Court File No. CV-18-604434-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF GREAT SLAVE HELICOPTERS LTD.

APPLICANT

BOOK OF AUTHORITIES OF THE RESPONDING PARTY GWICH'IN DEVELOPMENT CORPORATION,
(Opposition to Approval and Vesting Order)
(Returnable November 23, 2018)

November 22, 2018

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TO: **SERVICE LIST**

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APPLICANT

I N D E X

1. *Companies' Creditors Arrangement Act, RSC 1985, c C-36, as amended*

2. *Chase Manhattan Bank of Canada v Sunoma Energy Corp,* 2001 ABQB 142, affirmed 2002 ABCA 286

3. *GATX Corp v Hawker Siddeley Canada Inc* [1996] OJ No 1462

4. *West End Development Corp v Alyce Holdings Ltd,* 1995 CarswellOnt 3240, 59 ACWS (3d) 546

5. *Alignvest Private Debt Ltd v Surefire Industries Ltd,* 2013 ABQB 729

6. Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed (Toronto: Thomson Reuters Canada Limited, 2013)

7. *Winalta Inc, Re*, 2011 ABQB 399

TAB 1

CONSOLIDATION

CODIFICATION

Companies’ Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to November 8, 2018

Last amended on May 23, 2018

À jour au 8 novembre 2018

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to November 8, 2018. The last amendments came into force on May 23, 2018. Any amendments that were not in force as of November 8, 2018 are set out at the end of this document under the heading “Amendments Not in Force”.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 8 novembre 2018. Les dernières modifications sont entrées en vigueur le 23 mai 2018. Toutes modifications qui n'étaient pas en vigueur au 8 novembre 2018 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(i) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(j) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(k) carry out any other functions in relation to the company that the court may direct.

Monitor not liable

(2) 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.

2005, c. 47, s. 131; 2007, c. 36, s. 72.

Right of access

24 For the purposes of monitoring the company's business and financial affairs, the monitor shall have access to the company's property, including the premises, books, records, data, including data in electronic form, and other financial documents of the company, to the extent that is necessary to adequately assess the company's business and financial affairs.

2005, c. 47, s. 131.

Obligation to act honestly and in good faith

25 In exercising any of his or her powers or in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the Code of Ethics referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

2005, c. 47, s. 131.

Powers, Duties and Functions of Superintendent of Bankruptcy

Public records

26 (1) The Superintendent of Bankruptcy must keep, or cause to be kept, in the form that he or she considers

présente loi relativement à la compagnie et aux assemblées de créanciers de celle-ci, s'il estime que sa présence est nécessaire à l'exercice de ses attributions;

h) dès qu'il conclut qu'il serait plus avantageux pour les créanciers qu'une procédure visant la compagnie soit intentée sous le régime de la *Loi sur la faillite et l'insolvabilité*, d'en aviser le tribunal;

i) de conseiller le tribunal sur le caractère juste et équitable de toute transaction ou de tout arrangement proposés entre la compagnie et ses créanciers;

j) de rendre publics selon les modalités réglementaires, de temps et autres, les documents réglementaires et de fournir aux créanciers de la compagnie des renseignements sur les modalités d'accès à ces documents;

k) d'accomplir à l'égard de la compagnie tout ce que le tribunal lui ordonne de faire.

Non-responsabilité du contrôleur

(2) S'il agit de bonne foi et prend toutes les précautions voulues pour bien établir le rapport visé à l'un ou l'autre des alinéas (1)b) à d.1), le contrôleur ne peut être tenu pour responsable des dommages ou pertes subis par la personne qui s'y fie.

2005, ch. 47, art. 131; 2007, ch. 36, art. 72.

Droit d'accès aux biens

24 Dans le cadre de la surveillance des affaires financières et autres de la compagnie et dans la mesure où cela s'impose pour lui permettre de les évaluer adéquatement, le contrôleur a accès aux biens de celle-ci, notamment les locaux, livres, données sur support électronique ou autre, registres et autres documents financiers.

2005, ch. 47, art. 131.

Diligence

25 Le contrôleur doit, dans l'exercice de ses attributions, agir avec intégrité et de bonne foi et se conformer au code de déontologie mentionné à l'article 13.5 de la *Loi sur la faillite et l'insolvabilité*.

2005, ch. 47, art. 131.

Attributions du surintendant des faillites

Registres publics

26 (1) Le surintendant des faillites conserve ou fait conserver, en la forme qu'il estime indiquée et pendant la

TAB 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: Bearspaw Petroleum Ltd. v. ConocoPhillips Western Canada Partnership | 2009 ABQB 202, 2009 CarswellAlta 475, [2009] 7 W.W.R. 125, [2009] A.W.L.D. 1915, [2009] A.W.L.D. 1985, 176 A.C.W.S. (3d) 245, 4 Alta. L.R. (5th) 393 | (Alta. Q.B., Apr 1, 2009)

2001 ABQB 142
Alberta Court of Queen's Bench

Chase Manhattan Bank of Canada v. Sunoma Energy Corp.

2001 CarswellAlta 264, 2001 ABQB 142, [2001] A.W.L.D. 288, [2001] A.J. No. 245, 104 A.C.W.S. (3d) 214, 283 A.R. 260

The Chase Manhattan Bank of Canada (Plaintiff) and Sunoma Energy Corp. (Defendant)

LoVecchio J.

Heard: February 1, 2001
Judgment: February 28, 2001
Docket: Calgary 0001-06953

Counsel: *Grant W.D. Cameron*, for Applicant, Best Pacific Resources Ltd.
Richard N. Billington, for Respondent, Eravista Energy Corp.
Clinton W. Ford, *David W. Mann*, for Receiver, PriceWaterhouseCoopers Inc.

Subject: Natural Resources; Property; Corporate and Commercial
Related Abridgment Classifications
Natural resources
III Oil and gas
III.6 Exploration and operating agreements
III.6.b Joint operating agreement
Headnote
Oil and gas --- Exploration and operating agreements — Joint operating agreement
Applicant had right of first refusal pursuant to farmout agreement — Other party went into receivership — Receiver divided party's assets and interests into parcels — Third party made offer to purchase parcel — Purchaser allocated $1.0 million of purchase price to assets covered by agreement — Receiver sent notice of proposed sale to applicant — Applicant refused on basis that price for assets was grossly inflated — Applicant took no further action before notice expired and sale closed — Applicant brought application for declaration that its right of first refusal was infringed — Application dismissed — Right was not defeated by exception in agreement for sale of all of assignor's interests — Clause was aimed at single transaction and did not apply to piecemeal sale by receiver — Notice given complied with agreement — Applicant failed to prove that receiver breached duty of good faith in accepting third party's allocation — Applicant failed to effectively maintain or exercise right under agreement.
Table of Authorities
Cases considered by *LoVecchio J.*:
Budget Car Rentals Toronto Ltd. v. Petro-Canada Inc. (1989), 6 R.P.R. (2d) 142, 46 B.L.R. 81, 34 O.A.C. 359, 69 O.R. (2d) 289, 60 D.L.R. (4th) 751 (Ont. C.A.) — considered

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Canadian Long Island Petroleums Ltd. v. Irving Wire Products, [1974] 6 W.W.R. 385, [1975] 2 S.C.R. 715, (sub nom. *Irving Industries (Irving Wire Products Division) Ltd. v. Canadian Long Island Petroleums Ltd.*) 3 N.R. 430, 50 D.L.R. (3d) 265 (S.C.C.) — considered

Gateway Realty Ltd. v. Arton Holdings Ltd. (1992), (sub nom. *Gateway Realty Ltd. v. Arton Holdings Ltd. (No. 3)*) 112 N.S.R. (2d) 180, (sub nom. *Gateway Realty Ltd. v. Arton Holdings Ltd. (No. 3)*) 307 A.P.R. 180 (N.S. C.A.) — considered

Gateway Realty Ltd. v. Arton Holdings Ltd. (No. 3) (1991), 106 N.S.R. (2d) 180, 288 A.P.R. 180 (N.S. T.D.) — considered

GATX Corp. v. Hawker Siddeley Canada Inc. (1996), 1 O.T.C. 322, 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]) — considered

Nuance Global Traders (UK) Ltd. v. Agra Inc. (February 9, 1998), Doc. 97-BK-000135 (Ont. Gen. Div.) — considered

Pierce v. Empey, [1939] S.C.R. 247, [1939] 4 D.L.R. 672 (S.C.C.) — applied

Two Forty Engineering Ltd. v. Platte River Resources Ltd. (1996), 41 Alta. L.R. (3d) 1, 181 A.R. 172, 116 W.A.C. 172 (Alta. C.A.) — considered

APPLICATION by party to farmout agreement for declaration that its right of first refusal to assets sold by receiver was infringed.

***LoVecchio J.*:**

INTRODUCTION

1 The applicant Best Pacific Resources Ltd. claims a Right of First Refusal ("ROFR") over certain assets sold by the Receiver of Sunoma Energy Corp. to the respondent Eravista Energy Corp.

BACKGROUND

2 The facts, which are not (for the most part) in dispute, are set out in the chambers briefs and accompanying affidavits. Briefly, Sunoma and Best Pacific are successors in interest to a Farmout Agreement, dated August 1978, that provides both parties with ROFRs over certain lands and interests. The 1974 CAPL Operating Procedure was incorporated by reference into the Farmout Agreement. Clauses 2401(B) and 2402 of the Operating Procedure define the substance and procedure of the ROFR.

3 Sunoma went into receivership in April of 2000. PriceWaterhouseCoopers was appointed as receiver. The Receiver divided all of Sunoma's assets into ten parcels and offered them for sale. Eravista offered to purchase several of the properties in Parcel 6, for a total of $ 4.35 million. Part of that offer related to Sunoma's assets near Hillsdown, Alberta, which included the petroleum and natural gas interests and other interests covered by the Farmout Agreement (the "Hillsdown Assets"). Best Pacific's working interest in those assets varies between 78.2668% and 79.32%. Before the sale to Eravista, Sunoma held the balance of the working interests.

4 On 14 November 2000, the Receiver sent a ROFR notice (the "Notice") to Best Pacific, inviting it to exercise or waive its rights with respect to the proposed sale of the Hillsdown Assets to Eravista. In accordance with the Operating Procedure, the Receiver gave Best Pacific twenty days from the date of the Notice to exercise its ROFR on the same terms and conditions as set forth in the Sale Agreement between the Receiver and Eravista.

5 Under that Sale Agreement, the purchase price for the Hillsdown Assets was set at $1.015 million plus interest and G.S.T. The Sale Agreement was originally scheduled to close on 14 December 2000 - however, the Receiver and Eravista later decided that the sale would close on or about 31 December 2000.

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6 The Notice included the following warning: "Failure to respond to this notice within the time provided shall be deemed an election not to exercise your preferential right of purchase." This was also in accordance with the Operating Procedure.

7 Best Pacific felt that the Lands were worth considerably less than $ 1 million. On 29 November 2000, its solicitors sent a letter to the Receiver stating the following:

> Our client takes the position that the purchase price referred to in the Notice as the consideration to be paid to [the Receiver for the Hillsdown Assets]... is grossly inflated at $1,025,000.00 [*sic*], and that a more accurate assessment of the value of the underlying assets is in the neighbourhood of $30,000.00 based upon a recent independent engineering report. Accordingly, it is our position that you have not complied with the disposition notice requirements under clause 2401B of the 1974 CAPL Operating Procedure.

8 The solicitors went on to quote a case and a text-book, suggesting that a vendor has a duty to act in good faith in defining a purchase price. The letter concludes:

> However, should the purchase price payable under the offer be reduced to its actual fair market value, you may consider issuing another notice to our client, which our client may then consider on its merits. Be aware that if you take any steps toward completing the sale of the subject assets pursuant to the offer mentioned in the Notice we have instructions from our client to obtain an order from the Court of Queen's Bench enjoining you from proceeding with the sale and granting such other relief as may be available to our client.
>
> If you remain unconvinced, our client may also consider arbitration on the value to be assigned to the subject assets and/or the proper construction of clause 2401 contained in the CAPL 1974 Operating Procedure.

9 The Notice expired on 4 December 2000. On that same date, this Court granted an Order approving the Receiver's sale to Eravista of part of Parcel 6 (including the Hillsdown Assets). Best Pacific was not given notice of the application, and did not appear when the Order was granted. The issue of whether the respondents should have given notice to Best Pacific is not before this Court.

10 Best Pacific did not commence any arbitration or court action before the Notice expired.

11 Best Pacific filed a notice of motion in this Court on 11 December 2000 indicating that it would be applying, *inter alia*, for an injunction preventing the Receiver from selling the Hillsdown Assets to Eravista, pending a full review of the issues. On 19 December 2000, Justice McCallum granted an order adjourning the injunction application *sine die*, and directing the balance of the issues to this special chambers application. On the same date, the parties entered an interim agreement allowing the sale to close, and holding the Hillsdown Assets in trust pending the resolution of the issues outlined below.

ISSUES

12 The parties have asked the Court to resolve the following issues:

> 1. Was Best Pacific entitled to a Right of First Refusal notice at all?
>
> 2. If the answer to issue 1 is "yes", was the Notice valid?
>
> 3. If the answer to issue 2 is "yes", did Best Pacific take the required steps on or before 4 December 2000 to exercise or maintain its Right of First Refusal?

DECISION - ISSUE 1

13 Best Pacific was entitled to a Right of First Refusal notice.

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ANALYSIS - ISSUE 1

14 The relevant portions of clauses 2401 and 2402 of the Operating Procedure read as follows:

> [Clause] 2401: Subject to Clause 2402, a party hereto shall not assign, sell or dispose of any interest in the joint lands... without first complying with the provisions in paragraph B below...
>
> [Paragraph] B. If a party (in this paragraph called "the selling party") wishes to assign, sell or dispose of, or has received an offer which it is willing to accept for the assignment, sale or disposition of, all or part of its interest in all or part of the joint lands (in this paragraph called "the subject interest"), the selling party shall give notice thereof to the other parties (in this paragraph called "the offerees"). The selling party's notice shall contain the terms and conditions of the proposed assignment, sale or disposition, including the consideration to be received for the subject interest and, if applicable, the name of the offering party. The offerees shall have the right for a period of 20 days after receipt of the notice from the selling party (in this paragraph called "the notice period"), to elect in writing to acquire the subject interest from the selling party on the terms and conditions contained in the notice.... If all the offerees decline or fail to elect within the notice period to acquire the subject interest, the selling party shall be free for a period of 60 days next following the expiry of the notice period, to assign, sell or dispose of the subject interest on the terms and conditions and to the offering party (if applicable) stipulated in its offer....
>
> If the consideration stipulated in the offer for the subject interest is one which cannot be matched in kind by the offerees, the selling party may set out in its notice its bona fide estimate of the value in cash of the said consideration.... In case of dispute as to the reasonableness of the estimate, the matter shall be referred to arbitration... but the notice period shall not be extended by such referral of the dispute to arbitration....
>
> [Clause] 2402: Clause 2401 shall not apply in the following instances, namely:
>
> > (a) An assignment made by way of security for the assignor's indebtedness;
> >
> > (b) An assignment, sale or disposition to an affiliate of the assignor, or in consequence of a merger or amalgamation of the assignor with another company;
> >
> > (c) An assignment, sale or disposition made by the assignor of all, or substantially all, or of an undivided interest in all, or substantially all of its petroleum and natural gas rights in the province... where the joint lands are situated.

15 The relevant sub-clause for the purpose of this issue would appear to be 2402(c); the question is whether this exception applies to the piecemeal sale of all of Sunoma's Alberta assets by a receiver. If the exception applies, the Receiver need not have issued the Notice at all.

16 In a case dealing with an agreement similar to that in the present case, the Supreme Court of Canada found that the intent of a ROFR clause is to protect joint owners of oil and gas ventures from being forced into joint ownership with a third party against their will. [1] It is reasonable to assume that the contracting parties had a similar intent when they incorporated clauses 2401(B) and 2402 into the Farmout Agreement.

17 In my view, the Court should look to the substance, and not the form, of the transaction that is alleged to give rise to the ROFR. [2]

18 In the present case, the practical effect of the piecemeal sale of Sunoma's assets by the Receiver is that there will be several assignments, each one relating to a portion of Sunoma's assets, as opposed to one assignment "of all, or substantially all," of Sunoma's Alberta assets. Clause 2402(c) refers to "[a]n assignment, sale or disposition". It is not in issue that the sale of all of the parcels will encompass substantially all of Sunoma's assets. In my opinion, however, clause

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2402(c) contemplates a *single* purchase of most or all of a party's assets in the province, as in *Two Forty Engineering Ltd. v. Platte River Resources Ltd.* [3] If the parties had intended for the exception to apply to plural assignments, sales, and dispositions (the sum of which amounted to a sale of all of a party's assets), the language in clause 2402(c) should have been different. Accordingly, I find that the exception in clause 2402(c) does not apply to the piecemeal sale of substantially all of Sunoma's Alberta assets to several purchasers.

19 Eravista also argued that clause 2402(a) might act as an exception in the present case, because the sale of the Hillsdown Assets "is in furtherance of realization upon an assignment made by way of security of Sunoma's indebtedness to the Chase Manhattan Bank of Canada." In my opinion, the exception in clause 2402(a) only applies to the original assignment by way of security, and not to any subsequent sale enforcing that security.

20 Finally, I note that the Receiver did, in fact, send the Notice. I take this as an indication that the Receiver believed it was required to send a ROFR notice to Best Pacific when Eravista offered to purchase part of Parcel 6. Given my decision above, I need not address the estoppel argument advanced by Best Pacific.

21 In conclusion, Best Pacific was entitled to receive a ROFR notice when Eravista offered to purchase the Hillsdown Assets from the Receiver.

DECISION - ISSUE 2

22 The Notice was valid.

ANALYSIS - ISSUE 2

23 Standard clauses creating ROFRs usually provide that the right comes into effect upon the selling party receiving a "*bona fide* offer... which it is willing to accept". [4] In the present case, the first paragraph of clause 2401(B) of the Operating Procedure does not explicitly state that the parties have a duty of good faith in allocating a value to the ROFR-encumbered property.

24 There is, however, an implied duty of good faith in the performance of contractual obligations. [5] Furthermore, despite the absence of privity of contract, the purchaser has a duty to the ROFR holder to ensure that the ROFR is dealt with appropriately. [6]

25 In the performance of its duties, the Receiver was granted several powers, including the power:

> ... to market any or all of [Sunoma's] Assets, negotiate sales and (subject to the approval of the Court if required hereunder) enter into one or more agreements of purchase and sale with potential purchasers, on such terms and conditions as the Receiver in its discretion may determine in respect of the Assets or any part or parts thereof;...

26 The Receiver created parcels and invited offers. In the offering notice, prospective purchasers were asked to submit bids, including the purchase price for the parcel "upon the terms and conditions in the Purchase and Sale Agreement" provided by the Receiver. Purchasers were also invited to submit comments on that Purchase and Sale Agreement.

27 Clause 10.2(a) of the Purchase and Sale Agreement between the Receiver and Eravista reads as follows:

> ... Purchaser, acting reasonably, shall allocate the base price to assets which are subject to... Rights of First Refusal and shall advise the Vendor in writing of the same and such allocations shall be used for the purposes of Right of First Refusal notices.

As this clause required, Eravista allocated a value to the Hillsdown Assets, and that value was used in the Notice. Counsel for the Receiver confirmed that it only approved the price for the entire purchase, and not for the Hillsdown Assets in particular.

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28 Eravista claims that it set the value of the Hillsdown Assets at $ 1,015,000 based on an assessment by its own engineers and geologists. Eravista would not disclose the basis of its allocation of value within the parcel to Best Pacific, stating that this information was confidential and proprietary.

29 Best Pacific submits that the allocation of value by Eravista gives rise to the possibility that it might exaggerate the value of the Hillsdown Assets "so as to ensure that the party enjoying the ROFR right will not or will not be able to exercise its rights under the terms of the ROFR notice."

30 The facts in the present case are a classic example of what commentators have called the "allocation dilemma". In Johnson and Stanford, *supra*, the authors state (at para. 54):

> The usual contractual obligation is for the vendor to designate the purchase price that is applicable to ROFR-encumbered properties. However, in a 'package' sale transaction, there is often no clearly defined purchase price to refer to for the specific properties.

31 Professor Flannigan points out the same problem when he states: "The bulk price of the *entire* package would presumably be a fair market value. However, because of tradeoffs and synergies, it will not necessarily represent simply an aggregation of individual fair market values." [7]

32 I note that a purchaser may have several reasons for allocating a particular value to a property. As the authors state in Johnson and Stanford, *supra* at para. 58:

> ... fair market value is not necessarily of particular, or even any, relevance; a wide range of values could be attributed to a particular ROFR-encumbered property by different parties based on their different assessment of the upside potential associated with undeveloped properties, or even the development potential for mature properties. The ROFR holder's perception of fair market value may not be even remotely close to the purchaser's notion of such value, i.e., what it would have been prepared to pay for the property if it was sold on a stand-alone basis. Moreover, there may be a value enhancement resulting from the package deal that would not otherwise exist, such as access to processing facilities and the like.

33 As noted above, the value of the Hillsdown Assets was set by the purchaser, Eravista, and not by the vendor. This was a departure from the usual practice, but an understandable one. The Receiver simply wants money for distribution to Sunoma's creditors. Whether it comes from Eravista or Best Pacific does not matter.

34 In any event, the ROFR holder clearly has the evidentiary burden of proving that the other parties have breached their duty of good faith in allocating value. In Johnson and Stanford, *supra*, the authors write (at para. 61):

> From the perspective of the ROFR holder, it will not suffice to simply argue that the allocated price does not in its view represent fair market value. While that may provide an indication that the allocation has been unfairly made or 'loaded up,' that alone will certainly not be conclusive. The ROFR holder will have to demonstrate on the evidence that the allocation principles applied by the purchaser and accepted by the vendor were unreasonable in the circumstances, or in other words that a duty of good faith has been breached.

35 Best Pacific presented two valuations of the Hillsdown Assets that differed from that provided by Eravista. Robert Howard, the Vice-President, Land at Best Pacific, states in an affidavit that he feels the Hillsdown Assets are worth somewhere between $125,000 to $130,000. Best Pacific also hired a consulting company, Sproule Associates, to evaluate the Hillsdown Assets. They found that the Hillsdown Assets were worth between $95,000 to $250,000, with an additional $10,000 or so for "probables".

36 With respect, these different valuations do not, in themselves, prove bad faith. This was the only evidence that supported Best Pacific's position on the second issue. Best Pacific did not produce evidence of an independent valuation

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of any or all of the other properties in Parcel 6. Such evidence might have supported its contention that the value of the Hillsdown Assets was grossly distorted in the Notice. I also note that assigning a different value to the Hillsdown Assets would impact on the value allocations elsewhere in Parcel 6, and could impact on another party's Right of First Refusal. This Court, or any arbitrator, would be put in the awkward position of having to shift values to other interests within the parcel.

37 In the final analysis, the Court would need to see more evidence of a breach of the duty of good faith, beyond evidence showing that Best Pacific would have assigned a different value to the Hillsdown Assets.

38 Best Pacific has not met the evidentiary hurdle of showing that the Receiver or Eravista breached their duty of good faith. It is simply not enough for the ROFR holder to present a different valuation from that provided in the ROFR notice. Accordingly, I find that the Notice given to Best Pacific was a valid ROFR notice.

DECISION - ISSUE 3

39 Best Pacific failed to take the required steps to exercise or maintain its Right of First Refusal before 4 December 2000.

ANALYSIS - ISSUE 3

40 Once a proper ROFR notice has been given, the ROFR holder must comply strictly with its terms and conditions if it wishes to exercise its right. [8] In *Pierce v. Empey*, [1939] 4 D.L.R. 672 (S.C.C.), the Court stated (at p. 674):

> The owner incurs no obligation to sell [to the ROFR holder] unless the conditions precedent [in the notice] are fulfilled or as a result of his conduct the holder of the option is on some equitable ground relieved from the strict fulfilment of them.

41 In the present case, clause 2401(B) clearly states that the ROFR holder has 20 days to respond to the ROFR notice. For ease of reference, the relevant portion of that clause reads:

> The offerees shall have the right for a period of 20 days after receipt of the notice from the selling party (in this paragraph called "the notice period"), to elect in writing to acquire the subject interest from the selling party on the terms and conditions contained in the notice.... If all the offerees decline or fail to elect within the notice period to acquire the subject interest, the selling party shall be free for a period of 60 days next following the expiry of the notice period, to assign, sell or dispose of the subject interest on the terms and conditions and to the offering party (if applicable) stipulated in its offer....

On a plain reading of this clause, the ROFR holder loses its right if it declines the offer in the notice or if it fails to elect within the 20 day period.

42 Best Pacific's solicitors sent a letter to the Receiver within the notice period stating (in effect) that the Notice was invalid. Best Pacific did not, however, take any other action before the expiry of the notice period. That expiry operates like a limitation and, at a minimum, Best Pacific should have filed a notice of motion before that time. The Receiver sold the Hillsdown Assets to Eravista within a period of 60 days following the expiry of the Notice. This Court will not interfere with that sale.

43 The solicitors' letter also talked about arbitration. Under the first paragraph of clause 2401(B), it is uncertain whether arbitration is available, which probably explains why Best Pacific was contemplating a collateral attack.

44 The second paragraph of clause 2401B provides some guidance. For ease of reference, the relevant parts of that paragraph read as follows:

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> If the consideration stipulated in the offer for the subject interest is one which cannot be matched in kind by the offerees, the selling party may set out in its notice its bona fide estimate of the value in cash of the said consideration.... *In case of dispute as to the reasonableness of the estimate, the matter shall be referred to arbitration... but the notice period shall not be extended by such referral of the dispute to arbitration...*[emphasis added].

45 In the present case, the consideration stipulated in the Notice was one that Best Pacific could match in kind, so this paragraph does not apply. However, the sentence in italics supports the conclusion that Best Pacific is required to take appropriate steps to contest the valuation in a ROFR notice before the end of the notice period. The parties clearly intended *ex ante* that the sale of a ROFR-encumbered property should not be held up merely because the ROFR holder contests the value of that property.

46 Best Pacific should have taken appropriate action to contest the valuation of the Hillsdown Assets within the 20 day notice period. It did not.

CONCLUSION

47 In the result, Best Pacific was entitled to receive a ROFR notice, and it received a valid notice. Best Pacific failed, however, to effectively maintain or exercise its rights before the Notice expired.

COSTS

48 Counsel may speak to me in the next 30 days, if they wish, on the issue of costs.

Application dismissed.

Footnotes

1 See *Canadian Long Island Petroleums Ltd. v. Irving Wire Products* (1974), 50 D.L.R. (3d) 265 (S.C.C.) at 275.

2 This approach has been endorsed, at least in the context of share transactions, by the Ontario Court (General Division) in *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 1 O.T.C. 322 (Ont. Gen. Div. [Commercial List]) and in *Nuance Global Traders (UK) Ltd. v. Agra Inc.* (February 9, 1998), Doc. 97-BK-000135 (Ont. Gen. Div.); see also C. Johnson & D. Stanford, "Rights of First Refusal in Oil and Gas Transactions: A Progressive Analysis" (1999) 37 Alta. L. Rev. (No. 2) 316, at para. 27.

3 (1996), 41 Alta. L.R. (3d) 1 (Alta. C.A.). See esp. paras. 5 & 12.

4 See e.g. *Canadian Long Island Petroleums*, *supra*at 267, *Budget Car Rentals Toronto Ltd. v. Petro-Canada Inc.* (1989), 60 D.L.R. (4th) 751 (Ont. C.A.) at 752, and *Hawker Siddeley*, *supra* at para. 14.

5 See *Gateway Realty Ltd. v. Arton Holdings Ltd. (No. 3)* (1991), 106 N.S.R. (2d) 180 (N.S. T.D.) (J.D.) at 192-92, aff'd (1992), 112 N.S.R. (2d) 180 (N.S. C.A.). In *Hawker Siddeley, supra*, Blair J. confirmed that this duty extends to ROFRs. The Court stated, at para. 71: "It is well established that the grantor of a right of first refusal must act reasonably and in good faith in relation to that right, and must not act in a fashion designed to eviscerate the very right which has been given." In a bankruptcy proceeding, the receiver takes on the grantor's duty of good faith.

6 See *Canadian Long Island Petroleums, supra*.

7 R. Flannigan, "The Legal Construction of Rights of First Refusal" (1997) 76 Can. Bar Rev. 1 at p. 33, note 183 (emphasis in original).

8 See Johnson and Stanford, *supra*, and cases cited therein, at paras. 7-8.

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TAB 3

Most Negative Treatment: Distinguished
Most Recent Distinguished: Barrick Gold Corp. v. Goldcorp Inc. | 2012 ONSC 3725, 2012 CarswellOnt 8085, 99 B.L.R. (4th) 1, [2012] O.J. No. 2927, 219 A.C.W.S. (3d) 572 | (Ont. S.C.J., Jun 26, 2012)

1996 CarswellOnt 1434
Ontario Court of Justice (General Division) [Commercial List]

GATX Corp. v. Hawker Siddeley Canada Inc.

1996 CarswellOnt 1434, [1996] O.J. No. 1462, 1 O.T.C. 322, 27 B.L.R. (2d) 251, 62 A.C.W.S. (3d) 700

In the matter of the Canada Business Corporation Act, R.S.C. 1985, c. C-44, section 241; And in the matter of a Shareholders Agreement dated April 12, 1967 in respect of CGTX Inc.; between GATX Corporation, General American Transportation Corporation and 3140172 Canada Inc. (Applicants) and Hawker Siddeley Canada Inc., Hawker Canada Holdings Inc., CGTX Inc., Beth M. Bandler, Arthur H. Crockett, Robert A. Ferchat, John F. Howard, Keith F. Moore, Louis Rochette, Frederick J. Sanford, Guylaine Saucier, Thomas K. Shoyama, A.M. Gordon Turnbull, Procor Limited and Marmon Holdings, Inc. (Respondents)

Blair J.

Judgment: April 26, 1996
Docket: B61/96

Counsel: *Thomas G. Heintzman, Q.C.*, and *Risa Sokoloff*, for applicants.
Burton H. Kellock, Q.C., and *John Lucki*, for Hawker Siddeley Canada Inc. and Hawker Canada Holdings Inc.
Stanley Fisher, Q.C., and *Joy Noonan*, for individual respondents.
Joseph M. Steiner and *Stephen Lamont*, for Procor Limited and Marmon Holdings Inc.
Robert B. MacKinnon, for CGTX Inc.

Subject: Corporate and Commercial
Related Abridgment Classifications
Business associations
III Specific matters of corporate organization
  III.2 Shares
    III.2.i Transfer
      III.2.i.iii Restrictions on transfer
        III.2.i.iii.A Shareholder agreement
          III.2.i.iii.A.2 Miscellaneous
Business associations
III Specific matters of corporate organization
  III.3 Shareholders
    III.3.e Shareholders' remedies
      III.3.e.ii Relief from oppression
        III.3.e.ii.E Miscellaneous
Business associations
III Specific matters of corporate organization
  III.3 Shareholders

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III.3.f Shareholder agreements
III.3.f.iii Fiduciary duty

Headnote

Corporations --- Shares — Transfer — Restrictions on transfer — Shareholder agreement — General
Corporations --- Shares — Transfer — Restrictions on transfer — Shareholder agreement — General
Corporations --- Shareholders — Shareholder agreements — Fiduciary duty
Corporations --- Shareholders — Shareholders' remedies — Relief from oppression — Miscellaneous issues

Corporations — Shares — Transfer — Restrictions on transfer — Shareholder agreement — Shareholder agreement giving each corporate shareholder right of first refusal except where shares transferred to affiliates — Shareholder contracting to transfer its shares to subsidiary and to allow third party to offer to purchase subsidiary's shares — Shareholder claiming that arrangement not triggering right of first refusal — Shareholder agreement encompassing all terminations of interest in corporation — Right of first refusal triggered.

Corporations — Shares — Transfer — Restrictions on transfer — Shareholder agreement — Shareholder agreement granting applicant and respondent right of first refusal if one "proposed to accept" offer for shares — Respondent authorizing sale of shares to third party — Respondent claiming until shareholder approval given pursuant to s. 189(3) of Canadian Business Corporations Act that it did not "propose to accept" offer — Application of s. 189(3) not applying to interfere with pre-existing contractual rights — Canadian Business Corporations Act, R.S.C. 1985, c. C-44, s. 189(3).

Corporations — Shareholders — Shareholder agreements — Fiduciary duty — Shareholder agreement giving each party right of first refusal — Respondent majority shareholder soliciting bids on its shares — Respondent disclosing information on business to bidders, including applicant — Applicant claiming that disclosure to third party bidders breaching duty of confidence and fiduciary duty to applicant — Disclosure being necessary to bidding process — Applicant taking advantage of disclosure — All parties being competitors — Applicant not being entitled to information from which others barred.

Corporations — Shareholders — Shareholders' remedies — Relief from oppression — Miscellaneous issues — Applicant and respondent corporations holding all shares in third corporation — Shareholder agreement giving both parties right of first refusal except in share transfer to affiliates — Respondent contracting to transfer its shares to subsidiary and to allow third party to bid on subsidiary's shares — Applicant having legitimate expectation of compliance with shareholder agreement — Respondent and its directors conducting affairs in manner unfairly prejudicial to applicant — Canadian Business Corporations Act, R.S.C. 1985, c. C-44, s. 241(2).

The applicant G Corp. held 45 per cent of the shares in C Co., a rail car leasing business. The respondent H Inc. held the other 55 per cent. Four directors of H Inc. were also directors of C Co. In a 1967 shareholders' agreement, G Corp. and H Inc. granted each other a right of first refusal if either received an offer which it "proposed to accept" to "sell or otherwise dispose of" its shares. The agreement provided that a transfer of shares to an affiliate did not trigger the right. In 1995, G Corp. offered H Inc. $74 million for its shares. H Inc. rejected the offer and began soliciting bids on its shares. G Corp. participated in the bidding process, which included the release of information about C Co. to potential bidders. G Corp. then made a bid of $113 million, which was rejected.

H Inc. then entered into a contract with a third party competitor, P Inc., with respect to the shares. The contract provided that H Inc. would transfer its shares in C Co. to a subsidiary with no other assets, the shares in the subsidiary would be distributed to H Inc.'s shareholders, and P Inc. would then offer to acquire the shares in the subsidiary, plus some other assets, for $120 million. H Inc. admittedly entered into the arrangement in part to avoid triggering G Corp.'s right of first refusal. P Inc. admitted entering into the contract so that G Corp. would either fail to acquire a majority interest in C Co., or be forced to pay top price for that interest.

G Corp. claimed that H Inc. breached the shareholders' agreement, and its good faith obligations under that contract. G Corp. alleged that C Co.'s directors breached their fiduciary duty to C Co., contrary to s. 122(1) of the *Canadian Business Corporations Act*. G Corp. also claimed that its relationship with H Inc. was akin to a joint venture, such that G Corp. was entitled to certain information about C Co. that other bidders were not. G Corp. alleged that H Inc. breached a fiduciary duty, and duty of confidentiality to G Corp., by releasing such information to all bidders during the bidding process. G Corp. applied for specific performance of its right to purchase H Inc.'s shares. G Corp. also applied for an oppression remedy under s. 241 of the*Canada Business Corporations Act*. H Inc. argued that its arrangement with P Inc.

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fell within the affiliate exception to G Corp.'s right of first refusal. H Inc. also argued that because P Inc.'s offer was to purchase "substantially all" of H Inc.'s assets, it needed shareholder approval, and until that point H Inc. was not capable of "proposing to accept" the offer, and thus the right was not triggered.

Held:

The application for specific performance was granted. Damages were not awarded.

The grantor of a right of first refusal must act reasonably and in good faith in relation to that right. That duty is not discharged where the essential purpose of the sale to the third party is to frustrate the right of first refusal. On that basis, the contract with P Inc. could not proceed.

The use of the phrase "sell or otherwise dispose" showed that the parties intended to include all means by which either chose to terminate its interest in C Co. The distribution of the shares of H Inc.'s subsidiary for the purpose of their being sold to P Inc. was a disposition within the meaning of the right of first refusal in the shareholder agreement.

Section 189(3) of the Act provides that shareholders must approve a sale of substantially all of a corporation's assets. The shares in C Co. made up the bulk of H Inc.'s undertaking, and sale of those shares would fundamentally change the nature of H Inc.'s business. Therefore, the sale of H Inc.'s shares would be a sale of substantially all of H Inc.'s assets for the purposes of s. 189(3). However, a statute is presumed not to interfere with pre-existing vested rights, which include contractual rights. To apply s. 189(3) would allow H Inc. to avoid its contractual obligations to G Corp., thus changing G Corp.'s right of first refusal to a right only to participate in bidding. Section 189(3), therefore, could not apply, and shareholder approval was not necessary before H Inc. could "propose to accept" within the meaning of the shareholder agreement. As H Inc.'s directors authorized acceptance of the offer, H Inc. has proposed to accept it, and G Corp.'s right of first refusal was triggered. The right was also triggered by H Inc.'s breach of contract, and breach of its good faith obligations.

The disclosure of information to bidders was necessary to solicit bids, and the directors did not act contrary to C Co.'s best interest in releasing that information. G Corp. requested much of the same information disclosed to other potential bidders. As G Corp. participated in the bidding process including that disclosure, it could not now complain about it. In addition, G Corp., H Inc., and P Inc. were all direct competitors. There was no fiduciary relationship between G Corp. and H Inc., and H Inc. did not owe G Corp. a duty to provide it with information about C Co. from which other bidders were barred. The claims for breach of confidentiality and breach of fiduciary duty should be dismissed.

Section 241(2) of the Act provides that if, "in respect of a corporation," the affairs of a corporation are conducted in a manner which unfairly prejudices a shareholder, oppression has occurred, and the court may grant a remedy. The relationship between shareholders constitutes part of the affairs of a corporation. Thus, matters impinging on that relationship are matters in respect of a corporation within the meaning of s. 241(2). G Corp. had a legitimate expectation that its right of first refusal would be respected. The conduct of H Inc. and its directors in breaching the shareholders' agreement unfairly prejudiced G Corp., contrary to s. 241(2). However, damages for oppression would not redress the wrong suffered by G Corp. Specific performance should be ordered. G Corp. was entitled to purchase H Inc.'s interest in C Co. for the portion of P Inc.'s $120 million offer attributable to that interest.

Table of Authorities

Cases considered:

Benson v. Third Canadian General Investment Trust Ltd. (1993), 14 O.R. (3d) 493, 13 B.L.R. (2d) 265 (Gen. Div. [Commercial List]) — *referred to*

Brant Investments Ltd. v. KeepRite Inc. (1991), 1 B.L.R. (2d) 225, 3 O.R. (3d) 289, 45 O.A.C. 320, 80 D.L.R. (4th) 161 (C.A.) — *applied*

Budget Car Rentals Toronto Ltd. v. Petro-Canada Inc. (1987), 45 R.P.R. 259 (Ont. H.C.) [affirmed (1989), 6 R.P.R. (2d) 142, 69 O.R. (2d) 289, 60 D.L.R. (4th) 751, 34 O.A.C. 359, 46 B.L.R. 81] — *distinguished*

Canadian Long Island Petroleums Ltd. v. Irving Wire Products, [1974] 6 W.W.R. 385, [1975] 2 S.C.R. 715, (sub nom. *Irving Industries (Irving Wire Products Division) Ltd. v. Canadian Long Island Petroleums Ltd.)* 3 N.R. 430, 50 D.L.R. (3d) 265 — *considered*

Cogeco Cable Inc. v. CFCF Inc., [1996] Q.J. 7 (Que. S.C.) — *considered*

Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co. (1979), [1980] 1 S.C.R. 888, 32 N.R. 488, 112 D.L.R. (3d) 49, [1980] I.L.R. 1-1176 — *considered*

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Deluce Holdings Inc. v. Air Canada (1992), 8 B.L.R. (2d) 294, 13 C.P.C. (3d) 72, 98 D.L.R. (4th) 509, 12 O.R. (3d) 131 (Gen. Div. [Commercial List]) — *referred to*

Downtown King West Development Corp. v. Massey Ferguson Industries Ltd. (1993), 33 R.P.R. (2d) 27, 14 O.R. (3d) 528 (Gen. Div.) [reversed (1996), 1 R.P.R. (3d) 1, 133 D.L.R. (4th) 550, 89 O.A.C. 373, 28 O.R. (3d) 327 (C.A.)] — *applied*

Jermyn St. Turkish Baths Ltd., Re, [1971] 3 All E.R. 184 (U.K. C.A.) — *applied*

Landymore v. Hardy (1991), 21 R.P.R. (2d) 174, 110 N.S.R. (2d) 2, 299 A.P.R. 2 (T.D.) [additional reasons at (1992), 112 N.S.R. (2d) 410, 307 A.P.R. 410, 10 C.P.C. (3d) 311 (T.D.)] — *applied*

Lord Elgin Hotel Ltd. v. Minister of National Revenue (1964), 36 Tax A.B.C. 268, 64 D.T.C. 637 — *applied*

MDS Health Group Ltd. v. King Street Medical Arts Centre Ltd. (1994), 12 B.L.R. (2d) 209, 55 C.P.R. (3d) 360 (Ont. Gen. Div. [Commercial List]) — *referred to*

Mason v. Intercity Properties Ltd. (1987), 37 B.L.R. 6, 59 O.R. (2d) 631, 38 D.L.R. (4th) 681, 22 O.A.C. 161, Ont. Corps. Law Guide 50,338 (headnote only) [leave to appeal to S.C.C. refused (1987), 62 O.R. (2d) ix (note), 28 O.A.C. 320 (note), 87 N.R. 73 (note) (S.C.C.)] — *applied*

Naneff v. Con-Crete Holdings Ltd. (1995), 23 O.R. (3d) 481, 85 O.A.C. 29, 23 B.L.R. (2d) 286 (C.A.) — *referred to*

Scottish Co-operative Wholesale Society Ltd. v. Meyer (1958), [1959] A.C. 324, [1958] 3 All E.R. 66 (Scotland H.L.) — *referred to*

Smith v. Morgan, [1971] 1 W.L.R. 803, [1971] 2 All E.R. 1500 (Ch.) — *referred to*

85956 Holdings Ltd. v. Fayerman Bros. Ltd., [1986] 2 W.W.R. 754, 32 B.L.R. 204, 46 Sask. R. 75, 25 D.L.R. (4th) 119 (Sask. C.A.) — *applied*

820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.) [additional reasons at (May 7, 1991), Doc. RE 1305/90 (Ont. Gen. Div.), affirmed (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.)] — *referred to*

Statutes considered:

Canada Business Corporations Act, S.C. 1974-74, c. 33

s. 183(2)*referred to*

Canada Business Corporations Act, R.S.C. 1985, c. C-44

generally*considered*

s. 2(1)*considered*

s. 4*considered*

s. 102(1)*considered*

s. 121(1)*considered*

s. 122(1)*considered*

s. 189(3)*considered*

s. 189(4)*considered*

s. 189(5)*considered*

s. 189(6)*considered*

s. 189(7)*considered*

s. 189(8)*considered*

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s. 189(9)*considered*

s. 241*considered*

s. 241(2)*considered*

s. 241(2)(a)*considered*

s. 241(2)(b)*considered*

s. 241(2)(c)*considered*

Part XV*considered*

Canada Corporations Act, R.S.C. 1952, c. 53

s. 121B [am. S.C. 1965, c. 52, s. 39]*considered*

Words and phrases considered:

AFFAIRS

. . . the relationship between the shareholders of a corporation constitutes a part of the "affairs" of that corporation [within the meaning of subsection 2(1) of the *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44], as do the relationships among the corporation itself and its affiliates and its shareholder, officers and directors.

APPLICATION by shareholder for specific performance of shareholders' agreement, and for damages for breach of fiduciary duty and duty of confidence, and for oppression, under the *Canadian Business Corporations Act*.

***Blair J.*:**

I. Background

Overview

1 The parties to this Application are all, in one fashion or another, very active participants in the railcar leasing market in Canada and the United States. They are battling over who will acquire the control block of shares in one of them, CGTX, which is the second largest operator in the field in Canada.

2 The Application evolves out of a right of first refusal attaching to that control block of shares, a 55% interest held by the Respondent Hawker Siddeley of Canada Inc.

3 General American Transportation Corporation ("GATX") is the remaining 45% shareholder of CGTX.[1] It does not wish the majority 55% interest to fall into the hands of CGTX's major Canadian competitor, Procor Limited. Rather, it would prefer to acquire the interest itself, and says it is entitled to rely upon the right of first refusal to do so (and, incidentally, to prevent Procor from succeeding in doing so).

4 CGTX Inc. is a Canadian corporation. It carries on a rail car leasing and management business, with a fleet of approximately 8,400 cars and annual revenue of $77 million. There are about five major competitors in the rail car leasing industry in Canada, and CGTX, as I have noted — with a share of about 34% of the market — is the second largest of those competitors. Procor is the largest, with approximately 50% of the Canadian rail car leasing market.

5 Hawker Siddeley Canada Inc. ("Hawker Siddeley") is a Canadian public company, first incorporated under Dominion charter in 1945 under the name A.V. Roe Canada Limited. It has experienced a number of amalgamations

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and name changes over the years, and was at one time a very large and diverse corporate enterprise engaging in a wide range of manufacturing and service industries. Hawker Siddeley has cut back its operations in recent years, however. By mid-1995 the Hawker Siddeley organization had been reduced to four main businesses, namely,

a) a sawmill equipment manufacturing business;

b) an aerospace component and service business;

c) its 55% interest in the railway car leasing business carried on through CGTX; and,

c) a business involving the provision of facilities and services for ophthalmologists conducting laser vision correction, carried on through its subsidiaries Beacon Eye Centre Inc. and Beacon Eye Institute, Inc. (collectively, "Beacon Eye")

6 Recently, Hawker Siddeley has decided, in effect, to liquidate its remaining operations and assets, including its majority interest in CGTX. That desire, and the events which have transpired as a result of it, are what lie behind this Application.

7 GATX owns the remaining 45% interest in CGTX. [2] GATX is an American corporation, headquartered in Chicago, which also operates rail car service centres and provides fleet management services in the rail car leasing industry and owns a fleet of approximately 65,000 leased railroad cars. Until recently, GATX has been content to carry on its business in Canada through its interest in CGTX. With changing patterns in the industry, however, and the increasing pull towards north-south traffic as a result of free trade in North America, that objective has changed. GATX has determined either to acquire Hawker Siddeley's majority interest in CGTX — thus giving it 100% control of CGTX's business — or to compete separately and directly against CGTX and Procor in the Canadian market.

8 At the moment there is an impediment to GATX achieving its objective of acquiring Hawker Siddeley's majority interest in CGTX. Procor — not oblivious, presumably, to the competitive significance of the Hawker Siddeley interest being "in play" — has entered into an agreement with Hawker Siddeley which, if completed, will allow it to acquire control over that Hawker Siddeley interest in CGTX. Under this agreement ("the Procor Agreement") a bid will be made for what is tantamount to a purchase of the Hawker Siddeley interest for a price of $120 million, subject to certain adjustments for two factors not relating directly to CGTX (the "Procor bid"). Procor has its own corporate reasons to acquire control of its major Canadian competitor. Its secondary objective, though, is at least to make GATX pay the highest price possible as the cost of entering the Canadian market on a 100% basis. [3] .

9 The Application is brought because GATX and Hawker Siddeley are parties to a Shareholders' Agreement entered into in 1967 which provides for a right of first refusal (the "Right of First Refusal") in the event that either party receives a *bona fide* offer from a third party to purchase its shares in CGTX. GATX asserts that the Procor Agreement has triggered this Right of First Refusal in its favour, and that *it* is therefore entitled to purchase the Hawker Siddeley interest. This assertion is vigorously opposed by Hawker Siddeley and Procor.

The Relief Sought

10 The Applicants seek,

a) a declaration that Hawker Siddeley is not entitled to dispose of its shares in CGTX pursuant to the Procor Agreement without the consent of the Applicants or without complying with the Right of First Refusal contained in the 1967 Shareholders' Agreement;

b) a declaration that the Right of First Refusal has been activated by reason of the Procor Agreement;

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c) a declaration that the Respondents' conduct in respect of Hawker Siddeley's proposed disposition of its 55% shareholding in CGTX pursuant to the Procor Agreement is oppressive or unfairly prejudicial to the Applicants' interests, or unfairly disregards those interests, contrary to section 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44;

d) a permanent injunction restraining the Respondents from taking any steps in respect of a disposition of the Hawker Siddeley in CGTX pursuant to the Procor Agreement;

e) an order that by virtue of the Right of First Refusal contained in the 1967 Shareholders' Agreement and the oppressive conduct of the Respondents, GATX may purchase the Hawker Siddeley interest in CGTX for the fair market value portion of the $120 million Procor bid which is attributable to that interest, and a reference to determine that value;

f) specific performance of the right to purchase, pursuant to the Right of First Refusal, and an order directing the delivery of the shares by the Respondents to the Applicants; and,

g) an order directing the trial of an issue regarding the Applicants' claim for compensation for oppressive and unfairly prejudicial conduct, and for damages.

II. Facts and the Central Agreements

11 As the Right of First Refusal contained in the Shareholders' Agreement, and the Procor Agreement which is said to be in breach of that Right of First Refusal, go to the heart of the dispute between the parties, I will outline their pertinent provisions at the outset. This will be followed by a more detailed explanation of the chronology and facts leading up to the execution of these agreements, and by a further analysis of the facts in Part III of the Reasons, dealing with Analysis and the Law.

A. The Shareholder's Agreement and Right of First Refusal

12 On April 12, 1967, after negotiations which lasted for approximately a year, GATX and Hawker Siddeley entered into the Shareholders' Agreement. In substance, the Shareholders' Agreement provides that if one party receives a *bona fide* offer to purchase its shares in CGTX, which that party is willing to accept, the other party will be entitled to have the first right to buy the shares at the same price. There is an exception for transfers as between corporate affiliates, provided the transferee agrees to be bound by the terms of the Shareholders' Agreement.

13 On the same date, April 12, 1967, the parties signed a letter agreement (the "Letter Agreement") which provided:

> If either of our Companies should receive any enquiry, expression of interest or tentative offer concerning a purchase of the shares of CGTX which we regard as genuine, each of us will inform the other. Any information exchanged between us as a result of this letter will not be considered as performance or part performance of any obligations arising under the Shareholders' Agreement between our Companies entered into to-day.

14 This Letter Agreement was referred to by then Vice-President and Treasurer of Hawker Siddeley, Mr. Bailie, as "a gentleman's agreement to inform one another if offers etc., are received to purchase the shares of one or the other in C.G.T.X., whether or not either of the present shareholders has any intention of selling."

> **The Shareholders' Agreement states, in its most pertinent parts:**
>
> [ellipsis]
>
> AND WHEREAS the parties hereto desire to promote their mutual interest and the interest of Canadian General by imposing certain restrictions on the transfer of common shares in the capital of Canadian General;

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NOW THEREFORE in consideration of the premises of the mutual covenants and agreements hereinafter contained and other good and valuable consideration the parties hereto covenant and agree as follows:

2. Neither party hereto will, save as expressly herein provided or permitted, sell or otherwise dispose of any common shares in the capital of Canadian General that may at any time be held or owned by it, except to the other party, and none of such shares shall be transferable, except as aforesaid, without the written consent of the other party, except upon the performance of the following terms and conditions:

(a) In the event a party hereto (the "Offeror") receives and proposes to accept a *bona fide* offer in writing from a third party for any of its common shares of Canadian General, the Offeror shall first furnish a copy of said offer to the other party hereto (the "Offeree"). The offer shall state the number of shares which the third party desires to purchase and the price per share in Canadian dollars which the third party is prepared to pay;

[ellipsis]

(c) The Offeree shall have thirty (30) days after the giving to it of any offer in which to accept it in whole, but not in part;

. . . . .

(d) The sale and purchase of common shares pursuant to an offer and acceptance, as above provided, shall be completed at the head office of Canadian General within ten (10) days after the expiration of the thirty (30) day period limited for acceptance, and the consideration shall be paid in cash or certified cheque

. . . . .

against delivery of the relative share certificates duly endorsed in blank for transfer

. . . . .

(e) In the event that an offer not be accepted by the Offeree, the Offeror shall be entitled, during the period of three (3) months following the date on which the offer was given to the Offeree, to sell to the third party all, but not part, of the shares so offered to and not purchased by the Offeree; provided, (i) the price is not less than the price stated in the offer made to the Offeree, and (ii) if the Offeror's said shares are not purchased by the third party within the said period of three (3) months, they shall forthwith again be subject to all the provisions of this agreement.

3. Clause 2 shall not apply to any of the following:

(a) The transfer of common shares by either party to another corporation which is affiliated with (as defined by the Canada Corporations Act) either of the parties hereto; or

(b) The pledge, hypothecation or transfer of common shares by either party to secure moneys borrowed; or

(c) The transfer of any common shares to provide the minimum number required to qualify directors;

provided that the transferee, by instrument in writing running in favour of the other party hereto, agrees to be bound by the terms and provisions of this agreement in the same manner and with the same effect as if such transferee had been the original party hereto from which such shares were transferred.

6. Upon the execution of this agreement, certificates representing all outstanding and issued shares of stock of Canadian General shall be surrendered to Canadian General and endorsed as follows, and returned to the respective owners:

Sale, transfer, pledge, assignment, or any other disposition of the shares of stock represented by this certificate is restricted by the terms of an agreement dated April 12, 1967, between General American Transportation Corporation and Hawker Siddeley Canada Ltd.

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15 The Shareholders' Agreement was variously described by the parties during the negotiations leading up to it as "a Pre-emptive Agreement

. . . . .

for the mutual protection of the two shareholders" (Mr. Mackenzie, the President and Managing Director of CGTX), a "Pre-emptive Agreement

. . . . .

which would give each party first refusal in the event the other party wished to dispose of its shares" (Mr. Emmert, the President of Hawker Siddeley), and "a reciprocal 'first refusal' agreement in the event that either of us wished to dispose of our share holdings in [CGTX]" (Mr. Bailie, the V.P.-Finance and Treasurer of Hawker Siddeley).

16 As for the exception regarding transfers, Mr. Bailie set out his objections to GATX's initial draft of the agreement, which contained no such clause, in this fashion in a memorandum to Mr. Emmert, dated June 22, 1966:

> I believe that the agreement should contain clauses which will permit inter-company transfer of shareholdings within Hawker Siddeley Canada group or General American without requiring the consent of the other party, and provided that H.S.C. or G.A.T.X. still retain voting control over the subsidiary to which the shares may have been transferred. This may seem a small matter, but there is not doubt in my mind that G.A.T.X. would like to get their hands completely on C.G.T.X. and I would not want to be beholden to them for a consent involving purely an internal re-arrangement within Hawker Siddeley Canada and which, as such, would have no bearing on factual control of C.G.T.X.

B. The Procor Agreement

17 The agreement between Procor and Hawker Siddeley which has been the catalyst for these proceedings ("the Procor Agreement"), is dated February 19, 1996. In substance, it provides as follows:

> (1) Hawker Siddeley has agreed to implement a corporate reorganization (the "Hawker Siddeley Reorganization") pursuant to which,
>
> (a) it will cause its 55% interest in CGTX to be acquired by a wholly-owned subsidiary incorporated for the purpose, Hawker Canada Holdings Inc. ("Hawker Holdings");
>
> (b) Hawker Holdings will agree to be bound by the terms of the April 12, 1967 Shareholders' Agreement; and,
>
> (c) Hawker Siddeley will distribute to its own shareholders all of the outstanding shares of Hawker Holdings.
>
> (2) At the conclusion of the Hawker Siddeley Reorganization (assuming it is approved), the common shareholdings of Hawker Siddeley will have been restructured into shareholdings in two public companies, namely:
>
> > (a) Hawker Holdings, which will have no liabilities and the only asset of which will be Hawker Siddeley's 55% interest in CGTX; and,
> >
> > (b) Hawker Siddeley, which will continue to hold the remaining assets of Hawker Siddeley.
>
> (3) Following completion of the Hawker Siddeley Reorganization, Procor has agreed to make a cash offer take-over bid to the Hawker Siddeley and Hawker Holdings shareholders to acquire all of the shares of Hawker Holdings for a price of $120 million, or $14.85 per share. In addition, at the completion of the take-over bid transaction, Procor is to acquire a one-third interest in Beacon Eye.

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18 Stripped to its essentials, the Procor Agreement constitutes an offer by Procor to acquire Hawker Siddeley's 55% interest in CGTX for a price of $120 million, or $14.85 per share (with some adjustment to reflect the value of a 1/3 interest in Beacon Eye).

C. Negotiations Between GATX and Hawker Siddeley

19 CGTX was incorporated in 1932 to carry on the railway car leasing and management business in Canada. It has done so since that time, according to the Applicants, as a joint venture and partnership between its majority and minority shareholders, who were originally predecessors of both Hawker Siddeley and GATX. Whether the relationship is characterized in that fashion or simply as that of co- operating shareholders, it seems to have worked to the mutual advantage of each group until recently. The Company has been profitable.

20 In recent years, however, the dynamics of the relationship between the parties have changed. The vitality and scope of Hawker Siddeley's operations have diminished and its corporate objectives have turned to dissolution, as I have earlier noted. GATX has re-assessed the manner in which it carries on its North American operations and now wants to compete directly in Canada.

21 In 1994 GATX and Hawker Siddeley entered into discussions about the disposition of their respective interests in CGTX. At first Mr. Moore — the current President and Chief Executive Officer of Hawker Siddeley — suggested to Mr. Menzies — the Senior Vice-President of GATX — that Hawker Siddeley should acquire GATX's shares. GATX declined this proposal, but indicated that it would be interested in purchasing Hawker Siddeley's majority position. Ultimately, in September 1995, GATX made a formal proposal to the Hawker Siddeley board of directors ("the September 1995 Proposal") in which it offered to purchase the Hawker Siddeley interest in CGTX "for a consideration of not less than Cdn. $74 million."

22 Hawker Siddeley rejected the proposal.

23 The September 1995 Proposal is of passing interest, however, for what it demonstrates about GATX's views of CGTX and about GATX's corporate objectives in Canada. It stresses, for instance,

- that CGTX is not well positioned to compete in the increasingly consolidated North American market, under its current ownership and management;

- that GATX is determined to build a strong presence for GATC[4] GATC in Canada, *with the alternative to buying 100% of CGTX being for GATC to establish a competing Canadian leasing operation*;

- that GATC had recently retained advisors to analyse the Canadian railcar leasing market — where GATC has been a competitor for 40 years — to assist in developing a Canadian strategy for GATC; and,

- that GATC is unable to achieve its Canadian objectives through its 45% interest in CGTX because its Canadian operations must be totally integrated into its North American operation.

24 Mr. Menzies acknowledged on cross-examination that GATX wanted the board of directors of Hawker Siddeley to understand from the September 1995 Presentation that if Hawker Siddeley did not sell its interest in CGTX to GATX, GATX would proceed to establish a competing business in Canada. Subsequently, in January 1996, GATX representatives disclosed similar business objectives for Canada in meetings with certain Western Canadian shippers in Calgary. In those meetings, GATX made it clear that if it were unable to come to an agreement with Hawker Siddeley respecting CGTX, "GATX would operate in Canada as a Canadian lessor" and would be a competitor to CGTX.

D. Hawker Siddeley's Initiatives to Promote Either the Sale of its Shares or the Sale of its CGTX Interest

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25 Having rejected GATX's $74 million offer for its interest in CGTX, Hawker Siddeley announced on September 19, 1995, "that it ha[d] retained Gordon Capital Corporation to assist in evaluating strategic alternatives for enhancing shareholder value", and that such alternatives could "include a recapitalization and a sale of all or part of Hawker Siddeley". The announcement went on to disclose that Hawker Siddeley had decided to take these steps after receiving an offer, which the Company had declined, for its 55% interest in CGTX. It did not reveal that the rejected offer had come from GATX.

26 Gordon Capital set about soliciting expressions of interest, and ultimately bids, for the acquisition of Hawker Siddeley's shares or for the acquisition of its business units, particularly the 55% interest in CGTX and Hawker Siddeley's aerospace businesses. The Beacon Eye business, being relatively new and in a start-up mode, was to be dealt with separately.

27 A bid process was established. Arrangements were made, as part of this process, for the necessary provision of information about Hawker Siddeley and its businesses to parties who had submitted written "expressions of interest", and access was provided to a "data room" set up for that purpose. Information divulged through this process was subject to "confidentiality agreements". Everyone participating was given a Procedures Memorandum which explained in detail what was to be done. A due diligence exercise would follow.

28 With respect to any offers for Hawker Siddeley's shares in CGTX, the Procedures Memorandum stated:

> An offer for the [Hawker Siddeley] 55% ownership interest in CGTX should be made subject to (i) the "Right of First Refusal" of General American Transportation Corporation ("GATX"), the owner of the remaining 45% ownership interest, pursuant to the terms of the Shareholders Agreement between GATX and [Hawker Siddeley] and (ii) to [Hawker Siddeley] shareholder approval.

29 GATX participated in the bidding process. It submitted a written expression of interest. It signed a confidentiality agreement. Through its own financial advisor and its solicitors it made its own requests respecting the documentation and type of information that should be made available in the data room. It attended at the data room. It conducted its due diligence and asked for even further information. Finally, on December 7, 1995, it submitted an offer to purchase the Hawker Siddeley interest in CGTX for $93 million plus an advance of $20 million to Hawker Siddeley, the full amount of which (i.e. $113 million) was to be distributed to Hawker Siddeley shareholders upon completion of the arrangement, with the advance to be repaid to GATX out of the proceeds of sale of other Hawker Siddeley assets.

30 On the advice of Gordon Capital, Hawker Siddeley rejected this offer. It advised GATX that it would be continuing the process established by Gordon Capital and invited GATX to continue to participate. On January 12, 1996, GATX was requested to submit its final offer with its best cash price. GATX replied on January 17th, stating that $93 million was its final and best price for the 55% interest in CGTX.

31 Meanwhile, initial expressions of interest in Hawker Siddeley by the Procor camp were being communicated as early as September 1995 when Hawker Siddeley representatives met with representatives of Procor and the Respondent, Marmon. Marmon is a major participant in the American railcar leasing industry. At that meeting its representative indicated that "his main interest [was] the 55% control interest in CGTX", although there was some interest in other aspects of Hawker Siddeley, particularly its aerospace business and Beacon Eye.

32 Marmon, with Procor, participated in the bid process developed by Gordon Capital. It submitted a non-binding expression of interest on November 27, 1995, stating its principal interest to be in the CGTX shares, which it estimated had an equity value of between $103 million and $123.6 million (Cdn). It signed a confidentiality agreement. It was provided with access to confidential information regarding CGTX and access to the data room. Marmon representatives and Procor representatives met with Hawker Siddeley and Gordon Capital representatives in December and January. Finally, the Procor Agreement was presented, and its execution authorized by the Hawker Siddeley board of directors on February 19, 1996.

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III. Analysis and Law

33 The Applicants assert that the Right of First Refusal has been activated, as a matter of contract, by the Procor Agreement. They submit further that the manner in which the Procor Agreement was conceived and given birth, constitutes a blatant attempt by Hawker Siddeley, in conjunction with the personal and other corporate Respondents, to circumvent the Right of First Refusal and that such conduct, together with the release of sensitive confidential information to competitors such as Procor in the bidding process established by Gordon Capital, comprises,

(i) a breach of contract on the part of Hawker Siddeley;

(ii) a breach of the "good faith" obligations of Hawker Siddeley and its directors under the contract and pursuant to section 122(1) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*");

(iii) "oppression" under section 241 of the *CBCA*; and,

(iv) a breach of confidentiality and of fiduciary duty.

34 The legal effect of this, the Applicants submit, is to activate the Right of First Refusal, thus entitling them to the relief claimed as summarized earlier in these Reasons.

35 I will deal first with the Right of First Refusal.

A. The Right of First Refusal

36 Hawker Siddeley and GATX representatives equally acknowledge that the Right of First Refusal contained in the Shareholders' Agreement is important to both shareholders. The general purpose of this Right of First Refusal, it seems to me, is evident. It is to protect the parties' respective interests by ensuring that if one party decides to dispose of all or a portion of its shares to a third party the other party has the pre-emptive right to acquire those shares first, on the same terms and conditions, including price, as that being offered by the third party. In this way, a party is protected against having an unwanted co-shareholder foisted upon it.

37 This interpretation, which I believe to be clear from the face of the document itself, is consistent with the legal characteristics attributed to a right of first refusal by the Supreme Court of Canada. It is also consistent with the views of the parties here, as expressed in the evidence.

38 I find the following statement by Estey J., in *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), 112 D.L.R. (3d) 49 (S.C.C.) to be a useful guide in approaching the interpretation of the Right of First Refusal. Although made in the context of the interpretation of an insurance contract, the comments are of general application in the exercise of contractual interpretation, in my opinion, and I have taken the liberty of inserting — in square brackets — general contractual language where specific reference to the insurance context was made in the text. Estey J. said, at pp. 58-59:

. . . . .

> [T]he normal rules of construction lead a Court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the [contract was made]. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the [contract] which promotes a sensible commercial result. It

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is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of [one of the parties to obtain a benefit contracted for] nugatory, should be avoided.

39 The Supreme Court of Canada dealt with the nature of a right of first refusal in *Canadian Long Island Petroleums Ltd. v. Irving Wire Products*, [1975] 2 S.C.R. 715. What was at issue in that case was a right of first refusal between two parties who each held a one-half interest in certain oil properties. In describing the substance of the right, Martland J. said, at p. 728:

> This agreement was one which governed the joint operation and development of certain oil properties. Clause 13, which is the important clause under consideration in this case, was a part of that agreement. It was one of the conditions governing the joint ownership of the property. *It was designed to protect the desire of each of the joint owners that it should not be forced into a joint ownership with another party against its will.*

40 And at p. 735:

> . . . . .
>
> As mentioned previously, the clause is a part of an agreement between joint owners of a property, governing the operation and development of it. *In essence it is a negative covenant whereby each party agrees not to substitute a third party as a joint owner with the other, without permitting the other party the opportunity, by meeting the proposed terms of sale, to acquire full ownership*. (italics added)

41 Mr. Turnbull, the Chief Financial Officer of Hawker Siddeley and a director of CGTX, acknowledged that Hawker Siddeley and CGTX would want to "make sure that [the Right of First Refusal] was fully and fairly respected". The following exchange on his cross-examination is enlightening:

> Q. And another way of putting it is to say, I suggest to you, that each party agrees that the purpose of this kind of agreement, and particularly in relation to a corporation, is *to ensure that each party will not substitute a new third party* or third parties *into the corporate relationship without giving the existing shareholder a right to meet the proposed terms of sale*, that's the basic purpose of the agreement?
>
> A. Whether that's the purpose or not, *it certainly is the import of this particular document*. (italics added)

42 Mr. Menzies, the Senior Vice-President of GATX, outlined his version of the purpose of the right of first refusal in the following passage in his affidavit:

> In my view, these provisions show the parties intended that neither party would sell or otherwise dispose of its shares of CGTX without first addressing the interests of the other party as a continuing owner of CGTX. Implicit in the Shareholders Agreement is a recognition that the disposition of CGTX shares by one party to a third party would risk fundamentally affecting or altering CGTX's business and the historical relationship between CGTX and its shareholders.

43 GATX places considerable emphasis in these proceedings upon the "business and historical relationship between CGTX and its shareholders" and the business environment in which the Shareholders' Agreement was made. In doing so, it seeks to highlight what it calls the joint venture and partnership nature of the CGTX operation and the fact that CGTX is said, historically, to have been viewed as the vehicle through which GATX has asserted its presence in Canada. As well, it seeks to underscore the highly competitive nature of the railway car leasing industry in Canada, in which there are but a handful of participants and in which CGTX and Procor are by far the largest participants. GATX submits the purport of the Shareholders' Agreement was to protect each party from having to live with *a competitor* as a co-shareholder without the opportunity to acquire the other party's interest first. It argues that by entering into the agreement with Procor, a major competitor, and structuring the arrangement in a fashion designed to circumvent the Right of First Refusal, Hawker Siddeley has breached the Shareholders' Agreement, and, further, that the breach has the effect of activating GATX's right to purchase.

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44 On my reading of the Shareholders' Agreement, it matters not whether the *bona fide* third party seeking to acquire the Hawker Siddeley interest, or the GATX interest, in CGTX is a competitor. The purpose of the Right of First Refusal is clear, as I have previously noted: one party cannot dispose of its interest without giving the other shareholder the first right to make the acquisition on the same terms. If the Right of First Refusal is triggered, it is immaterial whether or not the trigger has been pulled by a competitor.

45 It is apparent that in the course of the negotiations between the Marmon/Procor group and Hawker Siddeley, Marmon/Procor were well aware of the existence of the GATX Right of First Refusal. Hawker Siddeley appears at all times to acknowledge its existence. As I have already indicated, the Procedural Memorandum provided to all bidders in the Gordon Capital process underlined the fact that an offer to purchase the CGTX shares would be subject to that right. The President of Procor, Mr. Lester, testified that Procor was willing to go ahead with an offer arising out of its non-binding expression of interest notwithstanding that any offer made for the shares would have to be put to GATX.

46 In spite of this, however, it is patently clear on the Record, in my view, that the Procor offer was very carefully structured precisely to avoid the operation of GATX's Right of First Refusal. The nub of this lawsuit, of course, is to determine whether Hawker Siddeley and Procor were entitled to structure their agreement in such a manner, given the language of the Shareholders' Agreement; but I have no doubt that "getting around" the Right of First Refusal — to use a lay expression — or structuring the transaction in a fashion which would not attract the application of the Right of First Refusal — to put it in more formal legal terms, was a primary force behind the way in which the Procor Agreement was contrived.

47 The mechanism devised for achieving this hoped-for result is the metamorphosis of what is essentially an asset transaction (albeit one that involves the purchase of shares) into a shareholder transaction, with the added feature of the requirement of shareholder approval. Instead of selling the CGTX shares themselves — which are an asset in the hands of Hawker Siddeley — those shares are to be "transferred" to Hawker Holdings, a newly created subsidiary of Hawker Siddeley, the shares of which will then be dividended out to the existing shareholders of Hawker Siddeley. Hawker Holdings will remain an "affiliate" of Hawker Siddeley after the completion of that re-organization, so the scheme goes, and will agree to be bound by the Shareholders' Agreement. All of this is sanctioned by the exception regarding transfers to affiliates found in paragraph 3 of that Agreement, say Hawker Siddeley and Procor. The next step is that Procor will make a bid for all of the Hawker Holdings shares — Hawker Holdings' only asset being the 55% interest in CGTX — and it will be up to the shareholders of Hawker Holdings to decide whether or not to give approval. Those shareholders also happen to be the same as the shareholders of Hawker Siddeley itself, and consequently those shareholders will be entitled to sit back and wait for the highest bidder to come forth before approving a sale. Because the sale is a sale of substantially all of the Hawker Siddeley assets, the argument reckons, a special majority of those shareholders is required to vote in favour as well: *CBCA*, s. 189(3).

48 The effect is to recast what GATX submits is a transaction that should be subject only to the dynamics of a right of first refusal into a transaction which is tantamount to a take-over bid for shares representing Hawker Siddeley's most profitable asset and which is thus subject to all of the upward pressure on price which is characteristic of a take-over bid process.

49 In a memorandum following a meeting with Hawker Siddeley and Gordon Capital representatives on December 6, 1995, Mr. Lester, the President of Procor, wrote:

> *Their main interest seemed to be how to get around the GATX Right of First Refusal — not unlike ours*. We suggested they purchase GATX's 45%, however Brad Cameron [Gordon Capital] pointed out that GATX is a buyer, not a seller, and that this would be quite impossible. He mentioned that Hawker Siddeley would be willing to pay Procor a breakup fee if we submitted a proposal and GATX was the successful purchaser of Hawker Siddeley's 55%. According to Brad, if Procor won the bid, we would be more in a position of strength to force GATX to give up their 45% down the road. (italics added)

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50 The Minutes of the meeting of the Board of Directors of Hawker Siddeley on December 18, 1995, at which the $93 million GATX offer was rejected, state:

. . . . .

> The directors agreed that the offer, even without the conditions, was too low. *As a strategy to convince GATX to increase their offer*, it was agreed that the President and the advisors form [sic] Gordon Capital should approach Marmon Group Inc. to determine if their interest in CGTX is real, and if so, try to obtain an offer for the Corporation's shares in CGTX ("Shares") at the high end of the range of the previously received Marmon expression of interest. Under the Shareholder Agreement between the Corporation and GATX any bona fide offers received for the Shares which the Corporation is prepared to accept are subject to the right of first refusal. *The directors agreed that it may be necessary to pay a break-up fee to Marmon if Marmon agrees to submit an offer and GATX subsequently ends up owning the Shares* and if the net purchase price for the Shares is greater than the GATX offer. (italics added)

51 Notwithstanding the Board's apparent sensitivity at the time to the Right of First Refusal, management seems to have continued in its quest to find a transaction which would not activate it. In a memorandum to himself dated December 19, 1995, Mr. Moore of Hawker Siddeley made notes of what he described as the "Structure Following Marmon Discussions". The scenario envisaged at that time apparently involved the transfer of the CGTX interest and of the Beacon Eye interest to a new subsidiary of Hawker Siddeley, called Numco, and the subsequent sale of 100% of Numco to Procor pursuant to a plan of arrangement. Mr. Moore's comment was: "*Avoid R of FR*" (my emphasis). The following exchange about this took place on his cross-examination:

> Q. And your conclusion about that little scheme is it avoids the right of first refusal, that's what you say here, isn't it?
>
> A. Avoids right of first refusal, that is my comment at the bottom.
>
> . . . . .
>
> Q. *So you thought* that by transferring the shares of CGTX to a subsidiary and then selling the shares of the subsidiary to Procor, *you could get around the right of first refusal, is that what you are saying*?
>
> *A That is exactly the case*. (emphasis added)

52 At the January 9, 1996 meeting of the directors of Hawker Siddeley the continued interest of the Marmon Group was noted and a further presentation by Gordon Capital considered. That presentation recorded that the prospective purchasers for the CGTX interest were GATX and the Marmon Group (Procor). A draft letter of intent from the latter was attached. It contemplated the transfer of the CGTX interest and a portion of Beacon Eye to a new subsidiary of Hawker Siddeley, and the acquisition of the new subsidiary from Hawker Siddeley by the Marmon Group for cash. Gordon Capital listed among the advantages of this strategy that it:

- Increases the bid for CGTX Inc.; and,
- *Addresses the right of first refusal concern*

53 And among the disadvantages, that it was:

- *Likely to be viewed by GATX as a breach of the* "*spirit of the agreement*", and,
  - May trigger an injunction application by GATX, and
  - May trigger a damages claim by GATX

54 The Proposal was characterized under "Other Considerations" as an "aggressive strategy".

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55 The prospect of litigation apparently did not concern the Marmon/Procor Group. Mr. Moore records a conversation with the Marmon Group's representative in Chicago, Mr. Handlesman, on February 6, 1996. The Marmon Group's main concern, expressed in his notes of that conversation, as well as elsewhere in the evidence, was that Hawker Siddeley would simply take their offer and shop it to GATX before there was a binding agreement between Hawker Siddeley and Marmon/Procor for the payment of the break-up fee in the event that GATX matched or exceeded the Marmon/Procor bid. As for potential litigation, Mr. Handlesman is reported as commenting that he was not concerned: the only award could be to entitle GATX to exercise the Right of First Refusal and the objectives of Marmon/Procor would have been accomplished in any event because either they would get CGTX at a fair price or GATX would pay a higher price.

56 In an inter-office memorandum dated February 12, 1996, Mr. Lester of Procor set out his notes concerning a February 8th meeting at the offices of Hawker Siddeley's solicitors. He recorded that once the questions surrounding of Procor's break-up fee had been resolved "there was an obvious momentum to complete the deal." Under a heading "Timing and what happens next", he noted:

• Everyone works toward signing the Hawker Siddeley/Marmon agreement on Feb. 16. There is no deal for GATX to match until it is signed.

57 While Mr. Lester acknowledged on cross-examination that this latter comment regarding "no deal for GATX to match until it is signed" was a reference to GATX's right to match the price of the Procor Agreement under its Right of First Refusal, the following excerpt from his cross-examination is instructive, particularly the exchange at the conclusion of the line of questioning:

> Q. Yes. And then turn to the next page, timing and what happens next, everyone works towards signing the Hawker Siddeley/Marmon agreement on February 16th. There is no deal for GATX to match until it is signed. Was that discussed at this meeting?
>
> A. That was my understanding. What I had said to you before was that I was concerned that GATX might come in and try to match our deal before we got something signed and I was concerned that we would wind-up with nothing for all of our time and effort.
>
> Q. So what you're saying here is the, if I understand you correctly, that you wanted a deal in place which would give you your costs back before GATX had a right to match it under its right of first refusal so you would get your money out of this effort?
>
> A. Right. And we were trying to — we felt once we had the deal signed, they wouldn't be able to match it, but as long as we didn't have anything signed, Hawker Siddeley and GATX could have made their own deal.
>
> Once you have a deal, then GATX has something to match, that is what you say?
>
> A. Hopefully we made the deal so that they can't match it.
>
> Q. But you knew they had a right to match it under the right of first refusal, didn't you?
>
> *A. Well, they have a right of first refusal. We have structured something that is up for the shareholders to approve.*
>
> *Q. Structured something to get around the right of first refusal*?
>
> *A. That's right*. (emphasis added)

58 My conclusions and findings derived from all of this are the following.

59 Although the negotiating parties always kept an eye on the GATX Right of First Refusal, and even paid homage to the possibility that in the end GATX might be entitled to exercise it, it is clear on the evidence that they have done their

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best to neutralize its effect, and thus avoid its true application. What Hawker Siddeley and the Procor/Marmon Group hope they have accomplished is the structuring of a transaction which will not attract the application of the Right of First Refusal; but, even if it does, they expect to have lured GATX into a market-price bidding war, in which GATX will at least be required to match the price established by the Procor Agreement if it wishes to acquire the Hawker Siddeley interest, and may well be enticed into paying more. In short, the Procor price will become the springboard from which to launch a further round of upwardly spiralling price negotiations for the Hawker Siddeley interest. Such a result best accomplishes the respective corporate and business objectives of Hawker Siddeley (which are to maximize the value of the CGTX asset for its shareholders) and of Procor/Marmon (which are either to acquire the CGTX asset at what they see as a reasonable price, or force GATX, their competitor, to pay top worth as the cost of entering the Canadian market on a directly competitive basis — and, incidentally, to collect their $5 million break-up fee if the latter turns out to be the case).

60 These are understandable enough corporate and business objectives on the part of Hawker Siddeley and Procor when considered in isolation and from their own commercial perspectives, and that of the Hawker Siddeley shareholders. The question for determination on this Application, however, is whether they are entitled to pursue these objectives in the fashion they have done, having regard to the legal obligations governing the relationship between Hawker Siddeley and GATX as shareholders of CGTX and as parties to the Shareholders' Agreement containing the Right of First Refusal.

61 In my view, they are not.

62 The Respondents argue that it matters not whether the Procor Agreement was carefully crafted by them to avoid the Right of First Refusal. They say they are entitled to do just that. The question is to be determined on the basis of contractual rights, they submit, and the issue, therefore, is whether the Procor Agreement is caught by the Shareholders' Agreement or whether it is excepted from it. They assert that it is excepted.

63 What is the basis for this position?

64 Its starting point is to be found in the provisions of paragraph 3 of the 1967 Shareholders' Agreement and the "save as expressly herein provided or permitted" caveat in paragraph 2. Paragraph 3 in its material aspects bears repeating, and states as follows:

> 3. Clause 2 shall not apply to any of the following:
>
>> (a) The transfer of common shares by either party to another corporation which is *affiliated with* (as defined by the Canada Corporations Act) either of the parties hereto
>
> . . . . .
>
> [ellipsis]
>
> provided that the transferee, by instrument in writing running in favour of the other party hereto, agrees to be bound by the terms and provisions of this agreement in the same manner and with the same effect as if such transferee had been the original party hereto from which such shares were transferred. (italics added)

65 The Respondents argue that there is absolutely nothing in the Shareholders' Agreement which prevents a transfer of the Hawker Siddeley interest in CGTX, such as that contemplated in the Procor Agreement, to an affiliated corporation. Hawker Holdings, at the time of the proposed transfer, will be a subsidiary of Hawker Siddeley, and therefore an "affiliate" to which such a transfer is permitted. Secondly, the argument continues, Hawker Holdings will remain an affiliate of Hawker Siddeley following the proposed dividending of the Hawker Holdings shares to the shareholders of Hawker Siddeley, because each of Hawker Holdings and Hawker Siddeley will continue to be controlled by the same persons, i.e. the Hawker Siddeley common shareholders: see definition of "affiliated company" in the *Canada Corporations Act*, R.S.C. 1952, c. 53, as amended by S.C. 1965, c. 52, s. 39, enacting s. 121B (the statute in effect at the time of the execution of the 1967 Shareholders' Agreement). Finally, the Respondents submit that the provisions of a shareholders' agreement between Hawker Siddeley and GATX cannot operate as an impediment to *the shareholders* of

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Hawker Siddeley in dealing with *their* shares. Consequently, there can be nothing to prevent the shareholders of Hawker Siddeley and of Hawker Holdings from entertaining an offer from Procor, or anyone else, to purchase those shares.

66 In this fashion the Procor Agreement is said not to attract the operation of GATX's Right of First Refusal under the Shareholders' Agreement. If the result is to provide GATX with somewhat less protection than it might otherwise have had, so much the worse for GATX, the argument concludes. GATX got what it bargained for, given the insertion of the "save as expressly herein provided or permitted" provisions of paragraph 3 of the Agreement, which provisions were inserted at the insistence of Hawker Siddeley after its rejection of the initial draft of the Agreement put forward in 1966 by GATX.

67 This argument cannot prevail, in my opinion.

68 If what was entailed in the Procor Agreement were no more than the transfer of Hawker Siddeley's interest in CGTX to Hawker Holdings, GATX could have no complaint. It is arguable, at least, that the subsequent distribution of the Hawker Holdings shares to the shareholders of Hawker Siddeley would be permitted, if the transaction stopped there. But of course, the transaction does not, and cannot, stop there — otherwise it would not be *the Procor* transaction.

69 In my view the effect of the Procor Agreement must be looked at in its entirety and judged as a whole. Its objective is to remove the Hawker Siddeley interest in CGTX from the hands of Hawker Siddeley and the Hawker Siddeley shareholders and to transfer that interest into Procor's hands. The proposed transaction cannot be subdivided into isolated parts — each one of which, if considered out of context, might appear individually to be benign — and given effect to on that basis, given the existence of the Right of First Refusal which clearly attaches if the transaction is viewed as a whole.

70 I agree with counsel for GATX that by using the words "sell *or otherwise dispose of*" in the Shareholders' Agreement the parties intended to encompass all means and methods by which either of them might choose to terminate their interest in the CGTX shares. A transfer of assets by a corporation to its shareholders has been held to constitute a disposition: see *Lord Elgin Hotel Ltd. v. Minister of National Revenue* (1964), 18 D.T.C. 637 (T.A.B.). In this context, the distribution of the Hawker Holding shares for the purpose of their being sold to Procor — or, perhaps, to some other bidder in the take-over battle to follow — constitutes a "disposition" of Hawker Siddeley's 55% interest in CGTX, in my view.

71 I am accordingly satisfied that the proposed transaction between Hawker Siddeley and Procor cannot be sustained on the language of the Right of First Refusal itself. The Right of First Refusal is "in essence

. . . . .

a negative covenant [in which each of Hawker Siddeley and GATX have agreed] not to substitute a third party as a joint owner with [the other], without permitting the other party the opportunity, by meeting the proposed terms of sale, to acquire full ownership": see *Long Island Petroleums Ltd. v. Irving Industries, supra*, at p. 735. I therefore conclude that Hawker Siddeley is precluded, as a matter of straight contract law, from proceeding with the proposed transaction without first putting to GATX the option of purchasing Hawker Siddeley's shares in CGTX for that portion of the Procor price which the parties had attributed to those shares.

72 I shall return to the issue of what that price is at the conclusion of these Reasons.

73 There is, however, another basis upon which I am equally convinced that the Procor transaction cannot proceed except on the foregoing basis. It is well established that the grantor of a right of first refusal must act reasonably and in good faith in relation to that right, and must not act in a fashion designed to eviscerate the very right which has been given. This is an illustration of the application of the good faith doctrine of contractual performance, which in my view is a part of the law of Ontario. The law in this respect is nicely summarized in the following passage from a judgment of Saunders J. in *Landymore v. Hardy* (1991), 21 R.P.R. (2d) 174 (N.S. T.D.), at pp. 193-194:

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. . . . .

The grantor of a right of first refusal is not entitled to frustrate it by conveying the property in such a way as to avoid having to give the right in the first place: *Gardner v. Coutts & Co.*, [1968] 1 W.L.R. 173, [1967] 3 All E.R. 1064 (Ch. Div.).

Relations between the giver and the holder of a right of first refusal must be characterized by good faith and reasonableness.

> *The vendor must, of course, act bona fide in defining the price to be included in the offer*. This is a matter of fact
>
> . . . . .
>
> If she [the vendor] is proposing to sell by private treaty the price to be specified in the offer would be the price intended to be named in the estate agent's particulars, *or the lower price, if any, to which the vendor is, as a matter of fact, prepared to descend on such a sale*. [Emphasis added (by Saunders J).] (*Smith v. Morgan*, [[1971] 1 W.L.R. 803,] [1971] 2 All E.R. 1500 (Ch. Div.) [at p. 1504 All E.R.])

Consider as well the observations of V. Di Castri, *The Law of Vendor and Purchaser*, 3d ed. (looseleaf) (Toronto: Carswell, 1988), vol. 1, at p. 6-8:

> As to the giver of the right, the law implies a duty of reasonableness and good faith on his part in entering into a cash and property exchange transaction. *The duty is not discharged if the essential purpose of the sale to the third party is to frustrate the right of first refusal*. (underlining mine)

74 In Ontario, Mr. Justice Rosenberg came to the same conclusion, and cited the same passage, in *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1993), 14 O.R. (3d) 528 (Gen. Div.), at pp. 540-541. See also *MDS Health Group Ltd. v. King Street Medical Arts Centre Ltd.* (1994), 12 B.L.R. (2d) 209 (Ont. Gen. Div.), per Haley J.

75 The Procor Agreement, in my opinion, constitutes a "bona fide offer in writing from a third party" received by Hawker Siddeley, within the meaning of that term in paragraph 2(a) of the Shareholders' Agreement. Its purpose is to effect the acquisition of all of the Hawker Siddeley shares in CGTX, and the price — $120 million, or $14.85 per share — is ascertainable, subject to some adjustment for the Beacon Eye interest and the cost which Hawker Siddeley is prepared to throw away for the break-up fee.

76 There is another factor to consider, however. The bona fide offer must not only be one which the party in question "receives", according to the Right of First Refusal; it must also be an offer which that party "proposes to accept". On the surface it would appear that Hawker Siddeley "proposes to accept" the transaction contemplated by the Procor Agreement. The board of directors has duly authorized its execution, and it is the board of directors of a corporation which is charged with the statutory responsibility for managing its business and affairs: *CBCA*, subsection 102(1). The Respondents argue strongly, however, that in the circumstances of this case, the transaction requires shareholders' approval because it involves a sale of substantially all of the assets of Hawker Siddeley: see subsection 189(3) of the *CBCA*. Accordingly, they submit, the Procor transaction, or any sale of the Hawker Siddeley interest in CGTX, is an exception to the general rule that the directors bind the corporation. Because the sale "requires the approval of the shareholders", it is only through the act of shareholder approval that Hawker Siddeley is capable of "propos[ing] to accept" the Procor proposal. Consequently, until that shareholder approval has been obtained, the argument concludes, the Right of First Refusal, by its own terms, cannot be triggered.

77 Subsection 189(3) of the *CBCA* must therefore be addressed. Indeed, what bearing, if any, it has on the sale of Hawker Siddeley's interest in CGTX presents a most perplexing dilemma. Its resolution, in my opinion, is key to unravelling the parties' rights and the proper disposition of the Application.

B. Subsection 189(3) of the CBCA

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78 Subsection 189(3) of the *CBCA* was enacted in 1975.[5] It deals with the sale of all or substantially all of the assets of a corporation, and is to be found in Part XV of the *Act* concerning fundamental changes in a corporation. Such a transaction requires the approval of the corporation's shareholders by a special resolution. It triggers dissenting shareholder rights. Subsection 189(3) states:

> s. 189(3). A sale, lease or exchange of all or substantially all of the property of a corporation other than in the ordinary course of business of the corporation requires the approval of the shareholders in accordance with subsections (4) to (8).[6]

79 The Respondents argue that the transaction proposed in the Procor Agreement is caught by this statutory requirement. They submit it involves the sale of substantially all of Hawker Siddeley's remaining assets — namely its 55% interest in CGTX — and accordingly, regardless of whether GATX's right of first refusal is triggered, the shareholders of Hawker Siddeley have the right to approve or not to approve the transaction.

80 If this argument is correct it has profound implications for the exercise of the Right of First Refusal. Indeed, as I shall explain momentarily, the Right of First Refusal would cease, in effect, to be a right of first refusal. It would become instead a right to participate in a bidding war in which the Hawker Siddeley shareholders (with whom GATX did *not* contract) have the final word.

81 For reasons that I shall now outline, however, I do not believe that the provisions of subsection 189(3) apply in the circumstances of this case. Two questions must be addressed in explaining that conclusion. They are:

> a) whether the sale of Hawker Siddeley's 55% interest in CGTX constitutes a sale of "substantially all" of the assets of Hawker Siddeley; and, if so,
>
> b) whether the purchase of the Hawker Siddeley interest in CGTX pursuant to the Right of First Refusal is saved from the operation of subsection 189(3) of the *CBCA* because the statutory provision is inapplicable to the exercise of that vested contractual Right, the existence of which preceded the enactment of the statute.

82 Both questions I answer in the affirmative. I shall examine each in turn.

"*Substantially All*" *Assets*

83 In determining whether a sale involves "substantially all" of the assets of a corporation, the Courts have tended to look beyond a mere "quantitative" test. That is, the exercise requires more than simply comparing the value of the asset in question with the total value of the corporation's assets and deciding where the resultant percentage crosses the line and becomes "substantially all" of the assets. Rather, the Courts will look at the relationship between the asset in question and the nature of the company's operations as a whole, taking into account the quantitative aspects of the case in the process but trying to determine on an overall basis whether the sale will have the effect of fundamentally changing or destroying the nature of the corporation's business because "it is a sale of a part of the business so integral as to be essential for the transaction of its ordinary day-to-day business": see *85956 Holdings Ltd. v. Fayerman Bros. Ltd.* (1986), 32 B.L.R. 204 (Sask. C.A.) at p. 213 and generally at pp. 210-213, 25 D.L.R. (4th) 119 (Sask. C.A.), at 125 and generally at pp. 123-125; see also the decision of Farley J. in *Benson v. Third Canadian General Investment Trust Ltd.* (1993), 14 O.R. (3d) 493 (Gen. Div. [Commercial List]) and the recent decision of Halperin J. in *Cogeco Cable Inc. v. CFCF Inc.*, [1996] Q.J. No. 7 (C.S. Que.).

84 This approach has been developed based upon an analysis of the purpose of subsection 189(3). In that regard, Fraser and Stewart, *Company Law of Canada*, 6th ed. by H. Sutherland (Toronto: Carswell, 1993), has described its rationale in these terms:

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> Since the purpose of the provision is to protect the shareholders from a destruction of the corporation's business, the transaction must be tantamount to the winding-up of the corporation's business in order to require a special resolution: Good v. Lackawanna Leather Co. (1967), 233 A. (2d) 201, quoted with approval in 85956 Holdings Ltd. c. Fayerman Brothers Ltd., [1986] 2 W.W.R. 754 (Sask C.A.).

85 This passage was cited with approval by Halperin J. in *Cogeco Cable, supra*, at paragraph 26 of the QL Report. In *Fayerman Brothers, supra*, at p. 124 (D.L.R.) Vancise J.A. stated the aim of the provision to be "to protect the shareholders from a fundamental change in the corporation and to ensure that the means to accomplish the object of the corporation were not impaired".

86 In 1967, when the Shareholders' Agreement was entered into, the operations of Hawker Siddeley were extensive, diverse, and widespread. By the time of the Procor Agreement, however, those operations had been scaled back considerably. They were described in the September 1995 announcement of the Gordon Capital process, in the following fashion:

> Hawker Siddeley Canada is a diversified Canadian public company with operations in Canada and the United States. The company's shares are traded on the Toronto, Montreal and Vancouver stock exchanges. Through its subsidiaries and divisions, the company repairs and overhauls gas turbine engines and manufactures reciprocating aircraft engines and components for gas turbines for aircraft and industrial applications; leases and repairs railcars; manufactures sawmill and lumber processing equipment; and provides facilities and services for doctors performing Laser-PRK vision correction.

87 The Respondents submit that the CGTX interest is Hawker Siddeley's only substantial remaining operating asset, and that — in the words of a January 1996 presentation to the board of directors — "[Hawker Siddeley] as a continuing public company excluding CGTX would have questionable value".

88 Although I think that the question of whether the sale of the Hawker Siddeley interest in CGTX is a sale of substantially all of Hawker Siddeley's assets is not one which is free of doubt, I have concluded that it does qualify as such a sale. Certainly it was treated as such in the bidding process established by Gordon Capital, where all bids were to be made subject to Hawker Siddeley shareholder approval, to everyone's knowledge, including that of GATX.

89 Procor viewed the CGTX interest as comprising "the bulk of the value of the company", according to an internal memorandum, dated October 5, 1995, from Union Tank Car Company to Mr. Lester at Procor. Hawker Siddeley's 1994 Annual Report shows that the railcar leasing subsidiary contributed roughly one-half of the total sales in the Company's "transportation and services segment" (consisting of the aerospace business plus the CGTX interest) and $23.5 million of $27.5 million in operating profit for that segment. I note that the other two industry segments of Hawker Siddeley's business in that year — sawmill equipment and Beacon Eye — showed losses.

90 A January 9, 1996, presentation to the Hawker Siddeley board of directors by Gordon Capital contained the following "illustrative scenarios" of "Potential Value Realization" for Hawker Siddeley:

Sale Of:	Scenario A	Scenario B
CSMI	$16.3 million	$16.3 million
CGTX Inc.<7>	$93.0	$112.0
Aerospace Business	$25.0	$30.0
Beacon<8> (50%)	$ 8.0	$ 8.0

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Pension Recovery	$14.0	$28.0
Proceeds from Sale	$166.3 million	$194.3 million

<7> Assumes The Marmon Group transaction proceeds as proposed.
<8> Assumes The Marmon Group transaction proceeds as proposed

91 It is apparent that the CGTX interest is by far the predominant contributor to value in the Gordon Capital analysis.

92 The foregoing, on balance, is sufficient to confirm Mr. Moore's contention in his affidavit that "CGTX [accounts] for the bulk of Hawker Siddeley's remaining undertaking and overall value". In the words of Vancise J.A. in *Fayerman Bros., supra*, at p. 125 (D.L.R.), the sale of the CGTX interest would have "the effect of fundamentally changing the nature of the business formerly carried on by" Hawker Siddeley. I therefore conclude that its sale would be a sale of substantially all of the present assets of Hawker Siddeley.

93 This conclusion does not end the matter, however, because, as I have indicated, I am persuaded that subsection 189(3) of the *CBCA* does not apply to the exercise by GATX of its Right of First Refusal under the 1967 Shareholders' Agreement.

The Presumption Against Interference with Pre-Existing Vested Rights

94 When the Shareholders' Agreement was executed in 1967, subsection 189(3) of the *CBCA* did not exist and there was no legal requisite that shareholder approval be obtained for transactions involving the sale of all or substantially all of the corporation's assets. Subsection 189(3) came into effect in 1975, when the *CBCA* was first enacted. The question therefore arises whether the provisions of the *Act* requiring shareholder approval apply to the exercise of GATX's Right of First Refusal, having regard to the general presumptions that statutory enactments do not have retroactive effect nor are they intended to interfere with existing vested rights.

95 A distinction exists between these two presumptions, and the former is much stronger than the latter: see P. Côté, *The Interpretation of Legislation in Canada*, (2d ed.) (Cowansville: Les Éditions Yvon Blais Inc., 1991), at p. 106 and 151. Here, in my view, the question is not whether subsection 189(3) operates retroactively in relation to the right of first refusal, but whether it interferes with the pre-existing contractual rights of GATX in that regard under the Shareholders' Agreement.

96 Côté, *supra*, states, at p. 116:

> The distinction between non-interference with vested rights and the rule against retroactivity is, however, an important one. A statute which impairs vested rights is not necessarily retroactive: it is not retroactive at all if it only determines the future exercise of rights acquired in the past.

97 And, further, at p. 123:

> A statute is not retroactive merely because its application encroaches upon vested rights. In general, it is purely prospective statutes that threaten the future exercise of rights that were vested before their commencement. The application of new statutes to the future occurrence of ongoing situations depends on whether or not a statute has an immediate effect, and not on a retroactive effect.

98 Such is the case here. There is nothing in the *CBCA* which indicates that it is designed to have retroactive effect. Therefore, in light of the strong presumption against retroactivity, the statute is prospective in its operation. The question

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is whether its prospective operation can affect "the future exercise of rights that were vested before" subsection 189(3) came into effect, that is, the future exercise of the existing GATX Right of First Refusal.

99 A statute is presumed not to interfere with vested rights. The text, *Driedger on the Construction of Statutes*, 3d ed. (Butterworths: Toronto, 1994), R. Sullivan, ed., states, at p. 530:

> *To deprive individuals of existing interests or expectations that have economic value is akin to expropriation without compensation, which has never been favoured by law. To worsen the position of individuals by changing the legal rules on which they relied in arranging their affairs is arbitrary and unfair*. Where the application of new legislation creates special prejudice for some, or windfalls for others, the burdens and benefits of the new law are not rationally or fairly distributed. These effects may be hard on the individuals involved and they undermine the general security and stability of the law. For these reasons *interference with vested rights is avoided in the absence of a clear legislative directive*. (italics added)

100 Contractual rights are recognized as vested rights, and arise on the effective date of the contract: see *Driedger*, *supra*, p. 530. Although the purpose of subsection 189(3) of the *CBCA* is to protect the shareholders by providing them with a say in matters that will lead to a fundamental change in the nature of the corporation's business, I can find no "clear legislative directive" either from that purpose or in the *Act* as a whole that would justify the deprivation of GATX's existing contractual rights and expectations by bringing about a transformation in those contractual rights which would *itself* fundamentally change the nature of what was bargained for. Nor can I see any reason, in the circumstances of this case, for sanctioning the operation of subsection 189(3) in a fashion that is tantamount to invalidating a pre-existing corporate contract and to permitting Hawker Siddeley to use the provisions of the *CBCA* to avoid its contractual obligations with respect to the transfer of its property.

101 Two competing interests are at odds here. The first is that of giving effect to the duly expressed wishes of the Legislature to protect shareholders in circumstances involving fundamental changes to their corporation. The second is the interest of individuals — as Driedger has noted — in not having "the legal rules on which they have relied in arranging their affairs" changed in a way that is "arbitrary and unfair". Some further reflection upon the nature of a right of first refusal may assist in balancing these two competing interests.

102 Earlier in these Reasons I observed that the application of subsection 189(3) of the *CBCA* to the GATX Right of First Refusal would have significant implications for the exercise of that Right, converting it in effect into something altogether different. Instead of a right of first refusal it would become a mere right to participate in a bidding war in which the Hawker Siddeley shareholders (with whom GATX did *not* contract) have the final word.

103 Precisely this consequence is recognized by counsel for Procor, who state in paragraph 54 of their factum that:

> .... any exercise of 3140172's right of first refusal will result in an auction for the CGTX Interest, because of the requirement of shareholder approval. In circumstances where the shareholders must approve the sale, *a right of first refusal will not operate to close out the bidding after the initial Third Party Offer to Purchase*. At best, it provides the holder of the right of first refusal with the right to match the highest current offer for the subject property, in other words, a right to participate in the bidding.

104 In my view, this concept is the very reverse of what a right of first refusal entails, in as much as the holder of such a right is entitled to make the last move once the giver of the right has committed itself. Here, if the argument concerning subsection 189(3) is correct, the Hawker Siddeley shareholders will always be able to hold over the head of GATX — like the sword of Damocles — *their* ultimate approval of its exercise of the Right of First Refusal. In this way the shareholders — and Hawker Siddeley — are provided with a potent weapon enabling them to keep the price for the Hawker Siddeley interest "in play" beyond the establishment of the first price which was initially acceptable to the Company, acting through its Board of Directors. Since the holder of a right of first refusal is entitled to purchase at the

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first price which the giver of that right is prepared to accept, it can be seen that, in this sense, the effect of the application of subsection 189(3) of the *CBCA* is to turn the Right of First Refusal on its head.

105 I do not mean to suggest that there is something in the nature of a right of first refusal which shields the holder of that right from a bidding process altogether. There may well be competitors in the process which leads up to the presentation of a bona fide third party offer that the recipient is willing to accept, with all of the upward pressures on price that such a phenomenon entails. Once that point has been reached, however, the bidding process stops, in my view. The holder of the right of first refusal is entitled to match the offer which the recipient proposes to accept and to purchase at the offered price and subject to the proposed terms, without more. If such is not the case, a pre-emptive right to purchase becomes nothing more than a privilege to be told that the party opposite is interested in selling and an invitation to treat.

106 Consequently, when it is said that the giver of a right of first refusal is obliged to sell to the holder of that right "at the lowest price at which the vendor is prepared to sell, and not [to] subject the holder of the right of first refusal to an auction at a higher price" (Applicant's factum, paragraph 91(d)), it must be remembered that such a proposition can only have application *after* the point has been reached where there is an offer that is acceptable to the vendor. I do not read the decision of Mr. Justice Saunders in *Landymore v. Hardy, supra*, at p. 193 to mean something to the contrary. There, Saunders J. was dealing with a situation where the offer was neither *bona fide* nor from an arms length third party, as the price had been artificially inflated and the proposed purchaser was simply a corporate emanation of the giver of the right of first refusal. Having determined that the right of first refusal granted by the Hardys had been breached, but that they were prepared to accept an offer, the Court concluded that they were obliged to act bona fide in defining the price to be included in the offer and to sell at the lower price to which they were prepared to descend in the bargaining process: see also *Smith v. Morgan*, [1971] 2 All E.R. 1500 (Ch. D.), at p. 1504.

107 I pause to note that the shareholders of the selling party are not altogether unprotected in the right of first refusal process, particularly in circumstances such as those transpiring here. There is a built-in mechanism which encourages the "offered" price to be a good one: the prospective purchaser knows that the price put forward must be sufficiently high that the holder of the right of first refusal will not be tempted, or able, to match it. This factor may simply be present in the right of first refusal exercise itself. It may also be injected through a bidding process such as that conducted by Gordon Capital, or through a negotiated process such as that entered into between Hawker Siddeley and Marmon/ Procor. As I have already remarked — and as Mr. Heintzman concedes — there is nothing wrong with a market driven price being put forward to trigger a right of first refusal. The inequity arises when an attempt is made to structure the transaction in a fashion that will deprive the holder of that right.

108 The purpose of the *CBCA* itself is stated in section 4 of the *Act*, which specifies:

> The purposes of this Act are to revise and reform the law applicable to business corporations incorporated to carry on business throughout Canada, to advance the cause of uniformity of business corporations law in Canada and to provide a means of allowing an orderly transference of certain federal companies incorporated under various Acts of Parliament to this Act.

109 Only the first of these stated purposes — revision and reform of the law applicable to business corporations — can be of any relevance to the question of interference with vested contractual rights. Part XV of the *Act* dealing with fundamental changes in the corporation, and the dictate of subsection 189(3) within it calling for shareholder approval of a sale of substantially all of the corporation's assets — and the dissenting shareholder rights which accompany that provision — fall within this category, to be sure. However, given the built-in mechanism for prodding the price to a reasonable level prior to acceptance by the recipient of an offer — to which I have alluded above — I do not believe that those purposes are defeated by the exercise of the Right of First Refusal. The shareholders have a measure of protection in any event.

110 I agree with the following passage from *Driedger*, *supra*, at p. 537:

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> The key to weighing the presumption against interference with vested rights is the degree of unfairness the interference would create in particular cases. Where the curtailment or abolition of a right seems particularly arbitrary or unfair, the courts require cogent evidence that the legislature contemplated and desired this result. Where the interference is less troubling, the presumption is easily rebutted.

111 That being the case, and having regard to the nature of a right of first refusal and the fundamental alteration in the nature of this Right of First Refusal which would result from the operation of the requirement of shareholder approval were subsection 189(3) to be applicable, I am reluctant to conclude that the Legislature intended the presumption against interference with already existing contractual rights to be rebutted in circumstances such as those present on this Application. I can see no legislative direction or imperative calling for such a result, and I therefore hold that the presumption applies.

C. The Right of First Refusal Revisited

112 It follows, in my view, that shareholder approval is not a necessary pre-requisite either to the capacity of Hawker Siddeley to "propose to accept" the Procor offer, or to the exercise of the GATX Right of First Refusal.

113 It is the norm in corporate affairs for the directors to be the operative and directing minds through which the corporation acts: *CBCA*, s. 102(1). Situations to the contrary, as Halperin J. observed in *Cogeco Cable, supra*, at paragraph 24, are "indeed extraordinary".

114 The Hawker Siddeley Board of Directors has authorized the Procor Agreement, and in doing so, in my opinion, has established not only that the proposed transaction is a "*bona fide* offer" received by the Company, but that it is also one which Hawker Siddeley "proposes to accept". I hold, therefore, that the Right of First Refusal is activated, by its own contractual terms, as a result. I also hold that the Right of First Refusal is activated by Hawker Siddeley's breach of the Right of First Refusal and breach of their contractual good faith obligations in relation to it, as described earlier in these Reasons.

115 The fact that the Procor Agreement contains an element in addition to the CGTX interest — namely, the Beacon Eye aspect of it — cannot operate to defeat the Right of First Refusal, in my view, particularly when it is plain that the CGTX interest is the main target of the transaction. Where the thrust of the offer in question falls clearly within the parameters of a right of first refusal, that right cannot be defeated by the expediency of packaging the transaction in a fashion which makes it appear as if it encompasses something different: see *Downtown King West Development Corp., supra*. The Beacon Eye element can be severed, and has been treated as a severable part of the deal by Hawker Siddeley and Marmon/Procor throughout, making the circumstances distinguishable from those in cases such as *Budget Car Rentals Toronto Ltd. v. Petro-Canada Inc.* (1987), 45 R.P.R. 259 (Ont. H.C.), affirmed (1989), 69 O.R. (2d) 289, 60 D.L.R. (4th) 751, 6 R.P.R. (2d) 142 (C.A.).

116 Before dealing with whether the foregoing circumstances also give rise to a claim for "oppression" under s. 241 of the *CBCA*, I will first consider the allegations pertaining to the disclosure by Hawker Siddeley and the individual Respondents of confidential information.

D. Confidential Information, Fiduciary Duty, and the Underlying Competitive Environment

117 There is no doubt that Procor, and others, received a good deal of information about CGTX in the course of the bidding regime established by Gordon Capital that would be considered "confidential" and, indeed, sensitively so, in a business sense. The information related primarily to CGTX's finances and to particulars of its rail car fleet and the leases pertaining to that fleet. Mr. Turnbull acknowledged on cross-examination that absent the bidding process which Hawker Siddeley had put in place, such confidential information would never have been given to CGTX competitors such as Procor.

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118 It is in this context, and in the context of the oppression remedy claim — with which I shall deal in the next segment of these Reasons — that the personal Respondents are targeted in these proceedings. Each of them is a director of Hawker Siddeley and the Respondents Bandler, Moore, Sanford and Turnbull are four of the existing five directors of CGTX (the fifth CGTX director, Jacques C. Léger — who is its President and Chief Executive Officer — is not a party). Each of the four "common directors" is also a senior officers of Hawker Siddeley.

119 While allegations of breach of fiduciary obligations were advanced on behalf of the Applicants in argument, they did not form a central thrust of those submissions, and I say at the outset that I do not believe this Application falls to be determined on such considerations. No fiduciary relationship exists between the individual Respondents and any of the Applicants in the circumstances of this case.

120 The Applicants allege, in particular, that the four common directors breached their obligation to act in good faith towards, and in the best interests of, CGTX under subsection 121(1) of the *CBCA*. They allege further that the directors' decision to release the confidential information to potential bidders was based upon considerations extraneous to the best interests of CGTX, namely considerations of what was in the best interests of *Hawker Siddeley*. This, they submit, was in contravention of the directors obligations towards CGTX: see *Deluce Holdings Inc. v. Air Canada* (1992), 98 D.L.R. (4th) 509, 12 O.R. (3d) 131 (Gen. Div. [Commercial List]); and *Scottish Co-operative Wholesale Society Ltd. v. Meyer*, [1959] A.C. 324 (Scotland H.L.), at p. 367.

121 The evidence does not support these allegations.

122 To my mind, the disclosure of a certain amount of sensitive and confidential information to potential bidders is an inevitable, and indeed necessary, concomitant to the type of process established by Hawker Siddeley to find purchasers either for itself as a whole or for its business parts. GATX does not quarrel with Hawker Siddeley's right to seek purchasers or even purchasers who will pay a high price. Moreover, it participated in the bidding exercise itself — and in the process requested the disclosure of a good deal of information which it must have known would be distributed to others. Having done so, and having conceded that the bidding exercise was not *per se* a breach of the Shareholders' Agreement, GATX has no legitimate complaint about the disclosure of confidential information point, in my view.

123 I will elaborate on this conclusion a little further.

124 In doing so, I make the following preliminary observations in passing. Mr. Menzie's initial affidavit filed in support of the Application and the original motion for injunctive relief, it seems to me, was not as forthright as it might have been in revealing the nature and extent of GATX's participation in the bidding process, and, in particular, in revealing the extraordinarily broad scope of the confidential information which GATX, itself, sought to have made available, knowing — I conclude — that the information would be made accessible to other bidders in the course, at least, of the data room exposure.

125 For instance, the Court was not advised that on October 5, 1995, GATX, through its financial advisor, had written to Gordon Capital attaching GATX's "information request lists for CGTX, Orenda, and Consolidated Sawmill "*to assist [Gordon Capital] in preparation of the data rooms*." This Information Request List called for the provision of the very kind of confidential information that GATX now complains of being provided to Procor and others. In fact, it calls for the disclosure of more information than CGTX and Hawker Siddeley ultimately agreed to place in the data room and, the evidence suggests, more information than has ever been disclosed to Procor. It asked, amongst other things, for a detailed catalogue of information under the following headings:

• Current railcar fleet profile, including car number, DOT class, car description, date built, net book value and tax basis, plus a list of leased and idle cars

• Rental rates, including car numbers, leases, lease rates, renewal options, and original and remaining terms of lease contracts

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> • Customer profile *for each customer* showing number of rail cars currently leased, annual revenues and annual repair costs by car type
>
> • Capital Expenditures
>
> • Taxes
>
> • Financial Information, including valuations of CGTX and credit agreements for all lines of bank credit

126 On October 6, 1995, GATX's solicitors sent Gordon Capital their "preliminary due diligence lists" seeking: "all sales, lease and service agreements between the Company and any of its Subsidiaries and their respective largest 10 customers (measured on the basis of annual sales)". Later, in preparation for a meeting in late November, GATX prepared a list of additional information requests in the form of an agenda requesting, *inter alia*, that at the meeting Hawker Siddeley and CGTX management:

> 37. Describe CGTX's competitive position in each of the tank and freight/hopper markets including its market share and competitive advantages and disadvantages.
>
> 43. Describe how CGTX prices new railcar leases, specifically, the methodology and target rates for new railcar leases.
>
> 44. Describe how CGTX sets prices for renewing lease rates.

127 Neither the October 6th "preliminary due diligence lists' nor the meeting agenda were included in the GATX materials originally placed before the Court.

128 Not all of the information requested was provided to GATX by Hawker Siddeley and CGTX (and their directors), and even less was placed in the data room. GATX seems to justify its request for this broad sweep of confidential information on the basis that it is a shareholder of CGTX and on the basis of the professed "joint venture" or "partnership" relationship between GATX and Hawker Siddeley as shareholders of CGTX. It asserts that Hawker Siddeley and the directors — particularly the common directors — did not seek the permission of GATX to disclose confidential information to potential bidders and that they did so at their peril, being fully advised throughout the process that while GATX was participating it was "reserving its rights" under the Shareholders' Agreement.

129 It is true that GATX made it clear to Hawker Siddeley and to Gordon Capital that it was reserving any rights that it had by virtue of its relationship with Hawker Siddeley in respect of CGTX or of its legitimate expectations arising out of that relationship. At no time, however, did it ever specify that it was complaining or reserving its rights with respect to the disclosure of confidential information. I am satisfied that any reasonable person would interpret GATX's conduct in this regard as reserving its position in relation to the Right of First Refusal — which is what was uppermost in its mind — and not as taking issue with the disclosure of information process. It is obvious that some sort of detailed and sensitive information would have to be made available to potential bidders if any positive response to the process initiated by Gordon Capital was to be expected. I conclude from the language of the October 5, 1995 letter from GATX's financial advisors to Gordon Capital enclosing the detailed Information Request Lists for assistance "in preparation fo the data rooms" that GATX knew such information would be made available to others. Mr. Menzies' evidence that he somehow thought that competitors of GATX would not likely be taking part in the process does not make any commercial sense to me. Moreover, it is somewhat inconsistent with his views on the historical relationship between the parties and its basis around the competitive nature of the industry.

130 Having participated as it did in the information disclosure process, GATX cannot now complain about it, in my opinion. It cannot request that confidential information be made available to bidders attending the data rooms and then complain about delivery of that very same confidential information — in fact of a less extensive nature than what was requested by itself — when it turns out that a competitor has entered the fray (and, incidentally, made a higher bid).

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GATX's conduct in this regard is tantamount to consent or to a waiver of any right to complain about the release of the information in question.

131 The Applicants concede, in paragraph 114 of their factum, that the consent of GATX is effective to permit Hawker Siddeley and the CGTX directors to give out confidential information pertaining to the operations and finances of CGTX.

132 Much emphasis is placed by GATX in these proceedings, as I have mentioned, on what it refers to as "the historical relationship" between GATX and Hawker Siddeley in connection with the operations of CGTX. By that phrase, it seems, GATX is referring to what it views as the joint venture or partnership nature of the shareholders' relationship in the Company and as well to the fact that CGTX has been viewed as GATX's representation in Canada, since GATX did not lease to Canadian companies directly. In this latter connection, the Shareholders' Agreement is said to protect GATX from the prospect of having to live with a competitor as co-shareholder. This "historical relationship", it is suggested then, enhances the perfidious nature of the alleged breaches and, apparently, entitles GATX to confidential information about CGTX from which others are barred, and generally to a more advantageous position than others in the quest for Hawker Siddeley's interest in the Company.

133 I do not agree.

134 The parties to this litigation are all head-to-head competitors, directly or indirectly, in the North American railcar leasing market. Each has its own separate corporate objectives and strategies which it is seeking to achieve in relation to the Hawker Siddeley interest in CGTX. I see nothing in the relationship between GATX and Hawker Siddeley as shareholders in CGTX — provided that each party acts within the parameters established by the Shareholders' Agreement and the Right of First Refusal it contains — to mute that overall competitive dynamic. In my view, the historical relationship between GATX and Hawker Siddeley regarding CGTX, such as it may be, is not of much significance, one way or the other, to the issues on this Application. The relationship is governed by contract.

135 To the extent that equitable or discretionary principles may apply, I am satisfied that GATX has been as aggressive and hard-nosed in pursuing its own competitive self-interest as anyone. While no criticism can be directed at GATX for attempting to advance its own corporate objectives and strategies, its conduct in this regard — particularly the threat to compete directly in the Canadian market and the not-too-veiled suggestion that CGTX would be quite vulnerable in the process, with the attendant impact of that prospect on Hawker Siddeley's interest — considerably weaken the arguments advanced by GATX based upon some sort of "historical relationship" and "joint venture/partnership" relationship between it and Hawker Siddeley, it seems to me.

136 At the same time, none of this gives Hawker Siddeley a licence to breach its contractual obligations to GATX under the Right of First Refusal. Nor does it give Hawker Siddeley the right to engage in conduct which is "oppressive" to the interests of GATX as a shareholder of CGTX.

137 Let me move, then, to a consideration of the oppression remedy in the context of this case.

D. Oppression

138 The same facts and circumstances which support a finding of breach of contract and breach of good faith in relation to the Right of First Refusal also support a finding of "oppression", as that term is broadly used in section 241 of the *CBCA*. It is unnecessary to reiterate those facts and circumstances here.

139 Subsection 241(2) provides as follows:

> If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> > (a) any act or omission of the corporation or any of its affiliates effects a result,

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(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

140 Hawker Siddeley is an "affiliate" of CGTX, which is the "corporation" in this context. As a shareholder, GATX is a "security holder" of the corporation.

141 In approaching an analysis of the application of subsection 241(2), I make this initial observation: whatever the answers to the questions raised by subparagraphs (a), (b) and (c), they must be examined in the context of the threshold requirement found at the outset of the subsection, namely, that the impugned conduct must be "in respect of" the corporation (or an affiliate of the corporation). There can be no remedy under section 241 of the *CBCA* unless this is the case.

142 Hawker Siddeley submits that the scheme put forward in the Procor Agreement does not involve the affairs of CGTX or its corporate governance, but rather the transfer of Hawker Siddeley's CGTX shares, and, thus, that the provisions of the oppression remedy section are simply not engaged by the transaction in question. I do not accept this argument.

143 In a very narrow and technical sense it may be argued that the battle over the majority position in CGTX does not relate to the corporation itself but merely to the shares in that corporation. The Court ought not to adopt such a narrow and technical approach to the interpretation of the oppression remedy, in my view, however. The phrase "in respect of" is quite broad, and I am satisfied that a fight which will determine the control of a corporation is a fight "in respect of" that corporation. In the same way, conduct which is designed to infringe upon the prerogative of an existing shareholder to have first right of refusal at that control position is "oppressive" — in the broad sense of that word — of the shareholder "in respect of" the corporation.

144 I am fortified in this view by the concept of the "affairs" of a corporation as prescribed in the *CBCA* itself. Subsection 2(1), defines a corporation's "affairs in this fashion:

"affairs" means the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate.

145 In other words, the relationship between the shareholders of a corporation constitutes a part of the "affairs" of that corporation, as do the relationships among the corporation itself and its affiliates and its shareholders, officers and directors. Matters impinging upon those relationships must accordingly be matters "in respect of" the corporation, in my opinion.

146 The following questions emerge, then, for consideration in this case:

1) Have there been acts or omissions by Hawker Siddeley, the affiliate of CGTX, which are oppressive or unfairly prejudicial to or that unfairly disregard the interests of GATX as shareholder of CGTX?

2) Have the "affairs" of CGTX been carried on or conducted in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of GATX as a shareholder of CGTX?

3) Have the powers of the directors of Hawker Siddeley and CGTX been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of GATX as shareholder of CGTX?

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147 The answer to all three questions is "Yes". Hawker Siddeley's conduct, described in detail earlier in these Reasons, in breaching the Right of First Refusal and in breaching its good faith contractual obligations in that respect are "acts or omissions" which, in my view, effect a result that is "unfairly prejudicial to or that unfairly disregards" the interests of GATX as a shareholder of CGTX. GATX's Right of First Refusal is tightly interwoven into the fabric of its relationship to Hawker Siddeley and to CGTX as a shareholder of CGTX, and it had a reasonable and legitimate expectation that its Right of First Refusal would be respected. In the same way the "affairs" of CGTX have been conducted in a manner which has led to the same results.

148 Reasonable and legitimate shareholders' expectations go to the heart of the oppression remedy: see *820099 Ontario Inc. v. Harold E. Ballard Ltd.* (1991), 3 B.L.R. (2d) 113 at 123 (Ont. Gen. Div.), at pp. 185-187, affirmed (1991), 3 B.L.R. (2d) 113 (Ont. Div. Ct.); *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.), at p. 490; B. Welling, *Corporate Law in Canada: The Governing Principles*, 2d ed. (Toronto: Butterworths, 1991), at pp. 563-564, cited with approval in *Ballard, supra*. Mr. Bailie, the then V.P.-Finance and Treasurer of Hawker Siddeley, heralded the importance of the parties' expectations regarding the Right of First Refusal in a memorandum which shortly pre-dated the execution of the Shareholders' Agreement (February 23, 1967). He said:

> We have enjoyed an excellent relationship with G.A.T.X. and the partnership has been profitable for both parties. We could adopt the attitude that as holders of the controlling interest in C.G.T.X. that we have less interest in such an agreement than G.A.T.X. On the other hand, we believe that we have nothing to lose by entering into the proposed agreement and we do obtain the same rights as G.A.T.X. in the event they offer their shareholdings for sale — also we retain their continuing goodwill which is important.

149 Mr. Mackenzie — the then President of CGTX — expressed a similar sentiment in a July 4, 1966 letter, stating:

> I cannot visualize either one of the shareholders failing to exercise an option to purchase 100% of the other's stock as provided for in [the Shareholders' Agreement].

150 The dispute here is not, strictly speaking, a dispute as between *minority* and *majority* shareholders, in those capacities. The same analysis would apply had it been GATX, instead of Hawker Siddeley, which had entered into an agreement of the same nature as the Procor Agreement in similar circumstances. The availability of the oppression remedy is not limited to circumstances in which a minority is being "oppressed" by the majority, however: see Welling, *supra*, at p. 522 and the cases cited at footnote 205. It is fair to say, though, that the ability to protect against an unwanted majority shareholder is probably more significant than the prospect of protecting against a worrisome shareholder in the minority position, as Mr. Bailie's remarks cited above seem to reflect.

151 The same analysis can be made with respect to the exercise of the powers of the individual Respondents as directors of Hawker Siddeley. While I do not find them responsible in their personal capacities for Hawker Siddeley's breach of contract and breach of contractual good faith, a lack of good faith or *bona fides* is not essential to a finding of "oppression": *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (C.A.), at p. 305. In approving and authorizing the Procor Agreement, the powers of the Hawker Siddeley directors were exercised in a manner that was unfairly prejudicial to or that unfairly disregarded the interests of GATX as a shareholder of CGTX. In the circumstances of this case, in my opinion, such conduct does not attract personal liability on the part of the directors. Nonetheless, it is conduct which is caught by the provisions of subsection 241(2)(c) of the *CBCA*.

152 I do not hold that the conduct which is here impugned constitutes "oppression" in the classic sense of conduct which is "lacking in probity" or "burdensome, harsh and wrongful"; rather it is conduct which falls into the remaining two categories of subsection 241(2) as being unfairly prejudicial to the complainant or which unfairly disregards the complainant's interests as a shareholder. The authorities support the distinction, and indicate that the latter sort of conduct constitutes grounds which are "less rigorous" than classic "oppression": see *Mason v. Intercity Properties Ltd.*

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(1987), 38 D.L.R. (4th) 681 at pp. 684-685, 59 O.R. (2d) 631 (Ont. C.A.); *Re Jermyn Street Turkish Baths Ltd.*, [1971] 3 All E.R. 184 (C.A.).

III. Remedy

153 My examination of the facts and the law, to this point, have led me to conclude:

a) that the Right of First Refusal contained in the Shareholders' Agreement has been triggered in favour of GATX;

b) that Hawker Siddeley has breached the Right of First Refusal and failed to comply with its good faith contractual obligations in relation to that Right;

c) that the allegations of breach of confidentiality and breach of fiduciary obligation against Hawker Siddeley and the individual Respondents have not been made out; but that, nonetheless,

d) the conduct of Hawker Siddeley and the directors in relation to the Right of First Refusal constitutes "oppression", as that term is broadly used, and as provided in section 241 of the CBCA.

154 What, then, is the remedy available to GATX in the circumstances?

155 As the Right of First Refusal has been activated by the circumstances which have transpired, the ordinary remedies in such a situation would be an order for specific performance and/or damages: see, for example, *Landymore v. Hardy, supra*, and *Downtown King West Development Corp. supra*. Damages, however, are inadequate to redress the wrong in these circumstances, in my view. Although GATX has asked for a reference as to damages suffered as a result of the "oppression" it has asserted, what it seeks in the main is an order enforcing the exercise of its Right of First Refusal. It is the contractual entitlement to exercise that Right, the wrongful attempt by Hawker Siddeley and Procor to circumvent it, and the "oppressive" nature of the conduct in relation to those events, which form the basis for the granting of a remedy in favour of the Applicants. It seems to me that the most suitable remedy is one which rectifies the wrong and the "oppression", and which gives effect to the contractual entitlement. That remedy is a decree of specific performance.

156 The question then becomes: but specific performance of what? Is it specific performance of the transaction contemplated in the Procor Agreement, in so far as it relates to the acquisition of the Hawker Siddeley interest in CGTX — that is to say, the right to make an offer by way of take-over circular to all of the shareholders of Hawker Holdings (who also just happen to be the Hawker Siddeley shareholders)? Or, is GATX entitled to specific performance of what the transaction is in substance and which thus attracts the Right of First Refusal in the first place — that is, specific performance of an offer to purchase the Hawker Siddeley interest in CGTX at a price of $120 million less adjustments for the Beacon business factor and the Procor break-up fee?

157 The latter is what GATX seeks; and, it seeks it without the requirement of shareholder approval.

158 Entirely apart from the issue of subsection 189(3) of the *CBCA* — which I have earlier held to be inapplicable in the circumstances — it can be argued at another level that shareholder approval should not be necessary in the context of an award of specific performance. The Procor Agreement calls for shareholder approval on the part of Hawker Siddeley in terms of the proposed arrangement, and on the part of Procor in terms of the proposed take-over bid for the Hawker Holdings shares. These approvals are necessitated, however, by the very structuring of the deal in a fashion designed to frustrate the Right of First Refusal. Hawker Siddeley has relative assurance that the shareholders will approve the proposed arrangement, because it will be in their interests to create a take-over bid environment in which they (in their capacity as Hawker Holding shareholders) are the beneficiaries. Procor, on the other hand, is content to let the proposed transaction be put to the shareholders because it will end up accomplishing its objectives whether they accept or not; either it will capture majority control of CGTX — its chief competitor — or it will pocket its $5 million break-up fee and force GATX to pay more (or risk the prospect of living with Procor as a majority shareholder).

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159 A remedy of specific performance in the circumstances of this case is fed both by general equitable principles and by the Court's very broad discretion under the oppression remedy provisions of the *CBCA*. Within that framework, given the breach of the Shareholders' Agreement and the acts of oppression that I have found, why should Hawker Siddeley and Procor be able to benefit from the advantages of compelling shareholder approval, as described above? In my view, they should not. It is the very creation of this structure calling for the arrangement, the take-over bid, and the whip of shareholder involvement which lie at the heart of the breach of contract and the oppression.

160 I hold that the remedy to which the Applicants are entitled is a decree of specific performance in the sense that GATX is entitled to purchase Hawker Siddeley's 55% interest in CGTX for that portion of the $120 million Procor price which is attributable to that interest. That price I find to be $120 million less,

a) an amount attributable to the value which Hawker Siddeley and Procor placed upon the 1/3 interest in the Beacon Eye business; and less,

b) a further $5 million to reflect the "break-up price" which Hawker Siddeley is prepared to pay Procor if another "competing offer" is accepted.

161 By agreeing to pay a break-up fee in that amount, the Hawker Siddeley Board of Directors has indicated that the Company is prepared to accept, at least, a net price of $120 million less the break-up fee. GATX is entitled under the Right of First Refusal to purchase at the price which Hawker Siddeley "proposes to accept". That price would not be $120 million, if the Right of First Refusal were exercised, as both Hawker Siddeley and Procor recognized; it would be no more than $115 million.

162 Mr. Heintzman argued that GATX should be permitted to purchase at "the fair market value portion" of the Procor price attributable to the CGTX interest. I do not accept this submission. Hawker Siddeley did not agree to accept a price based upon a "fair market valuation" of the CGTX interest. It agreed to accept $120 million, less $5 million, less *the value which Hawker Siddeley and Procor placed upon* a 1/3 interest in the Beacon Eye business which Procor was to acquire by additional arrangement, whatever that may be.

163 There is not sufficient evidence presently before the Court to enable a finding to be made as to what that Beacon Eye value is. Counsel for Hawker Siddeley and Procor suggested that the consideration for the 1/3 interest in this business was "nominal" only. Hawker Siddeley's factum states (paragraph 81):

> The best available assessment regarding the maximum value of the entire Beacon business was that it did not exceed the total cash previously injected into it by way of loans (totalling approximately $17 million) from Hawker Siddeley, which remain outstanding to Hawker Siddeley.

164 Mr. Lester testified that Marmon and Procor did not ascribe any value to the option to acquire the Beacon Eye interest when entering into the Procor Agreement. He said that $120 million is the price that they are prepared to pay for Hawker Holdings — i.e. for the Hawker Siddeley interest in CGTX, which is to be the only asset of Hawker Holdings.

165 While it may be true that Hawker Siddeley and Marmon/Procor attributed little, if any, value to the Beacon Eye aspect of the proposed transaction, Marmon/Procor continued to express at least some interest in that business throughout the negotiations, and a Gordon Capital memorandum of December 17, 1995, allocates an estimated $12 million to the shareholder value of Beacon Eye. Other notes in the materials suggest a range of $8 million to $12 million.

166 Thus, I am not able to attribute a value to the Beacon Eye factor in the Procor purchase price, and there will have to be a reference to determine, as a matter of fact, what value the parties to the Procor Agreement gave it for that purpose, if that element of the price is to be pursued. At best, it would appear that the value of a 1/3 interest in the Beacon Eye business would be in a range of not more than $4 million, although I do not mean to place that value — or any value — on

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it by making such an observation. It may be, in the end, that the parties — GATX in particular — knowing the business realities of the situation far better than the Court can know them, decide that such a reference need not be pursued.

167 I think, however, that GATX is entitled to purchase the Hawker Siddeley immediately. Having regard to the foregoing caveat concerning the "business realities" of the Beacon Eye aspect of the Procor Agreement, I propose to give it the option of doing so upon the payment of $115 million on closing and either posting security pending a reference or waiving the reference and closing with finality.

E. Conclusion

168 For all of the foregoing reasons, the Applicants are entitled to the following relief, which is hereby ordered:

1) a declaration that Hawker Siddeley Canada Inc. is not entitled to dispose of its shares in CGTX pursuant to the Procor Agreement without the consent of the Applicants or without complying with the Right of First Refusal contained in the 1967 Shareholders' Agreement;

2) a declaration that the Right of First Refusal contained in the 1967 Shareholders' Agreement has been activated by reason of the Procor Agreement itself and the "oppressive" conduct of the Respondents in relation to it;

3) a declaration that conduct of Hawker Siddeley and the personal Respondents in respect of Hawker Siddeley's proposed disposition of its 55% shareholding in CGTX pursuant to the Procor Agreement is "oppressive" of the interests of the Applicants in CGTX, in the sense that it is unfairly prejudicial to and unfairly disregards those interests, contrary to section 241 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44;

4) an order that by virtue of the Right of First Refusal contained in the 1967 Shareholders' Agreement, and of the oppressive conduct of Hawker Siddeley and the individual Respondents, the Applicants GATX and 3140172 Canada Inc. may purchase Hawker Siddeley's 55% interest in CGTX for the price of $115 million less an amount reflecting the value attributed by the parties to the Procor Agreement to the 1/3 interest in the Beacon Eye business, which amount is to be determined upon a reference for that purpose, subject to the following:

(a) GATX and 3140172 Canada Inc. may purchase the Hawker Siddeley interest in CGTX immediately upon payment of the sum of $115 million, if they are prepared to waive the determination of the Beacon Eye value and forego any such reduction; or,

(b) GATX and 3140172 Canada Inc. may purchase the Hawker Siddeley interest in CGTX immediately upon payment of the sum of $115 million upon the closing of the transaction and the posting of security in the amount of $4 million, in a form satisfactory to Hawker Siddeley or to the Court, pending the determination by reference of an amount to be deducted from the $115 million purchase price to reflect the Beacon Eye portion of the Procor price.;

5) specific performance of the right to purchase pursuant to the Right of First Refusal, in accordance with the foregoing, and an order directing the delivery of the Hawker Siddeley shares in CGTX to GATX and 3140172 Canada Inc.

169 I make no order with respect to damages.

170 The Applicants are entitled to their costs of the Application on a party and party basis against Hawker Siddeley, Procor and Marmon, but not against the individual Respondents. While I have found the individual Respondents to have engaged in conduct which is "oppressive" under s. 241 of the *CBCA*, because of the particular language of the oppression remedy provision, I do not think they acted outside of their "corporate character" and a cost order against them personally is not warranted, in my opinion. Nor is a cost order in their favour. I will fix the costs, and may be spoken to in that regard, if counsel are unable to agree upon them.

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171 In conclusion, I wish to thank all counsel for their well-presented arguments on behalf of their respective clients.

Order accordingly.

Footnotes

1 GATX holds its interest in CGTX through its wholly owned subsidiary, the Applicant 3140172 Canada Inc. When reference is made throughout these Reasons to the "GATX" right of first refusal, it is recognized that, technically, it is the numbered company's right.

2 GATX is a wholly owned subsidiary of the Applicant, GATX Corporation, which is a Chicago-based publicly-traded holding company incorporated under the laws of the State of New York.

3 Procor is a Canadian affiliate of the Respondent Marmon Holdings Inc. Marmon is a U.S. private corporation which engages in the U.S. railcar leasing market through its U.S. affiliate, Union Tank Car Company. Procor is a subsidiary of Union Tank Car Company. Union Tank Car and the Applicant GATX Corp., through GATX, are major competitors in the U.S. railcar leasing market.

4 GATC is the Applicant, GATX Corporation, the parent corporation of GATX.

5 It was originally enacted as subsection 183(2).

6 Subsections 189(4) through 189(8) stipulate the procedure to be followed in obtaining shareholder approval, including the necessity for a special resolution i.e. a 2/3 vote.

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TAB 4

1995 CarswellOnt 3240
Ontario Court of Appeal

West End Development Corp. v. Alyce Holdings Ltd.

1995 CarswellOnt 3240, 59 A.C.W.S. (3d) 546

West End Development Corporation, Applicant/Respondent and Alyce Holdings Limited, Respondent/Appellant

Carthy J.A., Goodman J.A., McKinlay J.A.

Heard: December 4, 1995
Heard: December 5, 1995
Judgment: December 7, 1995
Docket: CA C23179

Counsel: *Barbara J. Murchie* and *Allan Sternberg*, for Appellant.
William J. Burden and *John R. Sandrelli*, for Respondent.

Subject: Insolvency; Contracts; Property
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.d Effect of arrangement
XIX.3.d.i General principles
Real property
III Sale of land
III.5 Option contracts
III.5.b Exercise of option
III.5.b.i Right of first refusal
Headnote
Sale of land --- Option contracts — Exercise of option — Right of first refusal

Per Curiam:

Endorsement

1 The appellant, Alyce Holdings Limited ("Alyce"), appeals, with leave, the order of Farley J., dated November 15, 1995, which approved a sale to MacDonald Development Corporation ("MacDonald") of the Diplomat, a rental apartment complex owned and operated under a co-tenancy agreement by the respondent, West End Development Corporation ("West End") and Alyce. The order also empowered West End to execute the agreement of purchase and sale and all necessary closing documents on behalf of itself and Alyce.

2 Alyce argues that it has a right of first refusal under the co-tenancy agreement which it exercised prior to the hearing before Farley J., and that, consequently, the motions judge should have approved a sale to it rather than to MacDonald.

3 West End was, at the time of the approval, subject to an order of Houlden J.A., dated July 12, 1995, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "Act"), placing it under the supervision of the court and of a Monitor appointed by the court. There was an argument by Alyce that Farley J. did not have jurisdiction

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under that Act to make an order which affected Alyce's property rights in the Diplomat. The application for approval of the sale was nominally brought pursuant to the Act, because leave was necessary, under Houlden J.A.'s order, to deal with property of West End. However, the nature of the relief sought was that provided for under Rule 14.05 of the *Rules of Civil Procedure*.

4 There are no material facts in dispute, and neither party requested cross examination on the affidavits filed by the other. West End was seeking approval of the sale to MacDonald; and Alyce, in an affidavit of Mr. Hassard, described as its "operating mind", requested approval of a sale to it. We see no true jurisdictional issue here.

5 The issue of exercise of the right of first refusal contained in s.18 of the co-tenancy agreement was argued before Farley J. Before us, Alyce pointed out that it had not intended to exercise that right with respect to the first offer from MacDonald; however, when that offer was revised to remove undertakings which Alyce refused to give and was reduced in price by some $450,000, Alyce seriously considered the possibility of meeting the new offer. Nonetheless, it did not present an offer of any kind within the time required by s.18 of the co-tenancy agreement. It further argued that an error in description of the land included in the MacDonald offer, and the subsequent rectification of that description entitled it to a further ten-day period in which to match the MacDonald offer. Farley J. did not accept that argument, considering it purely technical, since Alyce's consideration of its position was in no way based on that error.

6 We are of the view that there was ample evidence before Farley J. on which he could determine, which he obviously did, that Alyce did not exercise its right of first refusal within the terms of the agreement.

7 However, we feel that Farley J. went further than was justified on the evidence before him in attempting to resolve monetary issues and issues of priority as among West End, Alyce, and creditors of West End. In ordering payment out to West End of its fifty percent interest in the net proceeds of sale and of its interest in the vendor take-back mortgage (even though we were informed that all these monies would go to secured creditors of West End) Farley J. did not appropriately determine whether Alyce had any right to part of West End's portion of the proceeds, either as against West End or in priority to any of West End's creditors. There was insufficient evidence and insufficient opportunity to argue these contentious matters in the summary proceedings before him.

8 The co-tenancy agreement provides for the rights of Alyce and West End. If either party fails to fulfil its obligations under the agreement, the rights of the other party should be enforced in proceedings which put them clearly in issue. In the meantime, the order of Farley J. should be limited to approval of the sale to MacDonald, the execution of the necessary documentation to carry out the transfer of the property, and payment of a mortgage, under which approximately $365,000 is owing, in favour of the Canadian Imperial Bank of Commerce out of West End's portion of the proceeds. There was sufficient evidence of the existence of that mortgage and to justify its payment *out of West End's* portion of the proceeds in priority to any rights of Alyce against West End. In agreeing that payment of that mortgage should be made, we do not decide the possibility that Alyce may also be responsible for the satisfaction of fifty percent of that mortgage. We make no determination of that issue at this time.

9 The appeal is allowed in part. Paragraphs 1, 2, 3 of the order of Farley J. are affirmed. There will be an order that the above-mentioned mortgage in favour of the Canadian Imperial Bank of Commerce is to be paid out of the interest of West End in the proceeds. The balance of the net proceeds, including the vendor take-back mortgage, are to be held in escrow as the parties may agree, or the court direct, pending the determination of the entitlement thereto as between West End and Alyce, and any necessary priority issues involving creditors of West End.

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TAB 5

2013 ABQB 729
Alberta Court of Queen's Bench

Alignvest Private Debt Ltd. v. Surefire Industries Ltd.

2013 CarswellAlta 2515, 2013 ABQB 729, [2014] A.W.L.D. 161, 237 A.C.W.S. (3d) 23

Alignvest Private Debt Ltd., Applicant and Surefire Industries Ltd., Respondent

C.A. Kent J.

Heard: December 4, 2013; December 5, 2013
Judgment: December 9, 2013
Docket: Calgary 1301-11285

Counsel: Sean Collins, for Applicant
Tom Cumming, Cliff Prophet, for Receiver
Trevor Batty, for Trican Well Servicing Ltd.
Edward Halt, Q.C., for Precision Well Servicing
Andrew Maciag, Locklynn Price, for Surefire Industries USA, LLC
Aaron Stephenson, for OGES

Subject: Insolvency; Contracts; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Table of Authorities
Statutes considered:
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

***C.A. Kent J.*:**

1 On August 30, 2013, Surefire Industries Ltd. (Surefire) was granted protection pursuant to the Companies' Creditors Arrangement Act. Those proceedings were terminated on September 25, 2013, and the Monitor under the CCAA proceedings was appointed Receiver and Manager of Surefire's assets. Surefire's principal secured debtor is Alignvest Private Debt Ltd. (Alignvest). Alignvest is owed approximately $13 million.

2 The business of Surefire was to manufacture large pieces of equipment to be used in the oil and gas industry. Most of the pieces of equipment were unique to the customers (the customers) that requested the manufacture of the piece. At the time of Surefire's insolvency, there were several pieces of equipment on Surefire' premises in various states of completion. There is a dispute about the title to those pieces of equipment. That dispute will be decided by this court. In the meantime, the Receiver is in the process of liquidating other assets of Surefire.

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3 The assets include 50% of the units in Surefire USA through Surefire Holdings Inc. Both Surefire USA and Surefire Holdings Inc. are Texas companies and neither are subject to receivership proceedings. Surefire USA is a private company. Unitholders in the company are Surefire Holdings Inc., Stewart & Sons Holdings, Inc. and C. Jim Stewart IV. The rights of the unit holders are contained in a unitholders agreement. The company is managed by a Board of Directors which consists of two representatives of Surefire Holdings Inc., and a representative of each of Stewart & Sons Holdings and Mr. Stewart. The unitholders' agreement also sets out rights in respect to the transfer of shares, including a right of first refusal, and in respect of the admission of new members of Surefire USA.

4 On November 21, 2013, the Receiver brought an application to approve a Protocol Agreement which it had negotiated with Surefire USA, the purpose of which was to address the marketing of Surefire's interests in Surefire USA. When the agreement was put before me on November 21, one of the provisions was that Mr. Sam Fleiser would be appointed to the Board of Surefire USA. Mr. Fleiser is an officer and director of Alignvest. The agreement also provides for the Receiver to nominate one other person to the Board. The Receiver also provided to me on a confidential basis a list of proposed bidders for the Surefire units. That list was not provided to the customers.

5 On November 21, counsel for some of Surefire's customers, notably Trican Well Service Ltd. and Precision Well Servicing, objected to the appointment of Mr. Fleiser. They had not seen the list of proposed bidders and were concerned that Alignvest may be on the list. If that was the case, they argued, Mr. Fleiser would be in a conflict between his duties to Alignvest and his duties to Surefire USA. The objections of the customers appeared to have some merit. However, the application had been brought on short notice so that no one could provide me with sufficient authority to give me comfort either to approve the agreement in its entirety or reject it. I approved the agreement subject to a proviso that Mr. Fleiser was to maintain the confidentiality of any confidential information provided to him as a director of Surefire USA. I invited counsel for the customers to provide me with a letter outlining their concerns about Mr. Fleiser's nomination to the board. On November 29, counsel for Trican did provide such a letter.

6 Whether I would have approved the agreement without the proviso I originally put into place or at all is hypothetical. I can say that I continued to have some discomfort with the agreement. However, the landscape changed significantly.

7 The Receiver renewed its application to approve the agreement. There were two additional factors. The first was an undertaking which Alignvest gave to the Receiver that it would not bid on the Surefire USA units without court order and only if the sales process did not yield a suitable offer or an accepted offer failed to close. The second was more information about the unitholders' agreement, specifically the ROFR contained in that agreement. Those two factors give me the comfort that I need to approve the agreement. The customers continue to have reservations about Mr. Fleiser's appointment. I understand those concerns, but in my view, the fact that Alignvest will not be a bidder in the first instance and there is a ROFR that could be exercised by other unit holders balance off those concerns. This is coupled with the fact that any proposed sale will need to be approved by this court. Accordingly, the draft order is approved subject to paragraph 10 of that draft including a reference to Alignvest's undertaking and subject to Alignvest providing that undertaking to the Court.

8 I wanted to provide these reasons in writing for several reasons. First, there is no question that Mr. Fleiser is a qualified person to put on the board. It is the potential for conflict because of his two positions that raised concerns. Second, I wanted to ensure that everyone clearly understand that the customers' initial objections were not without merit. Finally, from the commencement of the receivership in September, the customers have been suspicious about the neutrality of the Receiver. Some of them apprehend bias based upon a number of facts that I will not go into. If I had determined that the Receiver was not acting in the best interests of the estate, I would have dealt with that issue. As the sales process unfolds, the customers have asked for more transparency. To the extent that the Receiver can provide information, I would like that to happen.

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TAB 6

Rescue!

The Companies' Creditors Arrangement Act

Janis P. Sarra, B.A., M.A., LL.B., LL.M., S.J.D.

University of British Columbia Faculty of Law and
Peter Wall Institute for Advanced Studies

Second edition

2013

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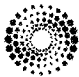

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with securities trading in the US. Rules promulgated under *Sarbanes-Oxley* forbid certain activities by an auditor, such as "appraisal or valuation services, fairness opinions, or contribution-in-kind reports" or "management functions or human resources".[94] Other examples are rules of ethics prohibiting the auditor from managing assets of its client;[95] or rules of ethics forbidding the disclosure of confidential information concerning the audit client.[96] These examples represent functions that a monitor could conceivably be required to fulfill.

The issue of confidentiality is thorny, as the monitor, as an officer of the court, could have an obligation to disclose information it knows, while the monitor has a concurrent obligation to keep information confidential. Breton suggests that in view of the fact that situations change in the course of the restructuring proceedings, the auditor could face problems arising from its position as auditor, and not from its position as monitor, if it assumes the role of monitor in a *CCAA* proceeding.[97]

12. Officer of the Court

Canadian courts have held that the monitor is an officer of the court and has an obligation to act independently and to consider the interests of the debtor and its creditors.[98] The courts have held that the duty of the monitor is to act in the interests of all stakeholders with an interest in the debtor company.[99] This broader notion of the monitor's duties recognizes that multiple stakeholders are interested in the proceedings. The Ontario Superior Court of Justice in *Royal Oak Mines* held that the monitor's role is to be neutral and to act in the best interests of all concerned.[100] In *Re PSINet Ltd.*, Mr. Justice Farley of the Ontario Superior Court held that there was no jurisprudence to support an argument that a monitor represents the interests of creditors in the same way as a trustee in bankruptcy,

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[94] *Sarbanes-Oxley Act of 2002*, Title II, s. 201.

[95] Rule 204 of the Harmonized Rules of Professional Conduct adopted on 13 April 2010 by the Public Trust Committee of the Canadian Institute of Chartered Accountants.

[96] Code of Ethics of Chartered Professional Accountants of Québec, s. 48. The Code of Ethics can be found at http://www2.publicationsduquebec.gouvqc.ca/dynamicSearch/telecharge.php?type=2&file=/C_48_1/C48_1R6_A.HTM.

[97] Jean-Daniel Breton, "Senate Committee Recommendation no. 35 — A Career Limiting Move?", in J. Sarra, ed., *Annual Review of Insolvency Law, 2004* (Toronto, Carswell, 2005).

[98] *Re Fairview Industries Ltd.* (1991), 11 C.B.R. (3d) 43, (*sub nom.* Re Fairview Industries Ltd. (No. 2)) 109 N.S.R. (2d) 12 (N.S.T.D.) at para. 75; *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B.C.A.) at para. 28, leave to appeal refused (1995), 32 C.B.R. (3d) 179n (S.C.C.); *Re United Used Auto & Truck Parts Ltd.* (1999), 12 C.B.R. (4th) 144 (B.C.S.C. [In Chambers]), affirmed [2000] B.C.J. No. 409, 16 C.B.R. (4th) 141 (B.C.C.A.), leave to appeal allowed [2000] S.C.C.A. No. 142, 2000 CarswellBC 2132, 2000 CarswellBC 2133 (S.C.C.) at para. 20; *Re Hickman Equipment (1985) Ltd.* (2002), 34 C.B.R. (4th) 203, 214 Nfld. & P.E.I.R. 126 (Nfld. T.D.) at para. 33.

[99] *Re Royal Oak Mines Inc.* (1999), 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]) at para. 6.

[100] *Ibid.*

receiver or liquidator, given that the monitor does not act as an asset collector for purposes of distribution to creditors.[101]

The need for the monitor's impartiality goes to the perception of parties, particularly those parties that are not repeat players in the system, regarding the integrity of the insolvency system. As an officer of the court, the monitor's obligation is to review the parties' positions and then give an opinion based on its expertise. The expertise that the monitor brings to the proceeding is financial expertise, not legal expertise. Even where the monitor has retained legal expertise, its role is not to become the advocate of the debtor corporation or any other party. This kind of legal advocacy can lead to failed confidence in the integrity of the system.

The court has held that the monitor is to provide an independent assessment of the debtor's financial status and actions during the proceeding.[102] The court's recognition of impartiality has resulted in a very high level of deference by the court to the monitor's opinion. Where the opinion is contested by multiple stakeholders, the court may exercise slightly less deference, although it is still difficult for stakeholders to succeed where their objections do not align with the monitor's opinion. Even where the court has very serious reservations regarding the opinion of the monitor, it will recognize the monitor's experience, expertise and objectivity, but may caution the monitor about the necessity of remaining impartial, either at the court hearing or in any reasons for judgment issued.[103] However, the deference to the monitor will depend on how independent and objective the monitor is; and the court's assessment of that independence and objectivity may be influenced by past experience with the particular monitor, by the particular subject matter, and by how controversial the opinion offered is.

Hence, the need for the monitor to be accountable to the court and to all stakeholders and to be objective in performance of its obligations is key to the court's continued recognition of, and deference to, the monitor's opinion. It is also critically important to ethical practice that the monitor is fulfilling its fiduciary obligations and reducing the scope of potential conflicts of interest in the proceeding.

The Ontario Superior Court of Justice decision in *Re InterTAN* illustrates the court's expectation that the monitor will act as an impartial officer of the court, seeking direction in the best interests of all the stakeholders.[104] This judgment was discussed

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[101] *Re PSINet Ltd.* (2002), 30 C.B.R. (4th) 226 (Ont. C.A.) at para. 12, affirmed 2002 CarswellOnt 619 (Ont. C.A.), discussed in the context of being a representative of creditors for purposes of the *PPSA*.

[102] *Canadian Imperial Bank of Commerce v. Quintette Coal Ltd.* (1991), 1 C.B.R. (3d) 253, 53 B.C.L.R. (2d) 34 (B.C.S.C.).

[103] See for example, the discussion regarding the CIBC Aerogold Agreement in *Re Air Canada*, 2003 CarswellOnt 1572, [2003] O.J. No. 2267 (Ont. S.C.J.).

[104] *Re InterTAN*, decision of Morawetz J., (23 January 2009) File No. 08-CL-7841 (Ont. S.C.J. [Commercial List]).

in the context of interim financing in chapters 4 and 11, but the court's observations about the role of the monitor are important. Alvarez & Marsal Canada ULC, as monitor in the proceedings, brought a motion for direction on the amounts to be paid to the interim financing lenders, submitting that the circumstances under which the initial and amended orders had been approved had changed, warranting the protection of the debtors and their creditors.[105] The scope of security for a common Canada/US interim financing was broadened in the US proceedings after it had been approved by the Canadian court; the monitor advising that the conditions had been "bartered away" by the US debtors and interim financiers. The Ontario Superior Court of Justice held that it was appropriate for the monitor to bring this type of motion, in fulfillment of its obligations as a court-appointed monitor, particularly in view of the fact that the debtors had no functioning board of directors.[106] Morawetz J. held that to the extent that the interim financiers made advances and relied on an amendment not approved by the *CCAA* court, they did so at their peril.[107] The Court affirmed its broad authority as a court of general jurisdiction to exercise powers necessary to do justice between the parties.[108] The Court held that the monitor would be remiss if it did not bring forth its concerns to the court.[109] The judgment illustrates that while the monitor is not to become an advocate for any one party, where, in its impartial assessment, a situation of unfairness or other concern should be brought to the attention of the court and direction sought, it should do so in its capacity as the court's officer.

How the insolvency officer undertakes the balancing of interests is crucially important, given the high level of deference by the court to its recommendations. Where the monitor understands its role to be one of ensuring that all interests are considered, the process tends to be more successful, transaction costs lower, and there is greater buy-in by all parties, whatever the final outcome of the proceeding. The Court in *Re Laidlaw* explained the dynamic as that the monitor is a court-appointed officer that must "objectively look out for" and be concerned with protection of the "reasonable interests of all stakeholders", including the shareholders.[110] However, where shareholders' interests are so far underwater that they have no reasonable expectation of having a positive economic interest, there is no economic interest to protect.

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[105] *Ibid.* at para. 5.

[106] *Ibid.* at para. 8. The parent company, as sole shareholder, had executed an unanimous shareholder declaration pursuant to the *CBCA* to relieve the board of directors of their duties and assuming those powers itself.

[107] *Ibid.* at para. 57.

[108] *Ibid.* at para. 7, citing *TeleZone Inc. v. Attorney General (Canada)*, 2008 ONCA 892 (Ont. C.A.) and *80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd.*, [1972] 2 O.R. 280 (Ont. C.A.).

[109] *Ibid.* at para. 10.

[110] *Re Laidlaw Inc.*, 2002 CarswellOnt 790, [2002] O.J. No. 947 (Ont. S.C.J. [Commercial List]) at paras. 2-9.

Where such officers consider primarily the interests of secured creditors or accord little value to the interests of unsecured creditors or other stakeholders, they may not have adequately performed their role. The outcome of the proceedings, whether a restructuring or a sale, can suffer because value may not have been maximized or transaction costs may have increased from litigation by those parties that believe their interests were not considered. In *T. Eaton Co.*, the Court reminded the monitor of the necessity of remaining neutral and objective in the *CCAA* proceedings.[111]

There have been some issues regarding the monitor essentially leading evidence through its written or oral reports to the court, both pre-filing and during the proceedings. The company debtor should introduce the evidence and then it can be properly subject to cross-examination. The monitor is then left to be the neutral assessor of the information.

Andrew Kent and Wael Rostom have observed that increasingly, the monitor is taking on the role of "super-monitor", performing a whole new range of functions, including: the monitor frequently advises management on how to adjust to the restructuring process and deal with the various stakeholder groups at the same time that the monitor is monitoring compliance by the debtor with the various restrictions contained in the initial order; the monitor frequently acts as the debtor's financial advisor, particularly in respect of small or mid-sized companies; and the monitor can facilitate constructive negotiations between the debtor and creditors with respect to the terms of the restructuring, particularly where creditors do not have full confidence in existing managers.[112]

The caselaw reflects these further developments, in that the monitor's role, as ordered by the court, is often shaped to meet the exigencies of the particular proceeding. In some cases, where there is a loss of confidence in management, the monitor has effectively replaced the board and senior management and has assumed control of the reorganization process. An example is the *Royal Oak* case.[113]

In *Calpine Canada Energy Ltd.*, the Alberta Court of Queen's Bench ordered an expanded role for a monitor, finding that a supervisory role for the monitor was a

[111] *Re T. Eaton Co.*, [1999] O.J. No. 4216 (Ont. S.C.J. (Commercial List)).

[112] Andrew Kent and Wael Rostom, "The Auditor as Monitor in *CCAA* proceedings: What is the Debate?", in *Annual Review of Insolvency Law, 2003* (Toronto, Carswell, 2004) at 197-210, citing Canada, Parliament, "Proceedings of the Standing Senate Committee on Banking, Trade and Commerce" Issue No. 17, 11 February 1997.

[113] *Re Royal Oak Mines Inc.* (1999), 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]). Kent and Rostom observe that industry groups have recommended that the power to appoint a manager be expressly incorporated into the *CCAA*, citing The Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals, Joint Task Force on Business Insolvency Law Reform Report (15 March 2002) at 18, online: Insolvency Institute of Canada website www.insolvency.ca/en/iicresources/resources/JTF_Report_ReformProposals_2002.pdf.

method of alleviating the stresses that had occurred between the debtor and an income fund managed by the debtor.[114]

The expanded role is sometimes contested, and the courts consider the professionalism and impartiality of the officer in deciding specific issues where the monitor's views are contested. In *Re Mirant Canada Energy Marketing*, a court order under the *CCAA* provided that severance amounts could be paid at the discretion of the monitor, and the monitor refused to pay the full amount of a severance claim having regard to the effect that the payment would have on other employees.[115] The Court found that the monitor had properly exercised its discretion in the circumstances. In *Re Jackpine Forest Products Ltd.*, where the monitor participated in an application by a secured creditor to replace it, which was defended by other secured creditors, the monitor was not awarded costs; the British Columbia Supreme Court held that a monitor as an impartial officer of the court ought not to pursue its own interest in defending the appointment.[116]

There are also cases, such as *Air Canada*, where the monitor had a higher level of credibility with stakeholders than the management of the debtor corporation did. In such cases, the courts have allowed the monitor greater authority in trying to facilitate a positive outcome to the negotiations for a plan. Arguably, in the case of *Air Canada*, a successful workout may not have been possible but for the efforts and credibility of the monitor. While courts will not rubber stamp the actions or opinions of the monitor, where it plays a highly facilitative role and garners the respect of stakeholders, its expanded role advances the public policy objectives of the legislation.

13. Monitor's Reports and the Issue of Compellability

Frequently, the monitor's reports are filed as an exhibit, and then are treated as evidence by the court. Some of the model initial orders expressly state that the monitor's report will be considered evidence. In some instances, the monitor's report sets out competing positions of parties that are unable to agree on a matter. Occasionally, the monitor's report has been challenged as not "expert", particularly by US creditors in Canadian proceedings. In some instances, such as in the *Trident* proceeding, the monitor's report was part factual and part opinion and one of the parties objected to the opinion part. Usually such disputes are dealt with by the court during the proceeding, either by excluding part of the report or by ruling it admissible, but subject to the weight to be given to the court.

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[114] *Re Calpine Canada Energy Ltd.*, 2006 CarswellAlta 277 (Alta. Q.B.).

[115] *Re Mirant Canada Energy Marketing Ltd.*, 2004 CarswellAlta 352, 1 C.B.R. (5th) 252, 2004 ABQB 218 (Alta. Q.B.), additional reasons 2004 CarswellAlta 561, 1 C.B.R. (5th) 261, 2004 ABQB 334 (Alta. Q.B.).

[116] *Re Jackpine Forest Products Ltd.*, 2004 CarswellBC 87, 2004 BCSC 20, 27 B.C.L.R. (4th) 332, 47 C.P.C. (5th) 313, 49 C.B.R. (4th) 110 (B.C.S.C.).

TAB 7

2011 ABQB 399
Alberta Court of Queen's Bench

Winalta Inc., Re

2011 CarswellAlta 2237, 2011 ABQB 399, [2011] A.J. No. 1341, [2012] A.W.L.D. 737, 521 A.R. 1, 84 C.B.R. (5th) 157

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

In the Matter of the Plan of Compromise or Arrangement of Winalta Inc., Winalta Homes Inc., Winalta Carriers Inc., Winalta Oilfield Rentals Inc., Winalta Carlton Homes Inc., Winalta Holdings Inc., Winalta Construction Inc., Baywood Property Management Inc., and 916830 Alberta Ltd.

J.E. Topolniski J.

Heard: March 21, 2011
Judgment: June 24, 2011
Docket: Edmonton 1003-06865

Counsel: Kentigern Rowan for Deloitte & Touche Inc.
Darren Bieganek for Winalta Group

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Fees and conduct of monitor — Monitor acted for debtor in proceedings under Companies' Creditors Arrangement Act — Monitor was appointed at behest of principal creditor and shared certain reports with principal creditor, who provided interim financing — After receiving report, principal creditor ceased to provide interim financing, although this may have been coincidence — Monitor brought application to be paid fees — Monitor found to have acted improperly and given 60 days to make further submissions on fees — No presumption of regularity exists regarding fees — Insolvency monitor generally was appropriate comparator for judging fees, not chartered accounts generally or legal profession — Monitor charged separately for IT staff, administration and secretarial staff — Monitor required to provide more evidence regarding billing practices for IT staff, administration and secretarial staff — Use of subordinate staff did not constitute duplication of work, despite cursory descriptions of some items — CCAA proceedings moved quickly, restructuring involved multiple entities, including publicly traded parent, liabilities far outweighed asset values, intensive sales campaign was initiated to shed redundant asset, and there were numerous claims and disallowances — No evidence that subordinate staff were not thorough and diligent — No evidence, despite extensive questioning, that duplication of services existed among partners — Administrative charge of 6 per cent of total fees in lieu of disbursements was not reasonable, and monitor required to prepare documentation of disbursements — Parties agreed that fees for internal review were not proper — Provisions of s. 23 of Act did not allow monitor to provide principal creditor with report — Initial order gave authority for monitor to aid in required reports of debtor, but not to deliver them to principal creditor — Monitor was not transparent in actions regarding report, and ignored line between impartial court officer and consultant for principal creditor — No quantifiable loss or evidence of damage to estate was shown, but failure to scrupulously avoid conflict of interest negatively impacted integrity of insolvency system — Appropriate remedy was to reduce fees by amount associated with preparation of report.

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Agristar Inc., Re (2005), 2005 ABQB 431, 2005 CarswellAlta 841, 12 C.B.R. (5th) 1 (Alta. Q.B.) — considered

Bank of Montreal v. Nican Trading Co. (1990), 78 C.B.R. (N.S.) 85, 1990 CarswellBC 397, 43 B.C.L.R. (2d) 315 (B.C. C.A.) — considered

Bell ExpressVu Ltd. Partnership v. Rex (2002), 212 D.L.R. (4th) 1, 287 N.R. 248, [2002] 5 W.W.R. 1, 166 B.C.A.C. 1, 271 W.A.C. 1, 18 C.P.R. (4th) 289, 100 B.C.L.R. (3d) 1, 2002 SCC 42, 2002 CarswellBC 851, 2002 CarswellBC 852, 93 C.R.R. (2d) 189, [2002] 2 S.C.R. 559 (S.C.C.) — followed

Belyea v. Federal Business Development Bank (1983), 44 N.B.R. (2d) 248, 116 A.P.R. 248, 1983 CarswellNB 27, 46 C.B.R. (N.S.) 244 (N.B. C.A.) — followed

Columbia Trust Co. v. Coopers & Lybrand Ltd. (1986), 76 A.R. 303, 49 Alta. L.R. (2d) 93, 1986 CarswellAlta 259 (Alta. C.A.) — followed

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Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd. (2003), 2003 CarswellOnt 1104, 40 C.B.R. (4th) 10 (Ont. S.C.J.) — considered

Confederation Treasury Services Ltd., Re (1995), 1995 CarswellOnt 1169, 37 C.B.R. (3d) 237 (Ont. Bktcy.) — considered

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Peat Marwick Ltd. v. Farmstart (1983), 1983 CarswellSask 66, [1984] 1 W.W.R. 665, 30 Sask. R. 31, 51 C.B.R. (N.S.) 127 (Sask. Q.B.) — referred to

Prairie Palace Motel Ltd. v. Carlson (1980), 1980 CarswellSask 25, 35 C.B.R. (N.S.) 312 (Sask. Q.B.) — referred to

Sally Creek Environs Corp., Re (2010), (sub nom. *Sally Creek Environs Corp. (Bankrupt), Re*) 261 O.A.C. 199, 2010 CarswellOnt 2634, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) — distinguished

Siscoe & Savoie v. Royal Bank (1994), 1994 CarswellNB 14, 29 C.B.R. (3d) 1, 157 N.B.R. (2d) 42, 404 A.P.R. 42 (N.B. C.A.) — referred to

Smoky River Coal Ltd., Re (2001), 2001 ABCA 209, 2001 CarswellAlta 1035, 205 D.L.R. (4th) 94, [2001] 10 W.W.R. 204, 28 C.B.R. (4th) 127, 95 Alta. L.R. (3d) 1, 299 A.R. 125, 266 W.A.C. 125 (Alta. C.A.) — considered

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2120, 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) — considered

Triton Tubular Components Corp., Re (2006), 2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) — referred to

United Used Auto & Truck Parts Ltd., Re (1999), 12 C.B.R. (4th) 144, 1999 CarswellBC 2673 (B.C. S.C. [In Chambers]) — referred to

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s. 13.5 [en. 1992, c. 27, s. 9(1)] — considered

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

Generally — referred to

s. 23 — considered

s. 23(1)(h) — considered

s. 23(1)(i) — considered

s. 25 — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 34 — considered

R. 35-53 — referred to

R. 39 — considered

R. 44 — considered

Regulations considered:

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

Companies' Creditors Arrangement Regulations, SOR/2009-219

s. 7 — referred to

APPLICATION by monitor for approval of fees.

***J.E. Topolniski J.*:**

I. Introduction

> Professional fees in a *CCAA* proceeding hold the potential to be behest with controversy as a result of various factors including lack of transparency, overreaching and conflicts of interest.

(Professor Stephanie Ben-Ishai and Virginia Torres, "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2009* (Toronto: Thomson Carswell, 2008) 142 at p. 169)

1 Deloitte & Touche Inc's. application for approval of its fees as a monitor under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (*CCAA*) is opposed by the debtor companies, whose allegations mimic the concerns expressed by Professor Ben-Ishai and Virginia Torres in the preceding quote.

2 The Winalta companies (Winalta Group) obtained protection from their creditors under the provisions of the *CCAA* on April 26, 2010. At the time, three of nine of the Winalta Group were active. The Winalta Group's assets were worth about $9.5 million, while its liabilities exceeded $73 million.

3 The *CCAA* proceedings moved swiftly at the behest of the primary secured creditor, HSBC Bank Canada (HSBC). It took just six months from the initiation of the proceedings to implementation of the plan.

4 Deloitte & Touche Inc. now wants to be discharged and paid. The Winalta Group takes umbrage at its bill for $1,155,206.05 (Fee) and is asking for a $275,000.00 adjustment for alleged overcharging. It complains about the following:

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(i) charges for support and professional staff other than partners' services/inadequately particularized services (Non-Partner Services);

(ii) duplication;

(iii) a six percent administration fee charged in lieu of disbursements ($50,000.00);

(iv) mathematical errors ($47,979.39); and

(v) charges for internal quality reviews described as something "required to be independent from the engagement" ($10,000.00).

5 The Winalta Group also seeks a $75,000.00 reduction to the Fee as something "akin to punitive damages" for breach of fiduciary duty. It claims that the breach arose when Deloitte & Touche Inc. prepared and delivered a net realization value report to HSBC on September 2, 2010 (September NVR) that prompted HSBC to refuse funding costs to acquire takeout financing.

6 Deloitte & Touche Inc. has agreed to deduct its $10,000.00 charge for the internal quality reviews, but rejects the suggestion that the Fee otherwise is unfair or unreasonable. It asserts that it acted within its mandate and in compliance with its fiduciary obligations. It contends there is no evidence to support the suggestion that HSBC withdrew or reduced its support for the restructuring after receiving the September NVR.

II. A Quick Look Back

7 A brief review of the relationship between the Winalta Group, HSBC and Deloitte & Touche Inc. is useful to better appreciate some of the dynamics at play in this application.

8 The Winalta Group's operations and assets are located in Alberta, except for a small holding in Saskatchewan. Its head office is in Edmonton.

9 In November 2009, HSBC entered into a forbearance agreement with the Winalta Group, which owed it in excess of $47 million (the "Forbearance Agreement"). The Winalta Group agreed to Deloitte & Touche Inc. being retained as HSBC's private monitor, commonly called a "look see" consultant. The Winalta group also agreed to give HSBC a consent receivership order that could be filed with no strings attached.

10 The Winalta Group was not a party to the private monitor agreement between HSBC and Deloitte & Touche Inc., although it was responsible for payment of the private monitor's fees pursuant to the security held by HSBC. It was aware that the private monitor agreement provided for a six percent flat "administration fee" that would be charged by Deloitte & Touche Inc. in lieu of "customary disbursements such as postage, telephone, faxes, and routine photocopying." Charges for "reasonable out of pocket expenses" for travel expenses were not included in the "administration fee."

11 Clearly, HSBC was in the position of power. It agreed to support the Winalta Group's restructuring and to fund its operations throughout the *CCAA* process on the following conditions:

(i) the monitor would be Deloitte & Touche Inc. (the Monitor) and a Vancouver partner of that firm, Jervis Rodriquez, would be the "partner in charge" of the file;

(ii) HSBC would be unaffected by the *CCAA* proceedings;

(iii) the initial order presented to the court for consideration would authorize the Monitor to report to HSBC; and

(iv) the Winalta's Group's indebtedness to HSBC would be retired by October 30, 2010.

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12 On April 26, 2010, the initial order was granted as the Winalta Group and HSBC had planned (Initial Order).

13 HSBC continued to provide operating and overdraft facilities to the Winalta Group during the *CCAA* process, as outlined in the Initial Order, which also provided that the Monitor could report to HSBC on certain matters, the details of which are discussed in the context of the Winalta Group's allegation that the Monitor breached its fiduciary duties.

14 The Winalta Group did not seek DIP financing. Its quest for takeout financing to meet the October 30, 2010 cutoff imposed by HSBC was frustrated when HSBC refused to fund the costs associated with obtaining replacement financing without a three million dollar guarantee. A stakeholder came to the rescue. The Winalta Group is of the view that HSBC's refusal to pay the costs is directly attributable to the Monitor's actions in connection with the September NVR.

15 There is nothing in the evidence or the submissions made at the hearing of this application that hints at a strained relationship between the Winalta Group and the Monitor before the Winalta Group learned when it examined a Deloitte & Touche Inc. partner in the context of this application that the Monitor had provided HSBC with the September NVR.

16 The Monitor's interim accounts were sent at regular intervals. They described activities typical of a monitor in a *CCAA* restructuring, including intense activity in the early phases tapering off as the process unfolded, with a spike around the time of the claims bar date and creditors' meeting. There is no suggestion that the Winalta Group voiced concern about the Monitor's interim accounts. Up until the present application, it seems to have been squarely focused on the goal of obtaining a positive creditor vote and paying its debt to HSBC by the cutoff date.

17 In its twentieth report to the court, the Monitor stated that its Fee is for services rendered in response to "the required and necessary duties of the Monitor hereunder, and are reasonable in the circumstances."

III. Analysis

A. Proper Charges

1. General Principles

18 There is a scarcity of judicial commentary relating specifically to the fees of court-appointed monitors, which likely is attributable to the limited number of opposed applications for passing of their accounts.

19 In their article "A Cost-Benefit Analysis: Examining Professional Fees in *CCAA* Proceedings," the authors discuss their (qualified) survey of insolvency practitioners, stating at p. 168:

> Several answers noted the court's tendency has been to "rubber stamp" professional fees in non-contentious cases. This lack of judicial scrutiny was concerning to some participants, who stated that an increased degree of oversight would be helpful to ensure the legitimacy of the work completed and fees charged.

20 At pp. 146-147, they review certain cases addressing *CCAA* monitors' fees. Most of these cases, rather than focussing on general considerations in determining what constitutes a monitor's "reasonable fee," deal with specific concerns about professional fees, such as:

> (i) approval of Canadian and American counsel fees in a cross-border insolvency (*Muscletech Research & Development Inc., Re* (2007), 30 C.B.R. (5th) 59 (Ont. S.C.J. [Commercial List]); or
>
> (ii) approval of "special" or "premium fees" for an administrator under a *CCAA* plan of arrangement (*Confederation Financial Services (Canada) Ltd. v. Confederation Treasury Services Ltd.* (2003), 40 C.B.R. (4th) 10 (Ont. S.C.J.)).

21 In *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce*, 2005 SKQB 24 (Sask. Q.B.) at para. 10, (2005), 8 C.B.R. (5th) 34 (Sask. Q.B.), Kyle J. commented in the context of opposed applications to extend a stay

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under the CCAA on the significant amount of anticipated professional fees, noting that: "... the court must be on guard against any course of action which would render the process futile."

22 On a different application in the same proceeding (2005 SKQB 252 (Sask. Q.B.)), Kyle J. reiterated a concern about the burgeoning professional fees (at para.5), saying that they might "sink the company's chances of survival." He also was critical (at paras. 11-12) of the monitor's "excellent though useless" report, its practices of recording minimum half-hour blocks of time and billing for discussions with junior staff. The final criticism (para. 15) was that the monitor's fees were offside the local practice.

23 In *Triton Tubular Components Corp., Re* (2006), 20 C.B.R. (5th) 278 (Ont. S.C.J. [Commercial List]) at para. 83, additional reasons at2006 CarswellOnt 2968 (Ont. S.C.J. [Commercial List]) , Madam Justice Mesbur's criteria in scrutinizing the propriety of a monitor's counsel's fee was that which "...one would expect from a resistant client."

24 Given the paucity of judicial commentary on the fees of *CCAA* monitors generally, guidance often is sought from analogous case law dealing with the fees of receivers and trustees in bankruptcy.

25 One of the cases most often cited is *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.) at paras. 3 and 9, (1983), 44 N.B.R. (2d) 248 (N.B. C.A.), which set out the following principles and considerations that apply in assessing a receiver's fees:

> ...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, 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.

26 In *Agristar Inc., Re*, 2005 ABQB 431, 12 C.B.R. (5th) 1 (Alta. Q.B.) , Hart J. applied the factors articulated in *Belyea* in determining the fairness of the fees charged by a *CCAA* monitor which had been replaced part way through the proceedings. In that case, the court had the benefit of the replacement monitor's accounts to use as a direct comparator.

27 Referee Funduk in *Northland Bank v. G.I.C. Industries Ltd.* (1986), 60 C.B.R. (N.S.) 217, 73 A.R. 372 (Alta. Master) refused (at para. 18) to place a receiver's account under a microscope and to engage in a minute examination of its work. He opined (at para. 35) that: "... parties should not expect to get the services of a chartered accountant at a cheap rate," citing *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.) and *Peat Marwick Ltd. v. Farmstart* (1983), 51 C.B.R. (N.S.) 127 (Sask. Q.B.) in support.

28 In *Hess, Re* (1977), 23 C.B.R. (N.S.) 215 (Ont. S.C.), Henry J. considered the following factors in taxing a trustee in bankruptcy's accounts:

> (a) allowing the trustee a fair compensation for his services;
>
> (b) preventing unjustifiable payments for fees to the detriment of the estate and the creditors; and
>
> (c) encouraging efficient, conscientious administration of the estate.

29 Similar to the caution given in *Northland Bank*, Henry J. warned consumers (at para. 11) that: "...it should be borne in mind that the labourer is worthy of his hire. The creditors and the public are entitled to the best services from professional trustees and must expect to pay for them."

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30 In my view, the appropriate focus on an application to approve a *CCAA* monitor's fees is no different than that in a receivership or bankruptcy. The question is whether the fees are fair and reasonable in all of the circumstances. The concerns are ensuring that the monitor is fairly compensated while safeguarding the efficiency and integrity of the *CCAA* process. As with any inquiry, the evidence proffered will be important in making those determinations.

31 The Monitor in the present case takes the position that the Winalta Group has failed to present cogent evidence to show that the Fee is neither fair nor reasonable. In essence, it asks that the court apply a presumption of regularity.

32 I am not aware of any reported authority supporting the proposition that there is a presumption of regularity that applies to a monitor's fees. This application is no different than any other. The applicant, here the Monitor, bears the onus of making out its case. A bald assertion by the Monitor that the Fee is reasonable does not necessarily make it so. The Monitor must provide the court with cogent evidence on which the court can base its assessment of whether the Fee is fair and reasonable in all of the circumstances.

2. Non-Partner Services

33 The Fee includes charges for eighteen support staff, a number which the Winalta Group wryly notes equals that of its own staff complement. The support staff involved included those in clerical, website maintenance, analysis, managerial and senior management positions, with (discounted) hourly billing rates ranging from $65.89 per hour (clerical services) to $460.79 per hour (senior management services).

34 The Winalta Group urges that the (discounted) hourly rate of $588.00 charged by the two partners, Messrs. Jervis and Keeble, should have included any work performed by support staff, as is the typical billing practice for lawyers.

(a) Clerical, administrative, and IT staff

35 In *Peat, Marwick Ltd.* at para. 9, Vancise J. ruled that the charges for secretarial and clerical staff should properly form part of the firm's overhead and, therefore, should not be included in the account for professional services.

36 Referee Funduk in *Northland Bank* refused to follow that aspect of the *Peat*, *Marwick Ltd.* decision as it rested on what he referred to as an "erroneous presumption" that chartered accountants necessarily employ the same billing format as lawyers. Referee Funduk found that the receiver in that case had used the standard billing format for chartered accountants, in which support staff were charged separately. He expressed the view (at para. 30) that it is wrong to compare a chartered accountant's hourly charges to those of a lawyer and to conclude that there is enough profit in the accountant's charges so that work undertaken by staff should not be charged separately. He said that the two operations are not the same and the inquiry should focus on the standard billing format and practice of the profession in question.

37 The Alberta Court of Appeal weighed in on the topic in *Columbia Trust Co. v. Coopers & Lybrand Ltd.* (1986), 76 A.R. 303 (Alta. C.A.), Stevenson J.A. stating at para. 8:

> ... the propriety of charges for secretarial and accounting services must be reviewed to determine if they are properly an "overhead" component that should be or was included or absorbed within the hourly fee charged by some of the professionals who rendered services. The Court, moreover, must be satisfied that the services were reasonably necessary having regard to the amounts involved.

38 In the result, the court in *Columbia Trust Company* elected not to make an arbitrary award but rather to return the matter for "the application of proper principles."

39 In *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.), at 93, (1990), 43 B.C.L.R. (2d) 315 (B.C. C.A.), the British Columbia Court of Appeal found that, having regard to the evidence in that case, it was appropriate for the receiver to have charged separately for the secretarial and support staff. Taggart J.A., for the court,

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observed that *Columbia Trust* qualified but did not overrule *Northland Bank* as the Alberta Court of Appeal simply referred the matter back for review to ensure there was no duplication.

40 The law is no different as it concerns a *CCAA* monitor. While the court should avoid microscopic examination of the Monitor's work, the *Columbia Trust* requirements nevertheless apply. To a degree, I concur with Referee Funduk's observation in *Northland Bank* that the appropriate comparator of a monitor's charges is not the legal profession, as the Winalta Group urges. While mindful that insolvency professionals typically have a chartered accountant's designation, I do not agree with Referee Funduk that the standard billing format for chartered accountants is necessarily the correct comparator. The billing practices for chartered accounts engaged in non-insolvency work may, for a host of reasons, be based on different considerations. What matters is the standard billing practice in the Monitor's own specialized profession - that of the insolvency practitioner.

41 In the present case, the Initial Order specified that: "[t]he Monitor, counsel to the Monitor and counsel to the Applicants shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings." I interpret this to mean the Monitor's standard rates and charges applied in its insolvency practice.

42 Concerning the charges for IT staff, the law required the Monitor to maintain a website (*Companies' Creditors Arrangement Regulation*, SOR/2009-219, s. 7). However, that does not derogate from the Monitor's burden to establish that the service should be a permissible separate charge. Practically, the evidence in this regard should say whether the partners' hourly billing rates have been adjusted specifically to address the legislated requirement to maintain a website.

43 The Monitor has not met the evidentiary burden required of it. It must adduce sufficient evidence to show that in its insolvency practice its industry standard is to charge out secretarial, administrative and IT staff separately rather than to include or absorb those charges as part of the hourly fee charged by the professional staff. If that is its standard practice, it must show that the rates charged were its standard (or discounted) rates. It must also establish that the services were reasonably necessary having regard to the amounts involved.

44 The Monitor is to present affidavit evidence within the next 60 days to address the issues discussed, failing which the charges will be disallowed. This material will be prepared at the Monitor's own cost and the costs of any further application will be addressed at the appropriate time.

(b) Professional staff (non-partner)

45 The Winalta Group contends that there was a duplication of work by non-partner professional staff and that inadequate billing information has been provided. It points to certain entries that are terse, non-specific descriptions of services.

46 Like Hall J. in *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203 (Nfld. T.D.) at para. 20, (2002), 214 Nfld. & P.E.I.R. 126 (Nfld. T.D.), I consider many of the descriptions of services in the Monitor's accounts to be "singularly laconic." The party responsible for paying a monitor's bill is entitled to more. That said, I find the Winalta Group's suggestion of punishing the Monitor for this infraction by reducing the Fee to be unduly harsh.

47 Despite the cursory nature of certain entries, the work of the Monitor's subordinate professional staff appears to have been appropriate and in furtherance of the ultimate goal of restructuring the Winalta Group's affairs. There seems to be nothing blatantly untoward or unusual about the work undertaken by these individuals.

48 Engaging less senior professionals and other subordinate staff to report to and discuss their findings with more senior professionals is not unusual and does not "constitute any type of double teaming of a nature that would be obviously inappropriate" (*Hickman Equipment (1985) Ltd.* at para. 26).

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49 Consideration of the factors articulated in *Belyea* supports the finding that it was acceptable for the Monitor to engage less senior professional staff. In my view, it is relevant that the *CCAA* proceedings moved quickly; the restructuring involved multiple entities, including a publically traded parent; liabilities far outweighed asset values; an intensive sales campaign was initiated to shed redundant asset; and there were numerous claims and disallowances (all but one of which was resolved without the need for court intervention).

50 There is no evidence suggesting that the Monitor's non-partner professional staff was anything but knowledgeable, thorough and diligent, or that their services were excessive, duplicative or unnecessary. While there may have been some degree of professional overlap with the partners, given typical reporting structures, that is facially neither unusual nor inappropriate. The result achieved was positive - a 100 percent vote in favour of the plan of arrangement.

51 I am mindful that the Winalta Group was a co-operative debtor.

3. Duplication of work by partners

52 The Winalta Group also contends that there was duplication of work by two of Deloitte & Touche Inc.'s partners, Messrs. Keeble and Rodriquez.

53 HSBC held a figurative Sword of Damocles over the Winalta Group's head before and during the *CCAA* proceedings. Many concessions were made by the Winalta Group, including its agreement to Mr. Rodriguez being the partner "in charge" for the Monitor, despite his residence being in Vancouver while the Winalta Group's assets and operations were located in Alberta and Saskatchewan. Freed from HSBC's control, the Winalta Group belatedly questions Mr. Rodriguez's general involvement.

54 It is undisputed that Mr. Keeble was the Monitor's "hands on" partner. Mr. Rodriquez, who was familiar to HSBC's special credits branch located in Vancouver, doubtless performed many useful tasks, but as the known entity and more experienced partner, his main raison d'être was to liaise with and provide comfort to HSBC.

55 Both Messrs. Rodriquez and Keeble signed (and presumably carefully prepared or, at a minimum, carefully considered) all twenty of the Monitor's reports to the court. Report preparation underwent three stages. The initial drafts were prepared by the Winalta Group (at the Monitor's request). Next, a review was conducted by one or two of the Monitor's managers. Finally, the reports were delivered to Messrs. Rodriquez and Keeble.

56 The Monitor's accounts do not specify what portion of the fees charged for Mr. Rodriquez ($127,000.00) and for Mr. Keeble ($209,992.00) relates solely to report preparation. Similarly, the Monitor's accounts do not aid in determining if there was any other duplication of work by the two partners.

57 The Winalta Group is entitled to know exactly what it is paying for. That said, it thoroughly questioned the Monitor about the respective roles of Messrs. Rodriquez and Keeble. No evidence was presented to show that there was, in fact, any duplication or that any of the work that they undertook was unreasonable. These charges, therefore, are approved.

4. The administration charge

58 The Winalta Group contends that the Monitor's $50,000.00 administration charge (calculated as six percent of all accounts) in lieu of "customary disbursements" is an unfair "upcharge" with no correlation to reality. In response, The Monitor submits that the Winalta Group implicitly agreed to the administration charge. It further argues that the Winalta Group bears the onus of showing that this charge is offside current industry practice.

59 The Monitor did not inform the Winalta Group of its intention to charge on the same basis as it had billed HSBC. It simply picked up as the *CCAA* monitor where it had left off as HSBC's private monitor. The Monitor points to the Forbearance Agreement, which referred to the administration fee in the Monitor's retainer letter with HSBC as some evidence of the Winalta Group's knowledge and implicit agreement to pay any administration charge in the *CCAA*.

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60 Under the terms of HSBC's security, the Winalta Group was liable for the charges of the private monitor. However, it was not a party to the agreement between Deloitte & Touche Inc. and HSBC. In any event, there is no basis for imputing any agreement on the part of the Winalta Group to pay the administration charge in the context of Deloitte & Touche Inc.'s work as *CCAA* Monitor. Even if it were otherwise, I am far from satisfied that such charges are fair and reasonable in all of the circumstances.

61 A "disbursement" is defined as "the payment of money from a fund" or "a payment, especially one made by a solicitor to a third party and then claimed back from the client" (*Oxford Dictionaries Online*).

62 The administration charge may be more or less than the Monitor's actual disbursements. While it may be convenient for the Monitor to apply a flat percentage charge rather than keep track of disbursements, that does not mean that it is fair and reasonable. Indeed, even if a *CCAA* debtor expressly agreed to the administration charge, such agreement and the circumstances in which it was made simply are factors that the court should consider in determining whether the administrative charge is fair and reasonable in all of the circumstances.

63 The Monitor has failed to establish that the administration charge is fair and reasonable in all of the circumstances. The Monitor shall issue an account to the Winalta Group for actual disbursements incurred within 60 days. Whether the Winalta Group will be pleasantly surprised or disappointed will then be seen.

64 The disbursement account will be prepared at the Monitor's own cost.

5. Mathematical errors

65 The parties have resolved the alleged mathematical errors.

6. Internal quality reviews

66 At the hearing of this matter, the Monitor quite properly conceded that the $10,000.00 charged for internal quality reviews should be deducted from its Fees.

B. Breach of Fiduciary Duty/Conflict of Interest

67 A monitor appointed under the *CCAA* is an officer of the court who is required to perform the obligations mandated by the court and under the common law. A monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders.

68 Kevin P. McElcheran describes the monitor's role in the following terms in *Commercial Insolvency in Canada* (Markham, Ont.: LexisNexis Butterworths, 2005) at p. 236:

> The monitor is an officer of the court. It is the court's eyes and ears with a mandate to assist the court in its supervisory role. The monitor is not an advocate for the debtor company or any party in the *CCAA* process. It has a duty to evaluate the activities of the debtor company and comment independently on such actions in any report to the court and the creditors.

69 The Winalta Group contends that the Monitor breached its fiduciary duty (and implicitly placed itself in a conflict of interest position) by providing HSBC with the September NVR without its knowledge or consent. The onus of establishing the allegation of breach of fiduciary duty lies with the Winalta Group.

70 The September NVR was sent to HSBC via e-mail. It included a summary of the Monitor's analysis and backup spreadsheets for the following two scenarios:

(1) the bank appoints a receiver for all companies on September 7, 2010;

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(2) the bank supports the company through the *CCAA* and is paid out on October 31, 2010 through a refinancing of the assets of Oilfield and Carriers.

The author of the e-mail asked the recipient to confirm his availability to discuss the scenarios with Messrs. Rodriquez and Keeble the next day.

71 Mr. Keeble's responses to questioning, filed March 18, 2011, reference three other reports from the Monitor to HSBC dated June 7, August 12, and August 18, 2010, all of which discussed the estimated value of HSBC's security in various scenarios (Other NVRs). The Winalta Group neither complained of nor referred to the Other NVRs in its evidence or submissions. In the absence of any complaint and evidence, the sole focus of this inquiry is on the September NVR.

72 The Winalta Group's complaints concerning the September NVR are that it was prepared and issued without its knowledge and it lead to HSBC's refusal to fund its takeout financing costs. Articulated in the language used to describe a *CCAA* monitor's duties, the Winalta Group is saying that the Monitor favoured HSBC (placing it in an advantageous position over other creditors) and failed to avoid an actual or perceived conflict of interest.

73 Accusations of bias and breach of fiduciary duty can harm the public's confidence in the insolvency system and, if unfounded, the insolvency practitioner's good name. A careful investigation into allegations of misconduct is, therefore, essential. The process should entail the following steps:

1. A review of the monitor's duties and powers as defined by the *CCAA* and court orders relevant to the allegation.

2. An assessment of the monitor's actions in the contextual framework of the relevant provisions of the *CCAA* and court orders.

3. If the monitor failed to discharge its duties or exceeded its powers, the court should then:

(a) determine if damage is attributable to the monitor's conduct, including damage to the integrity of the insolvency system; and

(b) ascertain the appropriate fee reduction (bearing in mind that other bodies are charged with the responsibility of ethical concerns arising from a *CCAA* monitor's conduct).

Step 1: Reviewing the monitor's duties and powers as defined by the CCAA and court orders relevant to the allegation

(a) The monitor's fiduciary and ethical duties

74 Section 25 of the *CCAA* provides that:

25. In exercising any of his or her powers in performing any of his or her duties and functions, the monitor must act honestly and in good faith and comply with the *Code of Ethics* referred to in section 13.5 of the *Bankruptcy and Insolvency Act*.

75 Section 13.5 of the *Bankruptcy and Insolvency Act*, 1985 R.S.C. 1985, c. B-3 ("*BIA*") provides that a trustee shall comply with the prescribed *Code of Ethics*. The *Code of Ethics* is found in Rules 34 to 53 of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 under the *BIA*. These Rules provide in part that:

(a) Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in administration of the Act (Rule 34).

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(b) Trustees shall be honest and impartial and shall provide interested parties with full and accurate information as required by the Act with respect to the professional engagements of the trustees (Rule 39).

(c) Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment (Rule 44).

76 In addition, *CCAA* monitors are subject to the ethical standards imposed on them by their governing professional bodies.

77 A recurring theme found in the case law is that the monitor's duty is to ensure that no creditor has an advantage over another (see *Siscoe & Savoie v. Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.), at 8; *Laidlaw Inc., Re* (2002), 34 C.B.R. (4th) 72 (Ont. S.C.J. [Commercial List]) at para. 2; *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]) at para. 20; and *843504 Alberta Ltd., Re*, 2003 ABQB 1015 (Alta. Q.B.) at para. 19, *843504 Alberta Ltd., Re* (2003), 351 A.R. 222 (Alta. Q.B.)). The following observations made by Farley J. in *Confederation Treasury Services Ltd., Re* (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.), at 247 about a bankruptcy trustee's duty of impartiality resonate:

> The appointment is not a franchise to make money (although a trustee should be rewarded for its efforts on behalf of the estate) nor to favour one party or one side. The trustee is an impartial officer of the Court; woe be to it if it does not act impartially towards the creditors of the estate.

78 In his article, *Conflicts of Interest and the Insolvency Practitioner: Keeping up Appearances* (1996) 40 C.B.R. (3d) 56, Eric O. Peterson tackles the issue of conflict of interest in circumstances where an insolvency practitioner wears two hats. At p. 74, he states:

> ... The duties of a *CCAA* monitor are defined by standard terms in the court order, and are typically owed to the court, the creditors and the debtor company. Therefore, a private monitor or receiver would have a potential conflict of interest in accepting an engagement as *CCAA* monitor of the same debtor. The engagements are at cross purposes.

79 Mr. Peterson cautions (at p. 75) that even if an experienced business person consents to the insolvency practitioner wearing two hats, the insolvency practitioner should bear in mind Mr. Justice Benjamin Cardozo's statement that a fiduciary must be held to something stricter than the morals of the marketplace.

80 Not surprisingly, there may be heightened sensitivity about the work of a *CCAA* monitor who has chosen to wear two hats. Unfounded accusations may be made due to an honestly held suspicion about where the monitor's loyalties lie rather than out of spite or malice.

81 Common sense dictates that *CCAA* monitors should conduct their affairs in an open and transparent fashion in all of their dealings with the debtor and the creditors alike. The reason is simple. Transparency promotes public confidence and mitigates against unfounded allegations of bias. Secrecy breeds suspicion.

82 Public confidence in the insolvency system is dependent on it being fair, just and accessible. Bias, whether perceived or actual, undermines the public's faith in the system. In order to safeguard against that risk, a *CCAA* monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.

(b) The Monitor's legislated and court ordered duties

83 One of a monitor's functions is to serve as a conduit of information for the creditors. This did not, however, give the Monitor here *carte blanche* to conduct the analysis in the September NVR and issue it to HSBC. Such authority must be found in the *CCAA* or the court orders made in the proceeding.

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84 Subsections 23(h) and (i) of the *CCAA* deal with the monitor's duty to report to the court. Subsection 23(h) requires the monitor to promptly advise the court if it is of the opinion that it would be more beneficial to the creditors if *BIA* proceedings were taken. Section 23(i) requires the monitor to advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the debtor and its creditors. Typically, this report is shared with the creditors just before or at the creditors' meeting to vote on the proposed compromise or arrangement.

85 The provisions in the Initial Order describing the Monitor's reporting functions are central to this inquiry. They must be read contextually.

86 HSBC was an unaffected creditor that continued to provide financing to the Winalta Group by an operating line of credit and overdraft facility. There was no DIP financing as HSBC was, in effect, the interim financier. Clause 22 of the Initial Order speaks to HSBC's role as a financier during the *CCAA* process.

87 Clause 28(d) of the Initial Order reads, in part, as follows:

> 28. The Monitor, in addition to its prescribed rights and obligations under the *CCAA*, is hereby directed and empowered to:
>
>> (d) advise the Applicants in their preparation of the Applicant's cash flow statements and reporting required by HSBC or any DIP lender, which information shall be reviewed with the Monitor and delivered to HSBC or any DIP lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by HSBC and any DIP lender.
>>
>> [Emphasis added.]

88 Clause 30 of the Initial Order states:

> The Monitor shall provide HSBC and any other creditor of the Applicants' and any DIP Lender with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by the Court or on such terms as the Monitor and the Applicants may agree. [Emphasis added.]

89 The Monitor's capacity to report to HSBC was limited to the parameters of these provisions.

Step 2: Assessing the Monitor's actions

(a) Principles of interpretation

90 The interpretation of clauses 28(d) and 30 of the Initial Order lies at the heart of this stage of the analysis. Before undertaking that task, it is helpful to review the principles governing interpretation of the *CCAA* and *CCAA* orders.

91 In *Smoky River Coal Ltd., Re*, 2001 ABCA 209, 299 A.R. 125 (Alta. C.A.), the Alberta Court of Appeal cautioned that as *CCAA* orders become the roadmap for the proceedings, they must be drafted with clarity and precision, and the purpose of the legislation must be kept at the forefront in both drafting and interpreting *CCAA* orders (at para. 16).

92 The issue in *Smoky River Coal Ltd.* was the scope of a provision in an order that did not define a post-petition trade creditor's charge. The court stressed (at para. 17) the importance of clearly defining the scope of charges created by the order. Since the parties had failed to do so, the court balanced the parties' interests, presuming that creditors would understand the purpose of the *CCAA* and would expect that the disputed charge would be interpreted to accord with the

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commercial reality that the debtor would be operating in its ordinary course. In the circumstances, the court interpreted that requirement on "commercially reasonable terms" (at para. 19).

93 The provision at issue in *Afton Food Group Ltd., Re* (2006), 21 C.B.R. (5th) 102, 18 B.L.R. (4th) 34 (Ont. S.C.J.) was the scope of a director's and officers' indemnification. At para. 23, Spies J. ruled that the *Smoky River Coal Ltd.* considerations (a liberal interpretation, consideration of the purpose of the *CCAA*, the attempt to balance the parties' interests, and a commercially reasonable interpretation) apply only if the provision is ambiguous, or if there is a gap or omission. In all other circumstances, the court should:

> (i) assume that the parties carefully drafted the terms of the order;
>
> (ii) assume that the terms of the order reflect the parties' agreement within the parameters imposed by the court, and that such agreement was codified in the order and approved by the court; and
>
> (iii) interpret a clear and unambiguous provision in accordance with its plain meaning.

94 The different approaches employed by the courts in *Smoky River Coal Ltd.* and *Afton Food Group Ltd.* are easily reconciled given the degree of ambiguity in and the nature of the provisions being interpreted in each case.

95 In my view, the interpretation of *CCAA* orders requires a case-specific and contextual approach. In interpreting *CCAA* orders, the court should consider the objects of the *CCAA*, recognizing that the importance of the objects will vary with the circumstances of the case at bar. Other considerations include the degree of clarity of the provision, its nature, and its consequences for affected parties.

96 I adopt the reasoning in *Afton Food Group Ltd.* that the words of the provision should be given their plain and ordinary meaning, that the court is entitled to assume that the terms of orders [granted as presented] reflect negotiated agreements, and that the terms were crafted carefully. I add to this that the provision being interpreted should be read in the context of the order as a whole, not in isolation.

97 The modern approach to statutory analysis was summarized as follows by Elmer A. Driedger in his text, *The Construction of Statutes*, 2d ed.(Toronto: Butterworths, 1983) at p. 87, as cited in many cases, including *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 (S.C.C.) at para. 26:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(b) Interpreting the relevant provisions of the Initial Order and the CCAA

98 The object of the *CCAA* is to enable insolvent companies to carry on business in the ordinary course or to otherwise deal with their assets so that a plan of arrangement or compromise can be prepared, filed and considered by their creditors and the court. While this object does not play as significant a role in interpreting clauses 28(d) and 30 of the Initial Order as it might in other cases, nevertheless it is relevant.

99 Section 23 of the *CCAA* sets out certain reporting requirements for a court- appointed monitor. None of these authorized the Monitor in this case to provide HSBC with the analysis contained in the September NVR, without the knowledge and consent of the Winalta Group or the court.

100 Clause 28(d) of the Initial Order empowers and obliges the Monitor to give advice to the Winalta Group about its preparation of cash flow statements and reports required of it by HSBC or any DIP lender. It is clear from the plain and ordinary language of the provision that it applies to instances where the Winalta Group reports to HSBC. It is the Winalta Group's job to do the reporting. The Monitor's job is to assist the Winalta Group and to review the reports

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before they are delivered to the relevant lender. A contrary finding would render the words "and reviewed with the Monitor" nonsensical.

101 If there is any ambiguity in clause 28(d), it is about who is to deliver the reports. The use of the word "and" after the words "shall be reviewed with the Monitor" is open to the interpretation that the Monitor is to deliver the reports. As nothing turns on that point, I need not decide it.

102 I am entitled to and do assume that the parties' affected by clause 28(d) carefully crafted that provision and agreed to its terms. Had they intended the Monitor to undertake the analysis contained in the September NVR and to provide it to HSBC, they would have said so. Whether such a provision would have been granted is another question altogether.

103 This interpretation is supported by contrasting clause 28(d) with the unambiguous language of clause 30, which refers to the Monitor providing information to HSBC (given to the Monitor by the Winalta Group and declared by it to be non-confidential). Unlike clause 28(d), clause 30 absolves the Monitor of responsibility and liability for its acts. Presumably, the parties would have included similar protection in clause 28(d) if it was intended that the Monitor have the authority it claims.

104 Interpreting clause 28(d) as referring to reports by the Winalta Group rather than the Monitor also is supported by reading the Initial Order as a whole. Clause 22 speaks to HSBC continuing to provide operating and overdraft facilities to the Winalta Group. As HSBS, in effect, is an interim lender, it is logical that the Winalta Group is obliged under the Initial Order to provide it (and any DIP lender) with cash flow statements and any other required reports on a weekly basis (after having the information reviewed by the Monitor, presumably for accuracy).

105 Finally, this interpretation is supported by reference to the object of the *CCAA*, which is to have debtors remain in and control their business operations throughout the term of the restructuring. The debtor is the party that reports to its interim lenders.

106 The Monitor's interpretation of clause 28(d) as authorizing it to prepare and deliver the September NVR to HSBC does not withstand scrutiny. That clause neither expressly nor implicitly authorized the Monitor's conduct in that regard. If the Monitor had any hesitation about the scope of its authority under this clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

107 Clause 30 is unambiguous. To a degree, it supports the Monitor's action as its plain and ordinary language permits the Monitor to release to HSBC (or any DIP lender) information provided by the Winalta Group which it did not declare to be confidential. The Monitor's notes to the September NVR refer to estimated asset realizations, closing dates for certain transactions, and accounts receivable. Presumably, the Monitor obtained that information from the Winalta Group.

108 However, the Monitor's estimate of receivership fees, its various calculations, and its analysis stand on a completely different footing. By definition, that is not "information provided by the Winalta Group." Clause 30 does not authorize the Monitor to take information legitimately obtained from the Winalta Group and to use it as the basis for preparing and issuing the type of analysis contained in the September NVR report. Presumably, this provision (which was granted as presented) reflects a negotiated agreement and was carefully crafted.

109 The Monitor says that it would have prepared and given any creditor the type of analysis contained in the September NVR on demand, irrespective of the creditor's stake. That may be so (or not), but it does not mean that it is authorized or appropriate for it to do so, particularly without the knowledge and consent of the Winalta Group.

110 The Monitor's interpretation of clause 30 as authorizing it to prepare and deliver the September NVR to HSBC fails to withstand full scrutiny. Clause 30 did not authorize the Monitor to provide anything over and above the information provided by the Winalta Group. Again, if the Monitor had any hesitation about the scope of its authority under this

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clause (which I am of the clear view it ought to have had), its obligation was to seek clarification from the court before proceeding as it did.

111 Read contextually, neither the express language nor the spirit of clauses 28(d) and 30 of the Initial Order authorized the Monitor to issue certain of the information contained in the September NVR. Its authority was limited to relaying non-confidential raw data obtained from the Winalta Group. HSBC could then have interpreted the data (alone or with the assistance of another insolvency practitioner).

112 The Monitor was not transparent in its dealings with HSBC surrounding the September NVR.

113 Regrettably, and despite any well intentioned motivation that might be imputed to the Monitor, I find that theMonitor lost sight of the bright line separating its duties as an impartial court officer and a private consultant to HSBC when it provided HSBC with the analysis in the September NVR, thereby creating a perception of bias.

114 In circumstances where the Monitor ought to have been keenly attuned to heightened sensitivity about perceptions of bias, it should have sought clarification of the reporting provisions in the Initial Order before conducting the analysis in the September NVR and issuing it to HSBC. The Monitor failed to recognize the need to do so. Instead, it elected to rely on an unsustainable interpretation of clauses 28(d) and 30 of the Initial Order.

Step 3

(a) Determining if damage is attributable to the Monitor's conduct, including damage to the integrity of the insolvency system

115 HSBC's refusal to fund the Winalta Group's costs for procuring takeout financing appears to have fallen on the heels of it receiving the September NVR. Whether that was a mere coincidence or not has not been established by the Winalta Group.

116 No authority was cited for the proposition that the court is entitled to reduce a court-appointed monitor's fees on a basis "akin to punitive damages." However, *Sally Creek Environs Corp., Re*, 2010 ONCA 312, 67 C.B.R. (5th) 161 (Ont. C.A.) is informative, although distinguishable on its facts.

117 *Murphy* concerned the reduction of a trustee in bankruptcy's fees for misconduct where the relationship between the trustee and largest unsecured creditor had spoiled. The trustee rationalized acting without the approval of two inspectors he considered to be the "handmaidens" of the largest unsecured creditor. At times, the trustee acted contrary to the inspectors' express wishes. Concluding that the trustee had sided against it, the creditor complained to various regulatory bodies, alleging serious wrongdoing and mismanagement by the trustee.

118 On taxation, the registrar found the trustee guilty of 15 acts of misconduct ranging from multiple breaches of statutory duties to lying to regulatory bodies about the conduct of the estate. The registrar reduced the trustee's fees from $240,000.00 to $1.00 and disallowed or reduced many disbursements. The registrar's decision was appealed to Ontario's Superior Court of Justice and, in turn, to the Ontario Court of Appeal, which directed (at para. 125) that in preventing unjustifiable payments, the court should begin by considering discrete deductions for misconduct that cost the estate quantifiable amounts. The court also directed (at para. 126) that the court should consider the degree and extent of the misconduct, and its effect on the estate, the affected creditors, and the integrity of the bankruptcy process in general.

119 These directives apply equally to a court-appointed *CCAA* monitor.

120 In the present case, there is no quantifiable loss, nor is there evidence of damage to the estate. However, the Monitor's failure to scrupulously avoid a conflict of interest negatively impacts the integrity of the insolvency system.

(b) Ascertaining the appropriate fee reduction

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121 There is very little guidance on how the court is to assess an appropriate fee reduction where there is no quantifiable loss (*Nelson, Re* (2006), 24 C.B.R. (5th) 40 (Ont. S.C.J. [Commercial List]) at para. 31 (Ont. S.C.J.)).

122 Reducing a court-appointed officer's fee is not intended to be punitive, but rather is an expression of the court's refusal to endorse the misconduct (*Murphy* at para. 112; *Nelson, Re* at para. 31).

123 Placing a value on the erosion of the public's confidence is an extremely difficult task, particularly given that the object of the exercise is not to punish the offending party. Arbitrarily choosing a figure as a means of refusing to endorse the misconduct is unfair. In the circumstances of this case, I am of the view that the fairer approach is to deprive the Monitor of any charges associated with its misconduct.

124 Accordingly, the Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with its analysis in the September NVR, following which I will determine the appropriate fee reduction. Should the Monitor fail to provide this information, I will have no alternative but to reduce the Fee otherwise.

IV. Conclusions

125 The onus on this application rested with the Monitor to establish that its Fee was fair and reasonable. It has fallen short of doing so in a number of respects.

126 The Monitor exceeded it statutory and court ordered authority by conducting the analysis in the September NVR and providing it to HSBC. The Monitor failed to act with transparency in its dealings with its former client and blurred the bright line dividing its duties as a court-appointed *CCAA* monitor and a private monitor.

127 In the result:

(i) The Monitor will be afforded a further opportunity to provide better evidence concerning the separate charges for clerical, administrative and IT staff, as discussed above, failing which the charges are disallowed.

(ii) The Monitor is to provide affidavit evidence within 60 days particularizing all charges associated with the analysis in the September NVR, failing which I will otherwise reduce the Fee.

(iii) All affidavits will be prepared at the Monitor's own cost, and the costs of any further application will be addressed at the appropriate time.

(iv) The administration charge is disallowed, and the Monitor will issue an account for actual disbursements within 60 days.

• +

(v) The $10,000.00 charged for internal quality reviews is to be deducted from the Fee.

(vii) Subject to reductions for work connected with the analysis in the September NVR, charges for (non-partner and partner) professional services are approved.

(viii) If the parties cannot agree on costs, they may speak to me at the next application or within 120 days, whichever occurs first.

Order accordingly.

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

Court File No. CV-18-604434-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREAT SLAVE HELICOPTERS LTD.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF THE RESPONDING PARTY GWICH'IN DEVELOPMENT CORPORATION

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