relation to the amount realized by the receivership. The appellants point out that the compensation requested is approximately 20% of the amount realized. As I noted in paragraph 20, the motion judge held that "subject to checks and balances" of *Chartrand v. De la Ronde* and *Prairie Palace Motel Ltd. v. Carlson*, a "fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent". It is helpful to consider these cases.

53 In *Chartrand* the issue was whether a master had erred in principle in reducing a receiver's accounts, calculated on the basis of its usual hourly rates, on the ground that the entity in receivership was a non-profit federation. Although Hamilton J. was satisfied that the master had appropriately applied the factors recommended in *Belyea*, she concluded that the master had erred in reducing the receiver's compensation because the federation was a non-profit organization. She was otherwise in agreement with the master's application of the *Belyea* criteria to the circumstances of the receivership. However, she added at p. 32:

> Having said that, I do not interpret the *Belyea* factors to mean that fair and reasonable compensation cannot equate to remuneration based on hourly rates and time spent.

By this comment I take Hamilton J. to mean that there may be cases in which the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors requires the court to do so to constitute fair and reasonable remuneration. I presume that this is what the motion judge had in mind when referring to "the checks and balances" of *Chartrand*.

54 In *Prairie Palace Motel* the court rejected a submission that a receiver's fees should be restricted to 5% of the assets realized and stated at pp. 313-14:

> In any event, the parties to this matter are all aware that the receiver and manager is a firm of chartered accountants of high reputation. In this day and age, if chartered accountants are going to do the work of receiver-managers, in order to facilitate the ability of the disputing parties to carry on and preserve the assets of a business, there is no reason why they should not get paid at the going rate they charge all of their clients for the services they render. I reviewed the receiver-manager's account in this matter and the basis upon which it is charged, and I have absolutely no grounds for concluding that it is in any way based on client fees which are not usual for a firm such as Touche Ross Ltd.

Conclusion

(1) Bias

55 As I concluded earlier, the motion judge did not exhibit bias against the appellants or their counsel rendering the hearing unfair.

(2) Cross-examination of the receiver

56 The appellants did not have an opportunity to cross-examine Mr. Morawetz or another representative of the receiver in respect to its remuneration. Nor did they have an opportunity to cross-examine a representative of the receiver's solicitors, Goodmans, in respect to their fees and disbursements. This was as a result of the process sanctioned by the motion judge on the passing of the receiver's accounts in implicitly not requiring that the receiver's and the solicitors' accounts be verified by affidavit. Whether the appellants' lack of an opportunity to cross-examine the appropriate person in respect to these accounts should result in a new assessment being ordered, or whether this should be considered as a harmless error, requires further examination of the process followed by the motion judge in the context of the procedural history of the receiver's passing of its accounts.

57 Mr. Pape was not the appellants' original solicitor. The appellants were represented by another lawyer on February 9, 2001 when the receiver moved for approval of its accounts. The bank, which was directly affected by the receiver's charges, supported the fees and disbursements claimed by the receiver. Another creditor expressed concern that the receiver's fees were extremely high, but did not oppose their approval. Only the appellants opposed their approval. On February 16, 2001, which was the first return of the motion, the motion judge granted the appellants' request for an adjournment to February 26, 2001 to provide them a reasonable opportunity to review the receiver's accounts.

58 On February 26, 2001, the appellants requested a further adjournment to enable them to obtain an expert's opinion commenting on the fees of the receiver and its solicitors. The motion judge granted an adjournment to April 17, 2001 on certain terms, including the requirement that the receiver provide the appellants with curricula vitae and professional designations of its personnel, which the receiver did about two weeks later. The appellants' counsel informed the motion judge that he intended to examine "one or two people" from the receiver about its fees, whether or not they filed an affidavit. It appears that this was satisfactory to the motion judge who wrote in his endorsement: "A reporter should be ordered; counsel are to mutually let the court office know as to what time and extent of time a reporter will be required."

59 On March 13, 2001, the receiver wrote to the appellants to advise them of its position that any cross-examination in respect of the receiver's report to the court was not permitted in law. However, the receiver said that it would accept and

respond to written questions about its fees and disbursements. On April 4, 2001, the appellants gave the receiver twenty-nine written questions. The receiver answered the questions on April 10, 2001, and invited the appellants, if necessary, to request further information. The receiver offered to make its personnel available to meet with the appellants and their counsel to answer any further questions about its fees. By this time, Mr. Pape had been retained by the appellants. He did not respond to the meeting proposed by the receiver, but, rather, wrote to the receiver on April 12, 2001 stating that arrangements had been made for a court reporter to be present to take the evidence of the receiver at the hearing of the motion on April 17, 2001.

60 This set the stage for the motion of April 17, 2001 at which, as I have explained, the motion judge ruled that the appellants were precluded from cross-examining the receiver's representative, Mr. Morawetz, on the receiver's accounts, but nevertheless permitted Mr. Pape, as his "proxy", to question Mr. Morawetz, as an unsworn witnesses, about the accounts. In the discussion between the motion judge and counsel for all the parties concerning the propriety of Mr. Pape having made arrangements for the presence of a court reporter, it appears that every one had overlooked the motion judge's earlier endorsement that a reporter should be ordered for the passing of the accounts.

61 Although the appellants had obtained an adjournment to obtain expert reports about the receiver's fees, no report was ever provided by the appellants. They did file an affidavit of Mrs. Parravano, but did not rely on it at the hearing of the motion.

62 It appears from the motion judge's reasons for judgment and what the court was told by counsel that the practice followed in the Commercial List permits a receiver to include its request for the approval of its fees and disbursements in its report, with the result that any party opposing the amounts claimed is not able to cross-examine the receiver, or its representative, about the receiver's fees. In denying the appellants' counsel the opportunity to cross-examine Mr. Morawetz under oath, at p. 26 of his reasons, the motion judge referred to the practice that is followed in the Commercial List: "The more appropriate course of action is to proceed to interview the court officer [the receiver] with respect to the report so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions. That course of action was pointed out to the Parravanos and their previous counsel . . . "

63 Mr. Pape, before the motion judge, and Mr. Teplitsky, in this court, submitted that neither the practice of interviewing the receiver, nor the opportunity given to Mr. Pape to question Mr. Morawetz as the motion judge's proxy, is an adequate and effective substitute for the cross-examination of the receiver under oath. I agree. However, as I will explain, I am satisfied that in the circumstances of this case Mr. Pape's questioning of Mr. Morawetz was an adequate substitute for cross-examining him. It is well-established, as a matter of fundamental fairness, that parties adverse in interest should have the opportunity to cross-examine witnesses whose evidence is presented to the court, and upon which the court is asked to rely in coming to its decision. Generally speaking, in conducting a cross-examination counsel are given wide latitude and few restrictions are placed upon the questions that may be asked, or the manner in which they are asked. See J. Sopinka, S. N. Lederman, A. W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at paras. 16.6 and 16.99. As I observed earlier, in the cases in which the quantum of a receiver's fees has been assessed, cross-examination of the receiver and evidentiary hearings appear to be the norm, rather than the exception.

64 In my view, the motion judge was wrong in equating the receiver's report with respect to its conduct of the receivership with its report as it related to its claim for remuneration. As the authorities indicate, the better practice is for the receiver and its solicitors to each support its claim for remuneration by way of an affidavit. However, the presence or absence of an affidavit should not be the crucial issue when it comes to challenging the remuneration claimed. Whether or not there is an affidavit, the interested party must have a fair opportunity to challenge the remuneration at the hearing held for that purpose. I do not think that an interested party should have to show "special" or "unusual" circumstances in order to cross-examine a receiver or its representative, on its remuneration.

65 Where the accounts have been verified by affidavit, rule 39.02(1) provides that the affiant may be cross-examined by any party of the proceedings. Although there is a *prima facie* right to cross-examine upon an affidavit, the court has discretion to control its own process by preventing cross-examination or limiting it, where it is in the interests of justice

to do so. See, *e.g.*, *Ferguson v. Imax Systems Corp.* (1984), 47 O.R. (2d) 225 (Ont. Div. Ct.). It would, in my view, be rare to preclude cross-examination where the accounts have been challenged. Similarly, where the accounts have not been verified by affidavit, the motion judge has discretion to permit an opposing party to cross-examine the receiver, or its representative. In my view, the threshold for permitting questioning should be quite low. If the judge is satisfied that the questioning may assist in determining whether the remuneration is fair and reasonable, cross-examination should be permitted. In this case, I am satisfied that the submissions made by Mr. Pape at the outset of the proceedings were sufficient to cross that threshold.

66 Thus, whether or not there is an affidavit, the opposing party must have a fair opportunity to challenge the remuneration claimed. That fair opportunity requires that the party have access to the relevant documentation, access to and the co-operation of the receiver in the review of that material prior to the passing of the accounts, an opportunity to present any evidence relevant to the appropriateness of the accounts and, where appropriate, the opportunity to cross-examine the receiver before the motion judge, or on the trial of an issue or an assessment, should either be directed by the motion judge.

67 In this case, I am satisfied that the appellants had a fair opportunity to challenge the remuneration of the receiver and that the questioning of Mr. Morawetz was an adequate substitute for cross-examining him. I base my conclusion on the following factors:

- The appellants had the report for over two months.
- The appellants had access to the backup documents for over two months.
- The appellant had been given two adjournments to procure evidence.
- The appellants had the opportunity to meet with the receiver and in fact did meet with the receiver.
- The appellants submitted a detailed list of questions and received detailed answers. Mr. Pape expressly disavowed any suggestion that those answers were unsatisfactory or inadequate.
- The motion judge allowed Mr. Pape to question the receiver for some 75 pages. That questioning was in the nature of a cross-examination. I can find nothing in the transcript to suggest that Mr. Pape was precluded form any line of inquiry that he wanted to follow. Certainly, he did not suggest any such curtailment.
- Mr. Pape was given a full opportunity to make submissions.

(3) The remuneration claimed by the receiver and its solicitor

68 Having found no reason to label the proceedings as unfair in any way as they concern the receiver's remuneration, I shall now consider, on a correctness standard if there is any reason to interfere with the motion judge's decision on the receiver's remuneration.

69 In my view, the motion judge was aware of the relevant principles that apply to the assessment of a receiver's remuneration as discussed in *Belyea* and the other cases that I have reviewed. He considered the specific arguments made by Mr. Pape. He had the receiver's reports, the backup documents, the opinion of Mr. Morawetz, all of which were relied on, properly in my view, to support the accounts submitted by the receiver. Against that, the motion judge had Mr. Pape's submissions based on his personal view of what he called "human nature" that he argued should result in an automatic ten percent deduction from the times docketed by the receiver's personnel. In my view, the receiver's accounts as they related to its work were basically unchallenged in the material filed on the motion. I do not think that the motion judge can be criticized for preferring that material over Mr. Pape's personal opinions.

70 In addition, the position of the secured creditors is relevant to the correctness of the motion judge's decision. The two creditors who stood to lose the most by the passing of the accounts accepted those accounts.

71 The terms of the receiving order of Spence J. are also relevant, although not determinative. Those terms provided for the receiver's payment "at the standard rates and charges for such services rendered". Mr. Morawetz's evidence was that these were normal competitive rates. There was no evidence to the contrary, except Mr. Pape's personal opinions. It is telling that despite the two month adjournment and repeated promises of expert evidence from the appellants, they did not produce any expert to challenge those rates.

72 However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. Mr. Morawetz really could not speak to the accuracy or, except in a limited way, to the reasonableness of those accounts. There was no representative of Goodmans for the appellants to question or cross-examine. The motion judge did not give these accounts separate consideration. In my view, he erred in failing to do so. Consequently, I would allow the appeal to that extent.

Result

73 For the foregoing reasons, I would allow the appeal to the extent of setting aside the order of the motion judge approving the accounts of the receiver's solicitors, Goodmans, and order that the accounts be resubmitted, verified by affidavit, and that they be assessed by a different judge who may, in his or her discretion, direct the trial of an issue or refer the accounts for assessment by the assessment officer. In all other respects, the appeal is dismissed. As success is divided, there will be no costs.

***Catzman J.A.*:**

I agree.

***Doherty J.A.*:**

I agree.

Appeal allowed in part.

Footnotes

1 Among suggested precedents prepared for use in Ontario, at pp. 755-56, Bennett includes a precedent for a Receiver's Report on passing its accounts. The report is in the form of an affidavit in which the receiver, *inter alia*, includes a statement verifying its requested remuneration and expenses.

2 Although the practice in England formerly required that a receiver's accounts be verified by affidavit, the present practice is different. Now the court becomes involved in the scrutiny of a receiver's accounts, requiring their proof by the receiver, only if there are objections to the account. See R. Walton & M. Hunter, *Kerr on Receivers & Administrators*, 17th ed. (London: Sweet & Maxwell, 1989) at 239.

TAB13

1983 CarswellNB 27
New Brunswick Court of Appeal

Belyea v. Federal Business Development Bank

1983 CarswellNB 27, [1983] N.B.J. No. 41, 116 A.P.R. 248, 18 A.C.W.S. (2d) 19, 44 N.B.R. (2d) 248, 46 C.B.R. (N.S.) 244

BELYEA and FOWLER v. FEDERAL BUSINESS DEVELOPMENT BANK

Hughes C.J.N.B., Ryan and Stratton JJ.A

Judgment: January 18, 1983
Docket: No. 31/82/CA

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Appointment — Application for appointment — Person entitled to make application — General
Receivers --- Remuneration of receiver — Remuneration
Secured creditors — Receiver appointed by document — Remuneration — Factors to be considered.

There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and, while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous. The considerations applicable in determining the reasonable remuneration to be paid to a receiver should include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts and the costs of comparable services when performed in a prudent and economical manner. Whether an account for services is fair and reasonable is a matter of some difficulty. In many cases, attempts have been made to establish this fact by calling as witnesses persons who engage in the same profession or calling to testify that the charges made are the usual and normal charges for similar services made by members of that particular profession or calling in their locality. Even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, the courts will impose an underlying or implied limit or maximum on the professional fees it will allow, based on what is reasonable in relation to the dollar amount involved in the particular case. Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties. They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be fair and reasonable having regard to all of the material facts and circumstances of the particular case.

Action by secured creditors against debtor for deficiency owing under guarantee; claim that receiver's remuneration excessive.

***Stratton J.A.* (*Hughes C.J.N.B.* concurring):**

1 I have had the benefit of reading the judgment prepared by my brother Ryan and regret that I am unable to agree in all respects with his proposed disposition of this appeal [from 40 C.B.R. (N.S.) 157, 38 N.B.R. (2d) 162, 100 A.P.R. 162].

2 In his factum counsel for Messrs. Belyea and Fowler raises two grounds of appeal, namely, the reasonableness of the refusal by the Federal Business Development Bank to accept an offer made by Mr. Sam Gamblin to purchase the inventory of Chase Camera & Supply Limited for $40,000, and the reasonableness of the receiver's account of $11,730. I agree with Ryan J.A. that the refusal by the bank to accept the Gamblin offer was not, in the circumstances, unreasonable. However, I do not agree that the receiver satisfactorily established that its account for services was fair and reasonable.

3 There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.

4 The principles applicable in fixing the remuneration to be allowed a receiver have been discussed in a number of decisions. In the frequently quoted case of *Campbell v. Arndt* (1915), 8 Sask. L.R. 320, 9 W.W.R. 57, 24 D.L.R. 699 (S.C.) , it was pointed out that a receiver is generally paid by a commission on the gross amount of his receipts, the rate of which varies from 2 to 5 per cent in proportion to the care and trouble involved. The court in that case concluded that, although the receiver must have spent considerable time and experienced a good deal of trouble, there did not appear to have been any very exceptional difficulties entitling him to exceptionally larger fees and, accordingly, he was awarded as a fair remuneration a commission of 5 per cent of the funds coming into his hands.

5 A lump sum was awarded to receivers by the Nova Scotia Court of Appeal in *Eastern Trust Co. v. N.S. Steel & Coal Co. Ltd.* (1938), 13 M.P.R. 237 . In making their award, the court said at p. 240:

> As we view it, we are entitled, in order to fix the remuneration of both receivers and liquidators, to survey the entire operations under their charge since their appointment, to take into consideration the time each of them gave to the work and the responsibilities resting on them as receivers and liquidators, and to determine what the work necessarily done should cost, if conducted prudently and economically.

6 A lump sum was also awarded a receiver as fair compensation for his services in *Indust. Dev. Bank v. Garden Tractor & Equipment Co. Ltd.*, [1951] O.W.N. 47 (H.C.) . In that case, Marriott, Master, said at p. 48:

> In fixing the compensation of a receiver, the Court always has had complete jurisdiction to allow what is fair and reasonable under all the circumstances, but a receiver has no *prima facie* right to any fixed rate as a trustee in bankruptcy has under The Bankruptcy Act. In Kerr on Receivers, 11th ed. 1946, at p. 279, it is stated: "In the case of receivers and managers there is no fixed scale. They are sometimes allowed 5 per cent on the receipts: in other cases their remuneration is fixed at a lump sum or regulated by the time employed by the receiver, his partners and clerks." In *Re Fleming* (1886), 11 P.R. 426 , Chancellor Boyd stated: "Five per cent commission may be a reasonable allowance in many cases, but where the estate is large and the services rendered are of short duration and involving no very serious responsibility, such a rate may be excessive."

7 In fixing a lump sum rather than a percentage fee for a receiver's compensation in *Ibar Devs. Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. S.C.) , Saunders, Master, concluded that remuneration on a 5 per cent basis was just too high. He held that the receiver was entitled to a fair fee on the basis of a quantum meruit according to the time, trouble and degree of responsibility involved.

8 It should perhaps be noted that there is American authority for the proposition that where the duties of the receiver consist in liquidating assets, a commission on the fund is a more appropriate method of compensation than that based on

a fair price for the labour and time employed, and is the one commonly used. Where the compensation is so computed, 5 per cent is the usual and customary rate in ordinary cases. However, the rate varies according to the degree of difficulty or facility in the collection of different receipts: see 75 C.J.S. 1067.

9 The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

10 Experienced counsel know that it can be a matter of some difficulty to prove that an account for services is fair and reasonable. In many cases, counsel attempt to establish this fact by calling as witnesses persons who are engaged in the same profession or calling to testify that the charges made by the plaintiff are the usual and normal charges for similar services made by members of that particular profession or calling in their locality. In the present case, where the receiver was a chartered accountant, no evidence was tendered by any member of the accounting profession as to the usual and normal charges made for services similar to those performed by the receiver nor, indeed, was any evidence called other than that of the receiver, to establish the reasonableness of the charges which he unilaterally made for his services.

11 One of the compelling factors referred to in Williston on Contracts, 3rd ed. (1967), vol. 10, pp. 928-29 as a determinant of the reasonable value of services performed by lawyers is the amount involved. To state this proposition another way, even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of money or the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, courts will impose an underlying or implied limit or maximum on the professional fees it will allow based on what is reasonable in relation to the dollar amount involved in the particular case: see *J. W. Cowie Enrg. Ltd. v. Allen* (1982), 26 C.P.C. 241, 52 N.S.R. (2d) 321 (C.A.) .

12 Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties: see *Re Amalg. Syndicates*, [1901] 2 Ch. 181, 17 T.L.R. 486 . They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be fair and reasonable having regard to all of the material facts and circumstances of the particular case. In determining the fairness and reasonableness of a receiver's remuneration it is, I think, well to keep in mind what was said by Barker J. on this subject as long ago as 1894 in *Hall v. Slipp*, 1 N.B. Eq. 37 -39:

> ... while it is important that a remuneration consistent with the responsibility of the position should be allowed, it is of equal importance that the position should not be made a means simply of absorbing the moneys of creditors and others whose interests it is the duty of this Court to protect.
>
> ... while, as a general rule, a commission of five per cent. on receipts is allowable, exceptions are made in special cases, both in the way of increasing the amount where unusual work is required, or diminishing it where the amounts are large or the trouble is insignificant.
>
> ... It is evident, if the necessary expenses of administering estates in this Court bear so large a proportion to the amount involved as this, the practical result is simply to enrich the Court's officers at the expense of the suitors. In my opinion, however, the practice of the Court warrants no such result; and I think it only right to point out that it is a mistake to support that those who act as receivers are entitled to charge, or will be allowed, a remuneration made up on a scale of fees applicable to leading counsel.

13 In the present case, there was no evidence tendered of any express agreement regarding the remuneration to be paid to the receiver. Nor do I think that this is an appropriate case in which to limit the compensation payable to the receiver

to a reasonable percentage of the assets handled. On the other hand, were I to uphold the finding of the trial judge, I would in effect be allowing the receiver a fee equivalent to 35 per cent of the amount realized on the sale of the assets.

14 The record discloses that the receiver sold the inventory of Chase Camera & Supply Limited for $30,075 and that the total receipts from all sources were $36,566. The receiver charged a fee for its services of $11,730 which it deducted from the funds in its hands, remitting the balance to the bank. There was no evidence that this receivership was in any way complex. Indeed, the evidence was that the officers of Chase Camera & Supply Limited provided a good deal of assistance to the receiver in the disposition of the assets. In all of the circumstances, it is my opinion that the fee deducted by the receiver, categorized by one of the employees of the bank as "high", was unreasonable in relation to the dollar amount realized on the sale of the inventory and ought to have been reduced. In failing to make that reduction, I think the trial judge erred in principle.

15 Counsel for the Federal Business Development Bank did not call as witnesses the persons who actually performed the work in this receivership, other than Mr. Fowler who supervised it, nor did he tender in evidence any "record or entry of an act, condition or event made in the regular course of" the business of the receiver. In the absence of such evidence, it is difficult to see how s. 49 of the Evidence Act, R.S.N.B. 1973, c. E-11, can be of any assistance to the receiver in establishing its account. Moreover, the only evidence, other than that of Mr. Fowler, as to the reasonableness of the receiver's account was that of the in-house solicitor for the bank who testified that in a case such as this present one he "would have expected a receiver's bill of approximately $5,000.00, say in the range of $4,000.00 to $6,000.00, which would be something which we would reasonably anticipate". In view of this evidence, it is my opinion that a reasonable remuneration to the receiver in this case would be $6,000.

16 As my brother Ryan points out, the reasonableness of a demand for payment given on the same day that the bank was informed of a potential sale of the company's inventory was not in issue before us nor, for that matter, was it made clear what act of default by the company was relied upon by the bank as entitling it to crystallize its debenture. Therefore, these matters were not considered on this appeal.

17 I would allow the appeal and reduce the judgment at trial to $4,591.03. The defendants are entitled to the costs of this appeal which I would fix at the sum of $750.

***Ryan J.A.* (dissenting):**

18 This is an appeal by the defendants from a decision of a judge of the Court of Queen's Bench, wherein he directed judgment for the plaintiff against the defendants, jointly and severally, in the sum of $10,249.03 together with costs. In its action the plaintiff claimed against the defendants for a deficiency which it alleged was owing to it under a guarantee given by the defendants to secure a loan of $40,000 advanced by the plaintiff to Chase Camera & Supply Ltd.

19 The following facts are set out in the decision of the trial judge reported in (1982), 40 C.B.R. (N.S.) 157, 38 N.B.R. (2d) 162 at 163 -64, 100 A.P.R. 162 :

> In the summer of 1978 the plaintiff lent $40,000.00 to the company. To secure the loan the plaintiff took a debenture which gave it the right to appoint a receiver. The defendants guaranteed the loan. Both the debenture and guarantee were received in evidence.
>
> Relations between the company and the plaintiff were uneventful until August 27, 1979 when events started happening quickly. That morning Mr. Belyea visited Donald O'Leary, a senior credit officer of the plaintiff, and informed him that the company was in poor financial shape and that Mr. Sam Gamblin, of Gem Photo, was accompanied Mr. Belyea to the meeting, was prepared to pay $40,000.00 for the company's inventory. Mr. Belyea pointed out that this amount would more than satisfy the company's indebtedness to the plaintiff which then stood at approximately $34,000.00. Mr. Belyea requested the plaintiff's permission for this transaction.

By the afternoon of the same day the plaintiff had concluded that it could not consent to the transaction and instead appointed H.R. Doane Ltd. as receiver and requested them to take steps to liquidate the inventory. A partner of the Doane firm, Mr. Bev Fowler, was the Doane representative responsible for this task.

Mr. Fowler described the various options open to him at that time and described his efforts in arranging a sale, which took place after tender, to a Bridgewater, N.S. company for $30,000.00. In addition the plaintiff realized $4,925.24 apart from the receiver's efforts. A balance of $7,749,03 remained owing on the $34,231.85 due at the date of demand. Mr. O'Leary made mention of a balance of $8,279.30 as of November 10, 1981 but gave no details of this higher figure.

20 At a pre-trial conference the parties agreed that the issues to be determined by the trial judge were:

a) Did the plaintiff act reasonably in its refusal to accept the Gamblin offer? and

b) Was the receiver's fee of $11,730 reasonable?

The same issues were raised on this appeal.

21 As to the first issue the trial judge held the plaintiff was justified in refusing to accept the Gamblin offer of $40,000 for the inventory of Chase Camera & Supply Ltd. because a substantial amount was owing to the plaintiff, the value of the inventory on which it held its security was unknown to it and because the defendant Belyea disclosed to the plaintiff the company's poor financial situation. These factors no doubt appeared to the plaintiff to jeopardize its position as a creditor. In my opinion, the refusal to accept the Gamblin offer was a business judgment which I cannot say was unreasonable.

22 In his submission counsel for the defendants contended that, not only was the receiver's account unreasonable, but that the receiver had failed to prove that the work charged for was in fact performed. Mr. Fowler, a chartered accountant and licensed trustee, was an audit partner with H.R. Doane Limited specializing in insolvency work. He explained that each of Doane's employees is required to keep a time card upon which the employee enters the hours which he had spent each day on whatever accounts he works on. Mr. Fowler stated that at the end of each week the cards are "extended" and the information thereon is entered in each client's ledger account. He produced photocopies of all time cards and ledger sheets of the Chase Camera account which, by agreement of counsel, were used to establish the time spent by each employee who worked on the account.

23 In seeking to prove the reasonableness of the receiver's account, counsel for the plaintiff did not enter in evidence the employees' time cards or the client's ledger sheets, nor did he avail himself of s. 49 of the Evidence Act, R.S.N.B. 1973, c. E-11, which provides that:

A record or entry of an act, condition or event made in the regular course of a business is, insofar as relevant, admissible as evidence of the matters stated therein if the court is satisfied as to its identity and that it was made at or near the time of the act, condition or event.

24 Notwithstanding the fact the photocopies of the time cards and the client's ledger sheets were not entered in evidence, counsel for the defendants cross-examined Mr. Fowler at length on their contents as though they had been entered in evidence. For this reason and because counsel for the parties agreed at a pre-trial conference that the issue to be decided by the trial judge with respect to the account was whether or not it was reasonable and fair, I am satisfied that the trial judge was entitled to rely on the entries made in the cards as well as the viva voce testimony of Mr. Fowler in determining whether the account was reasonable and fair. The trial judge's finding that the receiver's account was fair and reasonable is a finding of fact supported by the evidence. Moreover, no evidence was tendered by the defendants to prove that the charges were unreasonable, or that the work was not actually performed. As there was no palpable or overriding error in his finding this court will not interfere with it.

25 This appeal did not raise the issue of the requirement of reasonable notice to which a debtor is entitled when a debt is payable on demand. This requirement was illustrated by the decision of the Supreme Court of Canada in *Ronald Elwyn Lister Ltd. v. Dunlop Can. Ltd.*, [1982] 1 S.C.R. 726, 41 C.B.R. (N.S.) 272, 18 B.L.R. 1, 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1, 42 N.R. 181 delivered 31st May 1982 after the present appeal had been argued. The question whether or not the circumstances of the instant case give rise to a cause of action against the plaintiff is one which we need not consider on this appeal.

26 In the result, I would dismiss the appeal with costs to be taxed in accordance with the schedule of costs in force at the time the action was commenced.

Directions given.

TAB14

1997 CarswellOnt 1246
Ontario Court of Justice (General Division) [Commercial List]

BT-PR Realty Holdings Inc. v. Coopers & Lybrand

1997 CarswellOnt 1246, [1997] O.J. No. 1097, 29 O.T.C. 354, 69 A.C.W.S. (3d) 1003

BT-PR Realty Holdings Inc., Applicant v. Coopers & Lybrand, Respondent

Farley J.

Judgment: February 26, 1997
Docket: B249/96

Counsel: *Kirk Baert*, for the applicant.
Jonathan Lisus, for the respondent.

Subject: Corporate and Commercial

***Farley J.*:**

1 The application was dismissed at the end of the hearing and these are the promised reasons.

2 Section 248(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended ("*BIA*") provides as follows:

> s.248(2) On the application of the Superintendent, the insolvent person, the trustee (in case of a bankrupt) or a creditor, made within 6 months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3), the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.

3 Both counsel wished to proceed today on the basis of the record before me - i.e. without *viva voce* evidence.

4 BT-PR Realty Holdings Inc. ("BT") brought this s.248(2) application seeking a reduction of the fees and charges of Coopers & Lybrand Ltd. ("C&L") in its capacity as receiver of the property of three companies involved in the baking and distribution business (the "Debtors"). The Toronto-Dominion Bank ("Bank") held a prior charge over the property. Each of the Bank and BT privately appointed C&L as receiver/manager over the property of the Debtors on January 25, 1996. Prior to that time BT and the Bank had had a discussion with C&L as to the nature of the receivership being in essence a liquidation. At that time C&L advised as to the three major participants from its side - namely a partner, a manager/principal and a senior associate/specialist with their hourly rates - as to which BT takes no objection. However it appears that Seleena Miller ("Miller") being the person in charge for BT of this receivership wished for C&L to minimize its involvement as she desired her consultant Roland Nimmo ("Nimmo"), BT's law firm and the personnel at the Debtors to do a great deal of the liquidation. The indemnity agreement for C&L provided that BT undertook to:

> Guarantee payment of Coopers & Lybrand Limited's professional fees and disbursements for services provided by Coopers & Lybrand Limited with respect to the appointment as Receiver of each of the Companies. It is understood that Coopers & Lybrand Limited's professional fees will be determined on the basis of hours worked multiplied by normal hourly rates for engagements of this type.

This is not a license to let the taxi meter run without check. The professional must still do the job economically. He cannot take his fare from the Courthouse to the Royal York Hotel via Oakville.

5 The debt of the Debtors to the Bank was approximately $525,000 and to BT approximately $3.5 million. Until discharged in mid April 1996 after the Bank had been paid out, C&L collected $911,421.83 and disbursed $169,636.53 yielding a surplus of $741,785.30 before fees to distribute to the Bank in a priority position and the residue to BT.

6 Nimmo was the eyes and years of Miller on site. He attended the Debtors premises daily during the first ten days during which time C&L raked up $40,450 in charges or about 60% of their total charges of $68,482.50.

7 At the same time as Miller was engaged in this receivership (apparently calling Nimmo some 10 to 15 times a day as well as frequently discussing the matters with C&L personnel) Miller was also engaged in supervising as well for other receiverships relating to loans of approximately $10 million each. I am of the view that this type of distanced "supervision" and the splitting of functions off is not truly conducive to minimizing the expenses of a receivership but probably will increase them to a fair degree. While Miller takes pride in the collection of accounts receivable - the actual collection of which is acknowledged by C&L as not involving them, it should be noted that only approximately $356,000 was collected by the persons designated by Miller including Nimmo's involvement notwithstanding the due diligence of BT through Miller and Nimmo prior to acquiring this loan in January 1996. BT estimated the value of accounts receivable at $500,000 to $600,000. This due diligence also valued the equipment at $450,000 based on Nimmo's estimate without an appraisal. The estimate was a fortunate one as the equipment was sold for $338,000 U.S. which is the equivalent to approximately $450,000 Cnd. I think this realization to be quite fortunate as the appraisal obtained valued the equipment at $200,000 Cnd. However through a connection made by C&L (as verified by the buyer) the bakery equipment was sold to a specialized buyer. I think it a reasonable inference that this connection allowed for an enhancement over the general appraisal. The connection was not however one made by BT notwithstanding its claim that according to Miller that BT: "obtained the buyer and negotiated a sale with little or no involvement from Coopers". On cross examination Miller conceded that when she swore her affidavit that the C&L affidavit was misleading. She was not relying upon any information other than an assumption that Fox responded to an advertisement for the sale of the equipment.

8 I think it unfortunate that Miller would take such great umbrage with C&L (and its account) when notwithstanding her definitive assertions in her affidavits she had to retreat on cross examination to advise that she made assumptions - assumptions that would seem without checking as to the reasonableness of same.

9 BT took issue with the fact that C&L charged about $5,000 for personnel designated as "Estate Administrators" at the rate of $80 per hour. I do not think that any one should be surprised that more routine or minor matters were handed off to C&L personnel who were charged out at substantially lower rates than that charged by the three identified personnel. If that were not done, then I would be of the view that Miller would complain that work was being done by over qualified persons (at higher than needed rates) and she would have been correct in that. That observation is subject to one qualification - for small intermittent matters, it may be more expensive to have a senior person instruct a junior with the junior doing the work than for the senior person to do it.

10 On February 8, Miller, on finding out the charges incurred to date, erupted indicating that it was outrageous and ridiculous. She wanted a daily time analysis and on being advised that that would cost extra, she advised that was fine. She also required draft invoices and forecasts of future work for her review on a periodic basis. I think it unfortunate that C&L somewhat down played Miller's concern over the size of their fees in their material. In any event, in accordance with its statutory duty, C&L did not draw any of its fees from the receivership account until specific approval was given by Miller in mid April. On April 12, 1996 Miller agreed with the C&L fees and was sent a confirmatory letter to that effect by C&L:

> This letter confirms the matters discussed in two telephone conversations of April 12, 1996 between the writer and your Miss Seleena Miller ... will approve Coopers' fees as receiver of the companies for the period from January 25, 1996 to the date we are formally discharged as receiver, and will authorize payment of same from the receiver's account.

Miller was fully aware of the magnitude of the accounts at this time. It is puzzling why Miller did not disclose this approval in her original affidavit. However when C&L responded with it, Miller swore in her supplementary affidavit that she did not approve of the payment and that she had been informed by C&L that it would withhold the file if payment were not forthcoming. In cross-examination Miller testified that she "did not have a choice in the matter" and that C&L "put a gun to my head" and further that C&L had acted in bad faith and unprofessionally. Then in another previously undisclosed revelation Miller further testified that a Mr. Page of the replacement receiver attended a meeting at C&L's office in which C&L made this threat (which would not apparently be at the same time as Miller alleges she was threatened since that was over the telephone). No evidence was tendered from Mr. Page. Notwithstanding this alleged outrageous behaviour, Miller took no action and made no complaint about this to anyone. There does not seem to be an air of reality to this late breaking news.

11 Miller complains about C&L misleading her as to the size of the surplus. However C&L has provided material which was sent to Miller after being shown to her at a meeting wherein the surplus was accurately predicted. Puzzling enough, again Miller did not mention this confirmatory calculation being sent to her in her first affidavit.

12 C&L in its material provides a detailed account of the steps taken throughout the receivership including particularized invoices. It is unfortunate that C&L did not immediately tender its dockets. They were not offered until the cross-examinations. However BT did not wish them at that time but only advised they should be sent to counsel. This unfortunately again was not done until a few days before this hearing. This is a rather casual attitude toward crucial information. However on the other hand, it speaks volumes that BT had no particular interest in them at any time, not even to the extent of complaining that they had not been sent over after her cross-examination. It appears that Miller was content to complain in generalities but did not wish to examine the specifics, notwithstanding that her position was that the bill be slashed by 75%.

13 Miller was aware of the long hours that the receivership field staff worked in the initial ten days. In fact Miller was insistent that all of the Debtors' inventory be sold at the earliest opportunity and she was aware that C&L devoted extensive time to negotiating for the sale of the inventory. Miller asserted that this could have been done by Nimmo with some help from one C&L representative. However in cross-examination she had to advise that it was merely an assumption that one C&L person would be able to count and liquidate the inventory.

14 Miller asserted that the steps taken by C&L were excessive and unreasonable, but her knowledge was indirect:

> Q. It is fair to say that the extent of your knowledge of what went on at the premises in the first nine days of the ... receivership is based entirely on what Mr. Nimmo might have provided to you and the information provided to you by the representative of Coopers. Correct?
>
> A. That is correct.

Miller advised that Nimmo was on site for approximately ten days for 10-12 hours a day. On the one hand she asserted that much of the work for which C&L billed BT was in fact performed by Nimmo. However on cross-examination she testified that Nimmo did not report to her about the steps which C&L was taking in the administration of the receivership and that he did not involve himself in the work being undertaken by C&L. One may well question then how Miller can be so certain that C&L was wasting time and doing inappropriate work if she had no direct knowledge and no indirect knowledge and did not care to review the dockets. It is of no assistance for her to assert that Nimmo advised her that C&L was duplicating his work. Not only is this hearsay but no explanation was given as to why Nimmo could not have given his evidence directly.

15 Miller swore that her group handled the sale of all the goods in the first five days and that the accounting and sale of inventory was performed by Nimmo not C&L. But on cross-examination she had to concede that she had no direct knowledge on this point and she did not know the extent of the inventory and the 30 day goods.

16 While Miller denied the legitimacy of Coopers fee for responding to creditors demands she does not have any direct knowledge in this area. She testified that Nimmo could have done this with the assistance of one C&L person. She indicated that she was relying on her lawyers and Nimmo for this. However her lawyers were not on site either to meet with any creditors. Miller deposed that her side "analyzed the claims of" and corresponded with and negotiated settlement with each of the 400 creditors, but she refused to provide any evidence in support of this statement.

17 C&L personnel (the partner and the principal/manager) testified as to the fees incurred. This included the organizing and updating of the accounts receivable sub ledger, a necessary step before accounts receivable could be pursued with certainty. Miller deposed that "Coopers never did this work". On cross examination she indicated that she had no direct knowledge and was only making an assumption.

18 She similarly swore that C&L never did the work of reviewing the Debtors' records for undisclosed assets. She did not rely on Nimmo for this conclusion and had to advise that she merely assumed they had not done the work.

19 Miller alleged C&L continued to bill time to the receivership after the termination of its appointment. Again this appears to have been another assumption.

20 It seems to me that Miller's assertions that C&L did not do the work, or were wasting time or otherwise acting inappropriately vis a vis its charges are merely that. They are not grounded in fact but are merely her unsubstantiated opinion, relying on assumptions in part and otherwise upon Nimmo's advice which clearly gets into contentious hearsay. This should be contrasted with the rather four square direct evidence given by the two C&L senior persons with backup detail and the (unfortunately late appearing) offered dockets.

21 It also seems to me that Miller overlooks that C&L was the receiver of the Bank, which Bank had priority. She could not reasonably expect the Bank to accede to her usurping C&L and in effect her side (she, Nimmo, her lawyers, etc.) becoming the Bank's receiver. Miller complained that C&L was spending most of its time (80%) reporting to the Bank. She makes this bald assertion without checking the dockets. I would also note that Miller had no hesitation in being in constant communication with Nimmo and C&L so she can scarcely complain about reasonable amount of reporting to the Bank by C&L. Of course if she was so certain that the liquidation would pay out the Bank with no problem, she could have had an easy way out of avoiding tolerating the Bank's receiver (if notwithstanding BT's appointment of C&L, C&L is so characterized as the "Bank's" receiver") by purchasing the Bank's position. Then she could have put in any receiver she liked and negotiated any terms with that receiver.

22 The issue on a s.248(2) hearing is whether the fees charged by the receiver are fair and reasonable in the circumstances as they existed - that with the benefit of the receivership going on, not with the benefit of hindsight. I would also note that it would be an unusual receivership and an unusual receiver where a receiver was able to be up to full speed instantaneously upon its appointment. There is a learning curve for the particular case and probably a suspicion equation to solve. The receiver must demonstrate that it acted in good faith and in the best interests of the creditor as opposed to its own interest or some third party's interests. The receiver must also demonstrate that it exercised the reasonable care, supervision and control that an ordinary man would give to the business if it were his own: see *Re Ursel Investments Ltd.* (1992), 10 C.B.R. (3d) 61 (Sask.C.A.). The receiver is not required to act with perfection but it must demonstrate that it acted with a reasonable degree of confidence: see *Ontario Development Corp. v. I.C. Suatac Construction Ltd.* (1978), 26 C.B.R. (N.S.) 55 (Ont.S.C.).

23 While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as *reasonably* possible: see *Bellyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B.C.A.). *Reasonably* is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

24 I do not particularly quarrel with the list of factors set out in the *Bank of Montreal v. Nicar Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C.CA.):

(a) The nature extent and value of the cases;

(b) the complications and difficulties encountered;

(c) The degree of assistance provided by the parties;

(d) time spent by the receiver;

(e) The receiver's knowledge, experience and skill;

(f) diligence and thoroughness;

(g) responsibilities assumed;

(h) results achieved; and

(i) the cost of comparable services.

However I would add (j) other material considerations - for example in this case: (i) the April 12 agreement to the fees; (ii) the priority receivership of the Bank in this co-receivership relationship; and (iii) the apparent diversionary and distracting excessive hands on requirements of Miller who all the while is demanding efficiency (more accurately a low fee at any price). I would think however that where there is a retainer given which indicates that the fee will be based upon the multiplicand of hourly rates and time expended this factor should receive special emphasis as it is what the parties bargained for. See above for my views about allowing the taxi meter to run without taking the passenger along the appropriate route. In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

25 I would say that I found it inappropriate for Miller to give so much hearsay evidence without in any way justifying it. The argument that she was acknowledged as being involved in the situation (since this was by remote through information from Nimmo and C&L personnel) as overcoming this deficiency, especially when she appears to rely on Nimmo (or bald assumptions) and does not appear to rely on anything positive to C&L as to anything said to her by C&L or others.

26 Rules 4 and 21 of the *BIA* Rules state:

> 4. The practice of the court in civil actions or matters, including the practice in chambers, shall, in cases not provided for in the act or these rules, and so far as it is applicable and not inconsistent with the Act or the Rules, apply to all proceedings under the Act or these Rules.
>
> 21. An affidavit on behalf of a corporation may be made by an officer or employee thereof *who has personal knowledge of the facts and deposes to that knowledge in the affidavit.* (emphasis added)

Rule 39.01(5) of the Rules of Civil Procedure states:

> 39.01(5) An affidavit for use in an application may contain statements of the deponent information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

Miller's affidavits are highly contentious and largely based upon hearsay information and assumptions. It would be inappropriate to rely on any such offending parts of her affidavits: see *Saskatchewan Economic Development Corp. v. Michalyca Management Limited* (1991), 12 C.B.R. (3d) 277 (Sask. Q.B.); 539618 *Ontario Inc. v. Olympic Foods (Thunder Bay) Ltd.* (1987), 22 C.P.C. (2d) 195 (Ont.Master); *York Condominium Corp No. 335 v. Cadillac Fairview Corp Ltd.* (1983) 42 O.R. (2d) 219 (Master); *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1989), 71 O.R. (2d) 513 (H.C.J.); *York Condominium Corp. No. 63 v. Barrington-Rockwood Investment Corp.*, [1991] O.J. No, 2673 (Gen.Div.); *Smith v. Adams*, [1986] O.J. No. 2064 (Dist.Ct.); *D'Amore v. Russ*, [1991] O.J. No. 749 (Gen.Div.). No explanation was offered as to why Nimmo or any of the others referred to by Miller did not provide direct affidavit evidence: see *Air Canada v. McDonnell Douglas Corp.* (1994), 19 O.R. (3d) 537 (Master).

27 Miller's allegations against C&L are serious accusations of bad faith and misconduct. It is therefore particularly unfortunate that virtually all of her allegations are based on hearsay and assumptions. Even if such were admissible, it is inherently unreliable and does not come close to satisfying the special scrutiny that such evidence deserves where there is an allegation in a civil case of serious misconduct (even though the test remains at the balance of probabilities). See also *Re H. Flagal (Holdings) Ltd.*, [1965] O.R. 33 (H.C.J.).

28 It may be that BT was annoyed at C&L and the Bank for withholding the net surplus thought to be attributable to BT. BT sued both C&L and the Bank. This was settled apparently on terms favourable to BT. While one may appreciate the natural human reaction of wanting to get back at the other side, one must appreciate that the settlement wipes the slate clean in law as to the issue in litigation. Thus *if* that were a part of BT's s.248(2) proceedings against C&L, it would be an inappropriate basis or consideration.

29 The application is dismissed. Given the flimsy basis on which BT founded its case and the serious misconduct allegations, such is deserving of a sanction in costs. I would not however award full solicitor and client costs in this situation because of the failure of C&L to provide the dockets right off the bat in the case. BT is to pay $9,000 to C&L forthwith.

End of Document

TAB15

CITATION: Target Canada Co. (Re), 2015 ONSC 7574
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-12-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP. AND TARGET CANADA PROPERTY LLC.**

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *J. Swartz* and *Dina Milivojevic*, for the Target Corporation

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

Richard Swan and *S. Richard Orzy*, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini and *Alan Mark*, for Alvarez & Marsal, Monitor

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

Lou Brzezinski and Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals

Linda Galessiere, for Various Landlords

ENDORSEMENT

[1] Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

[2] Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a

motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

[3] Such is not the case in this matter.

[4] The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

[5] The essence of the opposition is that the request of the Monitor to obtain approval of its activities – particularly in these liquidation proceedings – is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

[6] Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

[7] Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> "provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval."

[8] The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

[9] The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

> (2) Monitor not liable – if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

[10] Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

[11] In addition, paragraph 51 of the Amended and Restated Order provides that:

> ... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

[12] The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

(a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;

(b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;

(c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;

(d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;

(e) provides protection for the monitor, not otherwise provided by the CCAA; and

(f) protects creditors from the delay in distribution that would be caused by:

a. re-litigation of steps taken to date; and

b. potential indemnity claims by the monitor.

[13] Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

[14] Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel.

The issue was recently considered in *Forrest* v. *Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

> 25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque* v. *Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:
>
> > 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> ...
>
> 30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:
>
> > 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
> >
> > ....
> >
> > 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the

> test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
>
> ...
>
> 37. Although many of these authorities cite with approval the broad language of *Henderson* v. *Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[15] In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

[16] Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

[17] Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

[18] For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

[19] On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval

of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

[20] The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

[21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

[22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

[23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[25] Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

[26] The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015

BRIDGING FINANCE INC., as agent for 2665405 ONTARIO INC. Applicant	**1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED** Respondents	Court File No. CV-18-608978-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced in Toronto

BRIEF OF AUTHORITIES
(Returnable February 25, 2019)
(Approval of Brampton Transaction and Supplemental Relief)

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