Court File No. CV-23-00696017-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

(the "**Applicant**")

BOOK OF AUTHORITIES OF THE APPLICANT
(Approval and Vesting Order, Assignment Order and Ancillary Relief Order)

May 10, 2023

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TO: SERVICE LIST

LIST OF AUTHORITES

Tab	Description
1.	*8640025 Canada Inc.*, 2021 BCSC 1826
2.	*Arrangement relative à Black Rock Metals Inc.*, 2022 QCCS 2828
3.	*Canwest Publishing Inc., Re*, 2010 CarswellOnt 18866
4.	*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
5.	*Clearbeach and Forbes (Re)*, 2021 ONSC 5564
6.	*Clover Leaf Holdings Company et al. (Re),* (January 28, 2020) ONSC (Commercial List), Court File No. CV-19-00631523-00CL (Monitor's Expansion of Powers and Stay Extension Order)
7.	*Consumers Packaging Inc., Re* (2001), 27 C.B.R. (4th) 197, 2001 CanLII 6708 (CA)
8.	*Crystallex International Corporation (Re)*, (May 7, 2019), ONSC (Commercial List) Court File No. CV-11-9532-00CL (Endorsement)
9.	*Crystallex International Corporation (Re)*, (May 5, 2019), ONSC (Commercial List) Court File No. CV-11-9532-00CL (Order).
10.	*Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014
11.	*Green Relief Inc., Re*, 2020 ONSC 6837
12.	*Harte Gold (Re)*, 2022 ONSC 653
13.	*Hartford Computer Hardware, Inc., Re*, 2012 CarswellOnt 21271 (SC)
14.	*Just Energy Group Inc., et al,* (November 3, 2022), ONSC (Commercial List), Court File No. CV-21-00658423-00CL (Approval and Vesting Order)
15.	*Just Energy Group Inc. et al. v. Morgan Stanley Capital Group Inc. et al.*, 2022 ONSC 6354
16.	*LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL (ARIO)
17.	*LoyaltyOne Co. (Re)*, (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL (Endorsement)
18.	LoyaltyOne Co. (Re), (March 20, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL (SISP Approval Order)
19.	*LoyaltyOne Co. (Re)*, (May 1, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL (Endorsement)
20.	*LoyaltyOne Co. (Re)*, (May 1, 2023), ONSC (Commercial List), Court File No. CV-23-00696017-00CL (U.S. Plan Performance Approval Order)

21.	*Lydian International Limited (Re)*, 2020 ONSC 4006
22.	*Mountain Equipment Co-Operative (Re)*, 2020 BCSC 1586
23.	*Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037
24.	*Nortel Networks Corp., Re* (2009), 55 C.B.R. (5th) 229, 2009 CarswellOnt 4467 (SC)
25.	*PCAS Patient Care Automation Services Inc. (Re)*, 2012 ONSC 3367
26.	*Royal Bank v. Soundair Corp.* (1991), 83 DLR (4th) 76, 1991 CarswellOnt 205 (CA)
27.	*Target Canada Co., Re*, 2015 CarswellOnt 4745 (SC)
28.	*TBS Acquireco Inc. (Re)*, 2013 ONSC 4663
29.	*UrtheCast Corp., Re*, 2021 BCSC 1819
30.	*Veris Gold Corp. (Re)*, 2015 BCSC 1204
31.	*White Birch Paper Holding Co., Re*, 2010 QCCS 4915

TAB 3

2010 CarswellOnt 18866
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc., Re

2010 CarswellOnt 18866

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

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

Pepall J.

Judgment: June 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon A.J. Barnes, Alexander Cobb, Elizabeth Allen Putnam, for Applicants

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Miscellaneous
Various entities brought motion for order vesting, in purchaser, LP entities' right, title and interest in and to assets described in asset purchase agreement as amended by assignment and amendment agreement — It was ordered, inter alia, that all of LP entities' right, title and interest in and to acquired assets shall vest absolutely in purchaser free and clear of all security interests or encumbrances (other than permitted encumbrances) — Entitlements of affected creditors was to be restricted to their rights under plan and plan sanction order granted by court — Senior secured creditors' claims and all encumbrances in respect thereof as against acquired assets, unsecured creditors' pool and administrative reserve were to be discharged, barred and extinguished — Orders were made as to real and immovable property registrations in relevant provinces — Pursuant to clause 7(3)(c) of Personal Information Protection and Electronic Documents Act, LP entities were authorized to disclose and transfer to purchaser all human resources and payroll information in their records pertaining to their past and current employees — Vesting of acquired assets in purchaser was to be binding on any trustee in bankruptcy that may be appointed in respect of LP entities — Sale transaction contemplated by asset purchase agreement was exempt from application of Bulk Sales Act or equivalent legislation, and purchaser was discharged from any obligation under s. 6 of Retail Sales Tax Act or equivalent legislation.
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
s. 17 — considered
Land Registration Reform Act, R.S.O. 1990, c. L.4
Generally — referred to
Land Titles Act, R.S.A. 2000, c. L-4
s. 191(1) — considered

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Land Titles Act, R.S.O. 1990, c. L.5
Generally — referred to
Land Titles Act, 2000, S.S. 2000, c. L-5.1
s. 109 — considered
Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5
s. 7(3)(c) — considered
Retail Sales Tax Act, R.S.O. 1990, c. R.31
s. 6 — considered
Regulations considered:
Land Titles Act, 2000, S.S. 2000, c. L-5.1
Land Titles Conversion Facilitation Regulations, R.R.S., c. L-5.1, Reg. 2

s. 6.5 [en. Sask. Reg. 96/2002] — considered

MOTION for order vesting, in purchaser, certain entities' right, title and interest in and to assets described in asset purchase agreement as amended.

***Pepall J.*:**

VESTING ORDER

THIS MOTION made by Canwest Publishing Inc./Publications Canwest Inc. ("*CPI*"), Canwest Books Inc. and Canwest (Canada) Inc. (the "*Applicants*") and Canwest Limited Partnership/Canwest Societe en Commandite ("*Limited Partnership*", collectively and together with the Applicants, the "*LP Entities*", and each an "*LP Entity*"), for an order vesting in 7536321 Canada Inc. (the "*Purchaser*") the LP Entities' right, title and interest in and to the assets described in the asset purchase agreement between CW Acquisition Limited Partnership (the "*Assignor*"), 7535538 Canada Inc. ("*Holdco*") and the LP Entities dated as of May 10, 2010, as amended by the assignment and amendment agreement dated June 10, 2010 among Holdco, the Assignor, the Purchaser and the LP Entities (the "*Asset Purchase Agreement*"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Notice of Motion, the Affidavit of Douglas E.J. Lamb sworn June 14, 2010, the Eighth Report of FTI Consulting Canada Inc. (the "*Monitor's Eighth Report*") in its capacity as Court-appointed monitor of the LP Entities (the "*Monitor*") and the Supplement to the Monitor's Eighth Report, the Tenth Report dated June 14, 2010, the consolidated plan of compromise concerning, affecting and involving the LP Entities dated May 20, 2010, as such Plan has been and may be amended, varied, or supplemented by the LP Entities from time to time in accordance with the terms thereof (the "*Plan*") and on hearing from counsel for the LP Entities, the Monitor, the ad hoc committee of holders of 9.25% notes issued by the Limited Partnership, The Bank of Nova Scotia in its capacity as Administrative Agent (the "*Administrative Agent*") for the Senior Lenders, the court-appointed representatives of the salaried employees and retirees and such other counsel as were present, no one else appearing although duly served as appears from the affidavit of service, filed.

DEFINITIONS

1 *THIS COURT ORDERS* that any capitalized terms not otherwise defined in this Vesting Order shall have the meanings ascribed to them in the Plan.

SERVICE

2 *THIS COURT ORDERS* that the time for service of the Notice of Motion and the Motion Record herein be and is hereby abridged and that the motion is properly returnable today and service upon any interested party other than those parties served is hereby dispensed with and that the service of the Notice of Motion, the Motion Record and the Monitor's Eighth Report as effected by the LP Entities is hereby validated in all respects.

VESTING

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3 *THIS COURT ORDERS* that upon the delivery of the Monitor's certificate (the "*Vesting Certificate*") to the Purchaser and the LP Entities in accordance with the Plan, substantially in the form attached hereto as Schedule "A", and, with respect to the Quebec Property (as defined in Schedule "C") only the execution and delivery of the Deed of Transfer (as hereinafter defined) and, with respect to the Quebec Property (and any other Acquired Assets located or deemed to be located in the Province of Quebec) only the execution and delivery of the Deeds of Mainlevée (as hereinafter defined) and the RV Forms (as hereinafter defined), in accordance with paragraphs 3(b), 16 and 17 of this Vesting Order:

(a) all of the LP Entities' right, title and interest in and to the Acquired Assets, including, without limitation, the LP Entities' right, title and interest as landlord, tenant and sub-tenant, as the case may be, in and to the lands and premises leased pursuant to the leases and related agreements listed in Schedule "B" of this Vesting Order (collectively, the "*Leases*") and all other rights of the LP Entities in, and pursuant to, such Leases, and all of the LP Entities' right, title and interest in and to the real property legally described in Schedule "C" and Schedule "C.2" of this Vesting Order, shall vest absolutely in the Purchaser, free and clear of all security interests (whether contractual, statutory or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levies, charges or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise, including without limiting the generality of the foregoing, any and all Encumbrances (other than Permitted Encumbrances);

(b) all Encumbrances (other than Permitted Encumbrances), including all security registrations against the LP Entities in favour of any Affected Creditor, shall be and are hereby deemed to be discharged and extinguished including, without limitation, all personal and movable property encumbrances listed in Schedule "C.1" of this Vesting Order and all real and immovable property encumbrances listed in Schedule "C.1", Schedule "C.2" and in Parts 2 and 4 of Schedule "D" of this Vesting Order and, with respect to all security registrations registered against either the Quebec Property or any of the Acquired Assets at the Register of Personal and Movable Real Rights (the "*RPMRR*"), each of CIBC Mellon Trust Company and The Bank of Nova Scotia shall execute the necessary applications for registration of a voluntary cancellation required to discharge all encumbrances listed in Schedule "C.1" relating to such property (the "*RV Forms*"), which RV Forms shall be in form and substance satisfactory to each of CIBC Mellon Trust Company, The Bank of Nova Scotia and the Purchaser, acting reasonably, and shall be effective only upon delivery of the Vesting Certificate to the Purchaser;

(c) the entitlements of the Affected Creditors shall be restricted to their rights under the Plan and the Plan Sanction Order granted by this Honourable Court on the date hereof; and

(d) the Senior Secured Creditors' Claims and all Encumbrances in respect thereof as against the Acquired Assets, the Unsecured Creditors' Pool and the Administrative Reserve shall be discharged, barred and extinguished.

4 *THIS COURT ORDERS AND DIRECTS* the Monitor to file with the Court a copy of the Vesting Certificate set out in paragraph 3, as soon as reasonably practicable after delivery thereof provided that notwithstanding any other provision in this Order, the Monitor shall not deliver such Vesting Certificate unless and until (i) the Monitor has received confirmation from the Administrative Agent that the Administrative Agent has received, or escrow arrangements satisfactory to the Administrative Agent have been made, to ensure that the Administrative Agent receives, from or on behalf of the LP Entities in immediately available funds an amount sufficient to be distributed to the Senior Lenders in indefeasible repayment in full of all amounts owing under the Credit Agreement, the Hedging Agreements and the Collateral Agency Agreement (as such capitalized terms are defined in the Initial Order) and any other amounts secured by the security granted by the LP Entities in favour of the Collateral Agent (as defined in the Senior Credit Agreement), including Cash Management Claims, provided that the cash management services currently provided to the LP Entities by The Bank of Nova Scotia will either be assumed by the Purchaser or terminated on the Plan Implementation Date, in either case on terms satisfactory to the Purchaser and The Bank of Nova Scotia, acting reasonably; and (ii) the Monitor has received confirmation from the DIP Administrative Agent that either the DIP Lender Distribution Amount is nil or that the DIP Administrative Agent has received, or escrow arrangements satisfactory to the DIP Administrative Agent have been made, to ensure that the DIP Administrative Agent receives, from or on behalf of the LP Entities in immediately available funds, the DIP Lender Distribution Amount. For the purposes of calculating the amount

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set out in paragraph 4(i) herein, the principal amount outstanding under the Credit Agreement and the Hedging Agreements (as such capitalized terms are defined in the Initial Order) shall be as set out in Schedule "C" of the Plan Sanction Order granted by this Honourable Court on the date hereof provided that to the extent there is a dispute among the Administrative Agent, the LP Entities and the Monitor with respect to the amounts owing under the Credit Agreement, the Hedging Agreements, the Collateral Agency Agreement (as such capitalized terms are defined in the Initial Order), or any other amounts secured by the security granted by the LP Entities in favour of the Collateral Agent, including Cash Management Claims, such dispute will be determined by Order of the Court.

REAL AND IMMOVABLE PROPERTY REGISTRATIONS

Ontario

5 *THIS COURT ORDERS* that upon the registration in the Land Titles Division of the Toronto Registry Office (No. 66) (the "*Toronto Land Registry Office*") of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and the *Land Registration Reform Act* (Ontario) with respect to the Toronto Property (as defined in Schedule "C"), the Land Registrar for the Toronto Land Registry Office is hereby directed to enter the Purchaser as the owner of the Toronto Property in fee simple, and is hereby directed to delete and expunge from title to the Toronto Property all of the real property encumbrances relating to the Toronto Property listed in Schedule "C.1".

6 *THIS COURT ORDERS* that upon registration in the Land Registry Office for the Land Titles Division of Ottawa-Carleton (No. 4) (the "*Ottawa Land Registry Office*") of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and the *Land Registration Reform Act* (Ontario) with respect to the Ottawa Property (as defined in Schedule "C"), the Land Registrar for the Ottawa Land Registry Office is hereby directed to enter the Purchaser as the owner of the Ottawa Property in fee simple, and is hereby directed to delete and expunge from title to the Ottawa Property all of the real property encumbrances relating to the Ottawa Property listed in Schedule "C.1".

7 *THIS COURT ORDERS* that upon registration in the Land Registry Office for the Land Titles Division of Essex (No. 12) (the "*Windsor Land Registry Office*") of an Application for Vesting Order in the form prescribed by the *Land Titles Act* (Ontario) and the *Land Registration Reform Act* (Ontario) with respect to the Windsor Properties (as defined in Schedule "C"), the Land Registrar for the Windsor Land Registry Office is hereby directed to enter the Purchaser as the owner of the Windsor Properties in fee simple, and is hereby directed to delete and expunge from title to the Windsor Properties all of the real property encumbrances relating to the Windsor Properties listed in Schedule "C.1".

Alberta

8 *THIS COURT ORDERS* that, upon presentation for registration at the Alberta Land Titles Office (the "*Alberta LTO*") of a certified copy of this Vesting Order and an Affidavit of Value as prescribed by the *Land Titles Act* (Alberta), the Alberta LTO be and is hereby authorized and directed to cancel the existing certificates of title to the Alberta Properties (as defined in Schedule "C") and to issue new certificates of title for the Alberta Properties in the name of the Purchaser. The Alberta LTO be and is hereby directed to delete, discharge and expunge from such new certificates of title to the Alberta Properties all of the real property encumbrances relating to the Alberta Properties listed in Schedule "C.1".

9 *THIS COURT ORDERS* that, upon presentation for registration in the Alberta LTO, of a certified copy of this Vesting Order, the Alberta LTO be and is hereby authorized and directed to transfer the following real property instruments to the Purchaser: (a) Registration No. 912 088 658 registered on April 16, 1991 being a Caveat re: Purchase Agreement, registered in the name of Edmonton Journal Group ULC relating to the Edmonton Leasehold Property (as defined in Schedule "D"); and (b) Registration No. 912 088 661 registered on April 16, 1991 being a Caveat re: Lease, Etc., registered in the name of Edmonton Journal Group ULC relating to the Edmonton Leasehold Property and the 101 Street Edmonton Freehold Property (as defined in Schedule "C").

10 *THIS COURT ORDERS* that, upon presentation for registration in the Alberta LTO, of a certified copy of this Vesting Order, the Alberta LTO be and is hereby authorized and directed to delete, discharge and expunge the following instrument:

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Registration No. 002 341 255 registered on November 16, 2000 being a Caveat re: Mortgage, registered in the name of The Bank of Nova Scotia relating to the Edmonton Leasehold Property.

11 *THIS COURT ORDERS* that the cancellation of titles, issuance of new titles, transfers of instruments and discharge of instruments as set out in paragraphs 8, 9 and 10 shall be registered notwithstanding the requirements of Section 191(1) of the *Land Titles Act* (Alberta).

British Columbia

12 *THIS COURT ORDERS* that, for greater certainty, those lands and premises defined in Schedule "C" hereto as the BC Properties (the "*BC Properties*") and those lands and premises set out in Schedule "C.2" hereto be hereby conveyed to and vested in the Purchaser and upon presentation for registration in the Land Title Office for each of the relevant Land Title Districts of a certified copy of this Vesting Order, the Registrar of Land Titles (the "*BC Registrar*"), is hereby directed to enter the Purchaser as owner of the BC Properties, together with all buildings, fixtures, systems, interests, licences, commons, ways, profits, privileges, rights, easements and appurtenances to the said hereditaments belonging, or with the same or any part thereof, held or enjoyed or appurtenant thereto, in fee simple, and this Court declares that it has been proved to the satisfaction of the Court on investigation that the title of the Purchaser in and to the BC Properties is a good, safe holding and marketable title and directs the BC Registrar to register indefeasible title in favour of the Purchaser as aforesaid.

13 *THIS COURT ORDERS*, having considered the interest of third parties, that the BC Registrar is hereby directed to discharge, release, delete and expunge (i) from title to the BC Properties, all of the real property encumbrances relating to the BC Properties listed in Schedule "C.1" hereto; and (ii) from title to those lands and premises set out in Schedule "C.2" hereto, all of the real property encumbrances relating thereto set out on Schedule "C.2" hereof.

14 *THIS COURT ORDERS* that, for greater certainty, the LP Entities' registered leasehold right, title and interest in the lands and premises described in Part 1 of Schedule "D" hereto as the BC Registered Leasehold Property (the "*BC Registered Leasehold Property*"), together with the LP Entities' interest in all buildings, fixtures, systems, interests, licences, commons, ways, profits, privileges, rights, easements and appurtenances to the said hereditaments belonging, or with the same or any part thereof, held or enjoyed or appurtenant thereto, be sold to and vested in the Purchaser, and upon presentation for registration in the Land Title Office for the New Westminster Land Title District of a certified copy of this Vesting Order, and having considered the interest of third parties, that the BC Registrar is hereby directed to enter the Purchaser as owner of the BC Registered Leasehold Property, and to discharge, release, delete and expunge from title to the BC Registered Leasehold Property the encumbrance listed in Part 2 of Schedule "D" hereto.

Saskatchewan

15 *THIS COURT ORDERS* that upon payment of the required registration fee, the Registrar of Titles of the Saskatchewan Land Titles Registry is hereby authorized and directed pursuant to Section 109 of *The Land Titles Act, 2000* S.S. 2000, c. L-5.1 and Section 6.5 of *The Land Titles Conversion Facilitation Regulations*, c. L-5.1, Reg. 2 to cancel the existing titles to those lands and premises defined in Schedule "C" hereto as the Saskatchewan Properties (the "*Saskatchewan Properties*") and to issue new titles to the Saskatchewan Properties in the name of the Purchaser, free and clear of all of the real property encumbrances related to the Saskatchewan Properties listed in Schedule "C.1".

Quebec

16 *THIS COURT ORDERS AND DIRECTS*, in order to give effect to this Vesting Order, that prior to closing of the transactions contemplated by the Asset Purchase Agreement, CPI and the Purchaser shall enter into a deed of transfer in registrable form with respect to the Quebec Property (as defined in Schedule "C"), in substantially the form attached hereto as Schedule "E" (the "*Deed of Transfer*"), which Deed of Transfer shall be effective upon the delivery of the Vesting Certificate to the Purchaser.

17 *THIS COURT ORDERS AND DIRECTS*, in order to give effect to this Vesting Order, that prior to closing of the transactions contemplated by the Asset Purchase Agreement, each of CIBC Mellon Trust Company and The Bank of Nova Scotia shall

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execute deeds of mainlevée in registrable form with respect to all encumbrances granted to each of them as listed in Schedule "C.1" relating to the Quebec Property (collectively, the "*Deeds of Mainlevée*") which Deeds of Mainlevée and the RV Forms shall be in form and substance satisfactory to each of CIBC Mellon Trust Company, The Bank of Nova Scotia and the Purchaser, acting reasonably, and shall be effective only upon the delivery of the Vesting Certificate to the Purchaser.

ADDITIONAL PROVISIONS

18 *THIS COURT ORDERS* that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the LP Entities are authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in their records pertaining to their past and current employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the LP Entities.

19 *THIS COURT ORDERS* that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the LP Entities and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of the LP Entities;

the vesting of the Acquired Assets in the Purchaser pursuant to this Vesting Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the LP Entities and shall not be void or voidable, nor shall it constitute nor be deemed to be a preference, assignment, fraudulent conveyance, transfer at undervalue or any other challengeable or voidable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

20 *THIS COURT ORDERS AND DECLARES* that the sale transaction contemplated by the Asset Purchase Agreement is exempt from the application of the *Bulk Sales Act* (Ontario) ("*BSA*") and any equivalent or applicable legislation of any other province or territory in Canada and the BSA does not apply and, further, the Purchaser is discharged from any obligation under Section 6 of the *Retail Sales Tax Act* (Ontario) ("*RSTA*") and any equivalent or applicable legislation under any other province or territory in Canada and the Purchaser shall not incur any liability under Section 6 of the RSTA and any equivalent or applicable legislation under any other province or territory in Canada.

21 *THIS COURT ORDERS* that this Vesting Order shall have full force and effect in all Provinces and Territories of Canada and abroad as against all Persons and parties against whom it may otherwise be enforced.

22 *THIS COURT ORDERS* that the LP Entities and the Monitor may apply to this Court for advice and direction, or to seek relief in respect of, any matters arising from or under the Plan and this Vesting Order, including without limitation the interpretation of this Vesting Order and the Plan or the implementation thereof, and for any further Order that may be required, on notice to any party likely to be affected by the Order sought or on such notice as this Court orders.

23 *THIS COURT ORDERS AND REQUESTS* the aid and recognition (including assistance pursuant to Section 17 of the CCAA) of any court or any judicial, regulatory or administrative body in any province or territory of Canada and any judicial, regulatory or administrative tribunal or other court constituted pursuant to the Parliament of Canada or the legislature of any province or territory or any court or any judicial, regulatory or administrative body of the United States and the states or other subdivisions of the United States and of any other nation or state to act in aid of and to be complementary to this court in carrying out the terms of and giving effect to this Vesting Order.

Order accordingly.

Appendix

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SCHEDULE "A" MONITOR'S VESTING CERTIFICATE

Court File No. CV-10-8533-00CL

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC/ PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC. *APPLICANTS*

CERTIFICATE OF FTI CONSULTING CANADA INC. AS THE COURT-APPOINTED MONITOR OF THE LP ENTITIES (VESTING OF ACQUIRED ASSETS)

All capitalized terms not otherwise defined herein shall have the meanings ascribed thereto in the Amended Consolidated Plan of Compromise concerning, affecting and involving Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) Inc. and Canwest Limited Partnership/Canwest Societe en Commandite (collectively, the "*LP Entities*") dated May 20, 2010 (the "*Plan*"), which is attached as Schedule "A" to the Plan Sanction Order of the Honourable Madam Justice Pepall made in these proceedings on the • day of •, 2010 (the "*Order*"), as such Plan may be further amended, varied or supplemented by the LP Entities from time to time in accordance with the terms thereof.

Pursuant to an Order of this Court dated May 17, 2010, the Court approved the agreement of purchase and sale dated as of May 10, 2010 (the "*Asset Purchase Agreement*") between CW Acquisition Limited Partnership, 7535538 Canada Inc. and the LP Entities, which Asset Purchase Agreement was subsequently amended, and provided for the vesting in the Purchaser of the LP Entities' right, title and interest in and to the Acquired Assets, which vesting is to be effective with respect to the Acquired Assets upon the delivery by the Monitor to the Purchaser of this certificate.

THE MONITOR CERTIFIES the following:

1. The Monitor has received a written notice from the Purchaser and the LP Entities that all conditions precedent under the Asset Purchase Agreement have been satisfied or waived in accordance with the Asset Purchase Agreement and that the Asset Purchase Agreement has not been terminated;

2. The Monitor has received confirmation from the Administrative Agent that the Administrative Agent has received, or escrow arrangements satisfactory to the Administrative Agent have been made, to ensure that the Administrative Agent receives, from or on behalf of the LP Entities in immediately available funds, an amount sufficient to be distributed to the Senior Lenders in indefeasible repayment in full of all amounts owing under the Credit Agreement, the Hedging Agreements, the Collateral Agency Agreement (as such capitalized terms are defined in the Initial Order) and any other amounts secured by the security granted by the LP Entities in favour of the Collateral Agent, including Cash Management Claims;

3. The Monitor has received confirmation from the DIP Administrative Agent that either the DIP Lender Distribution Amount is nil or that the DIP Administrative Agent has received, or escrow arrangements satisfactory to the DIP Administrative Agent have been made, to ensure that the DIP Administrative Agent receives, from or on behalf of the LP Entities in immediately available funds, the DIP Lender Distribution Amount; and

4. The Monitor has received the amount referred to in Section 2.3(1)(c) of the Asset Purchase Agreement and evidence reasonably satisfactory to it that Holdco has issued to CPI the Share Consideration.

DATED at the City of Toronto, in the Province of Ontario, this • day of •, 2010.

FTI CONSULTING CANADA INC., in its capacity as Court-appointed Monitor of the LP Entities and not in its personal capacity

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By: ....

Name:

Title:

SCHEDULE "B" LIST OF LEASES AND RELATED AGREEMENTS

1. Lease between Southam Inc., as landlord, and London Life Insurance Company, as tenant, dated April 1, 1991 and the lease between London Life Insurance Company, as landlord, and Southam Inc., as tenant, dated April 1, 1991 as renewed by the renewal letter dated April 28, 2004 and as assumed by The Edmonton Journal Group Inc. on October 30, 2000, in respect of the Edmonton Leasehold Property (as defined in Schedule "D") municipally known as 10006-101 St., Edmonton, AB.

2. Purchase agreement between London Life Insurance Company and Southam Inc. dated March 15, 1991 in respect of the Edmonton Leasehold Property municipally described as 10006-101 Street, Edmonton, AB.

3. Lease between bcIMC Realty Corporation and Calgary Herald Group Inc., operating as Flyer Force, dated May 9, 2005, in respect of 1058-72nd Avenue, N.E., Calgary, AB.

4. Lease between The City of Calgary and Southam Inc. dated May 1, 1995, in respect of 800 MacLeod Trail, Calgary, AB.

5. Lease between 808 4th Avenue SW Leaseholds Inc. (successor in title to United Place Inc.) and The National Post Company dated October 2, 2002 as amended September 18, 2007, in respect of 808-4th Ave. SW, Calgary, AB.

6. Lease between Superfly Inc. and The Flyer Force, a Division of The Edmonton Journal Inc. dated July 10, 2003 as amended by (i) the amendment agreement dated January 12, 2004; and (ii) the amendment agreement dated August 17, 2004, in respect of 9303 28th Avenue, Edmonton, AB.

7. Lease between Superfly Inc. and The Flyer Force, a Division of The Edmonton Journal Inc. dated August 17, 2004, in respect of 9307 28th Avenue, Edmonton, AB.

8. Lease between Fuller Watson Holdings Limited and Lower Mainland Publishing Group Ltd. dated August 15, 2006, in respect of Units 1 & 2 - 22345 North Avenue, Maple Ridge, BC.

9. Lease between Sodican (B.C.) Inc. and Lower Mainland Publishing Group Inc. dated March 10, 2005, in respect of 100 - 126 East 15th Street, North Vancouver, BC.

10. Lease between Ligvita Developments Ltd., Strawberry Point Developments Ltd., Kalkadoon Properties Ltd. and Thomson Newspapers Co. Ltd. dated April 15, 1993 as amended by the amendment letter dated May 25, 1994 and renewed by the renewal letter dated January 3, 1997, in respect of 1046 Cedar Street, Campbell River, BC.

11. Lease between B.F.C. Projects Partnership, a corporate partnership between Cambridge Properties Ltd. and Benchmark Financial Corporation (successor in title to B-Cam Projects, a corporate partnership between Benchmark Estate Ltd. and Benchmark Holdings Ltd.) and Langley Advance, a Division of CanWest MediaWorks Publications Inc. (successor to Lower Mainland Publishing Group Inc.) dated November 6, 2001 as amended by (i) the extension dated April 16, 2004; (ii) the modification of Lease dated May 10, 2004; (iii) the lease amendment agreement dated July 23, 2004; and (iv) the extension dated September 24, 2007, in respect of Unit 112, 6375 - 202nd Street, Langley, BC.

12. Lease between ONNI Development (1525 Broadway) Corp. and Coquitlam Now and Van Net Newspapers, Divisions of CanWest Publishing Inc. dated December 4, 2008, in respect of 115-1525 Broadway Street, Port Coquitlam, BC.

13. Lease between Brookwest Industrial Inc. and North Shore News, a Division of CanWest MediaWorks Publications Inc. dated March 1, 2006, in respect of 120-400 Brooksbank Ave., Vancouver, BC.

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14. Lease between 581486 B.C. Ltd. and CanWest MediaWorks Publications Inc. dated July 10, 2007, in respect of 13163 - 76th Avenue, Surrey, BC.

15. Lease between Victor Properties Ltd. and Vancouver Courier, a division of CanWest Publishing Inc. (successor in title by assignment to Lower Mainland Publishing Group Inc., (successor in interest by assignment to RIM Publishing Inc.)) dated June, 1989 as amended by (i) the renewal letter dated June 28, 1994; (ii) the renewal letter dated March 31, 1999; (iii) the renewal letter dated August 3, 2004; and (iv) the amending agreement dated July 31, 2009, in respect of 1574 West 6th Avenue, Vancouver, BC.

16. Lease between Garlough Developments Ltd. and CanWest MediaWorks Publications Inc. dated September 1, 2007, in respect of 166E Island Highway, Parksville, BC.

17. Lease between Ontrea Inc., by its agent Cadillac Fairview Management Services Inc. (successor in title to Granville Square Leaseholds Ltd.), Pacific Newspaper Group Inc. (successor in interest by assignment to XSTM Holdings (2000) Inc. (formerly Southam Inc.)) and Canwest Global Communications Corp. dated December 22, 1995 as amended by (i) the letter agreement dated January 12, 1996; (ii) the amendment and assumption of lease dated October 11, 2000; (iii) the amending agreement dated May 31, 2002; and (iv) the facilities licence agreement between PNG and Global Communications Limited dated October 13, 2004, in respect of the property municipally known as 200 Granville Street, Vancouver, BC and legally described in Part 1 of Schedule "D".

18. Lease between Newcorp Properties Ltd. and Burnaby Now, A Division of CanWest Publishing Inc. (successor in title to Lower Mainland Publishing Group Inc.) dated December 27, 2001 as amended by (i) the letter agreement dated May 15, 2002; and (ii) the letter agreement dated February 19, 2009, in respect of 201A & 202A 3430 Brighton Ave, Burnaby, BC.

19. Lease between Diversified Management Inc. and The Now Newspaper, a Division of CanWest MediaWorks Publications Inc. (successor in interest by assignments dated April 14, 1999, August 3, 2000 and June 2002 to Lower Mainland Publishing Group Inc.) dated June, 1996 as amended by (i) the addendum dated May, 1999; (ii) the addendum dated June, 2002; (iii) the addendum dated March 15, 2006; and (iv) the addendum dated July 3, 2006, in respect of 201 and 203 - 7889 132nd Street, Surrey, BC.

20. Lease between Hass Holdings Ltd. and Delta Optimist, a division of CanWest MediaWorks Publications Inc. dated December 1, 2005, in respect of Units 207 and 208 in the Whitford Building, 4840 Delta Street, Delta, BC.

21. Lease between Sixth and Yukon Properties Ltd. and CanWest MediaWorks Publications Inc. dated May 3, 2007, in respect of 2188 Yukon Street, Vancouver, BC.

22. Lease between H. & B. Holdings (1982) Ltd. and Echo Publications dated December 22, 2001, in respect of 407-D Fifth Street, Courtenay, BC.

23. Lease between Donald E. Taylor Personal Law Corporation and Thomson Newspapers Canada, division of Thomson Canada Limited, carrying on business as The Citizen Newspaper dated January 1, 1997 as amended by (i) the lease renewal letter dated January 29, 2001; and (ii) the renewal letter dated March 10, 2006, in respect of 469 Whistler Street, Duncan, BC.

24. Lease between Canadian Pacific Railway Company and The Esquimalt and Nanaimo Railway Company and CanWest Global Communications Corp. (successor in interest by assignment dated October 22, 2000 to Southam Publishing (B.C.) Ltd., successor in title by assignment dated July 7, 1998 to Thomson Canada Limited.) dated November 4, 1996, in respect of Mile 75.56 - 75.59 Nanaimo, BC.

25. Lease by Canwest Publishing Inc., in respect of 1701 Peninsula Street, Ucluelet, BC. (documentation has not been provided)

26. Lease by Canwest Publishing Inc., in respect of 3355 Grandview Highway, Vancouver, BC. (documentation has not been provided)

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27. Lease between Carlton Call Centre Inc. and Canwest Limited Partnership, by its General Partner, Canwest (Canada) Inc. (successor in title to Canwest Media Inc. (successor in interest by assignment dated May 23, 2003 from Air Canada)) dated September 30, 1998 as amended by the lease renewal dated November 13, 2009, in respect of 300 Carlton Street, Winnipeg, MB.

28. Lease between City of Ottawa and Ottawa Citizen, a division of CanWest MediaWorks Publications Inc. dated September 1, 2003 as amended by (i) the lease renewal agreement dated September 1, 2005; and (ii) the lease renewal agreement dated December 1, 2007, in respect of 110 Laurier Avenue West, Ottawa, ON.

29. Lease between Montyco Investments (Windsor) Inc. and CanWest Publishing Inc. dated February 18, 2009 as amended by the amendment dated August 18, 2009, in respect of 1116-1120 Lesperance Road, Tecumseh, County of Essex, ON.

30. Lease between Sun Life Assurance Company of Canada and CanWest MediaWorks Publications Inc. (successor in interest by assignment dated November 1, 2005 to Ottawa Citizen Group Inc.) dated January 30, 2003 as amended by the amendment dated May 17, 2006, in respect of Units 404, 405, 406, 407, 408 at 1230 Old Innes Road, Ottawa, ON.

31. Lease between 1605 Main Street West (Hamilton) Limited and Canwest MediaWorks Publications Inc. dated May 16, 2006, in respect of 1603-1605 Main Street West, Hamilton, ON.

32. Lease between Fairlane Developments Inc. and Phoenix Media Group Inc. dated June 27, 2001 as amended by the letter agreement dated May 26, 2006, in respect of 1614 Lesperance Rd, Unit 2, Building A, Tecumseh, ON.

33. Lease between 414835 Ontario Limited and Canwest Publishing Inc. dated October 1, 2009, in respect of 40 Queen Street South, Tilbury, ON.

34. Lease between Sun Life Assurance Company of Canada and 156 O'Connor Limited (successor to 1331430 Ontario Inc.) and CanWest MediaWorks Publications Inc. dated May 8 th , 2007 as amended by (i) the generator license agreement dated June 27 th , 2007; and (ii) the storage lease dated February 25 th , 2008, in respect of 50 O'Connor Street, Ottawa, ON.

35. Lease between T.R.L. Investments Limited and CanWest Publishing Inc. dated October 28, 2009, in respect of 911 Golf Links Rd, Ancaster, Hamilton ON.

36. Lease by Canwest Publishing Inc., in respect of Rm 354 Legislative Building, Ottawa, ON. (documentation has not been provided).

37. Lease between WXI/DSG Realty Company and Dominion Square, Limited Partnership and the Montreal Gazette Group Inc. dated April 15, 2004, as subleased by CanWest Publishing Inc. (successor in title to Montreal Gazette Group Inc.) to Global Quebec, a division of CanWest Television Limited Partnership, acting by its general partner CanWest Television GP Inc. dated September 1, 2009, in respect of 1010 St. Catherine St. West, Montreal, QC.

38. Lease between Centre Terrarium Inc., represented by Arcturus Limited Partnership, by its General Partner, Arcturus Realty Corporation (successor in title to Progressive Holdings Inc.) and Canwest Publications Inc. (successor in title to Montreal Gazette Group Inc.) dated October 30, 2003 as extended by the extension letter dated October 15, 2008, in respect of 205-189 Hymus Blvd., Pont-Claire, QC.

39. Sublease between The Canadian Press and Canwest News Service, a division of Canwest Publishing Inc. dated January 1, 2010, in respect of Suite 1128, 529 14 th Street N.W. Washington, DC.

40. Lease between Nadiscorp Logistics Inc. and The Star Phoenix, a division of Canwest MediaWorks Publications Inc. dated December 12, 2005, in respect of 1502 Quebec Avenue, Saskatoon, SK.

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41. Lease agreement between Ebco Machining and Fabricating Ltd., as landlord, and Lower Mainland Publishing Group Inc., as tenant, dated July 1, 2001, with respect to certain premises on the ground floor and 2nd floor at 7280 River Road, Richmond, British Columbia.

42. Lease between EIG River Road Investments Inc., for and on behalf of Ebco Machining and Fabricating Ltd., as landlord, and College Printers, a division of Canwest Publishing Inc., as tenant, dated August 1, 2009, with respect to Unit 150 - 7280 River Road, Richmond, British Columbia.

43. Lease in respect of 17 Chesnutt Street, Kingsville, Ontario.

44. Sublease in respect of 100 Queen Street West, Toronto, ON (as contemplated in the Omnibus Transition and Reorganization Agreement).

45. Lease dated July 27, 2009 between Oceanside Storage Inc. and Oceanside Star.

46. Lease made July 26, 2007 between Hamilton Electric Ltd. and The Citizen in respect of premises in Duncan, BC.

47. Lease dated May 31, 2007 between OMERS Realty Corporation, Marine Building Holdings Ltd., 2073393 Ontario Inc. and CanWest MediaWorks Inc.

SCHEDULE "C" FREEHOLD REAL PROPERTY LEGAL DESCRIPTIONS

TORONTO PROPERTY (the "Toronto Property")

1450 Don Mills Road. Toronto

PIN 10117-0593(LT)

Part of Lot 10, Concession 3, EYS Twp of York as in TB395970; Subject To NY380043;

Toronto (N York), City of Toronto

OTTAWA PROPERTY (the "Ottawa Property")

1101 Baxter Road, Ottawa

PIN 03956-0003(LT)

Part Block G, Plan 383389, Part of Block H, Plan 383389 designated as Parts 1, 2, 3, 4, 9 and 28, on Plan 4R-247, Ottawa/Nepean

WINDSOR PROPERTIES (the "Windsor Properties")

167 Ferry Street, Windsor

PIN 01194-0257 (LT)

Lot 1 S/S Pitt Street Block B Plan 120 Windsor; Lot 2 S/S Pitt Street Block B Plan 120 Windsor;

Lot 3 S/S Pitt Street Block B Plan 120 Windsor; Lot 4 S/S Pitt Street Block B Plan 120 Windsor;

Lot 14 North Side Chatham Street Block B Plan 120 Windsor; Lot 15 North Side Chatham Street

Block B Plan 120 Windsor; Pt Lot 5 S/S Pitt Street Block B Plan 120 Windsor as in R223507; Pt

Lot 16 North Side Chatham Street Block B Plan 120 Windsor as in R172585; Windsor

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3000 Starway Avenue, Windsor

PIN 01352-0043 (LT)

Parcel Block 21-1, Section 12M-256; Block 21, Plan 12M-256, Windsor, Subject To SE28966

2605 Temple Drive, Windsor

PIN 01352-0021 (LT)

Parcel 1-1, Section 12M-256; Lot 1, Plan 12M-256, Windsor, Subject To SE28966

ALBERTA PROPERTIES (the "Alberta Properties")

215-16th Street. 315-16th Street and 1790-3rd Avenue, SE, Calgary

Title Nos. 001 313 350, 001 313 350 +1, 001 313 350 +2

Plan 7811505

Block 3

Lot 1

Excepting Thereout All Mines and Minerals

Plan May Land Industrial Park Calgary 7811505

Block Three (3)

Lot Two (2)

Containing 3.81 Hectares (9.43 Acres) More or Less

Excepting Thereout The Corner Cut on Plan 8011039

Excepting Thereout All Mines and Minerals

Plan 7811505

Block 3

Lot 3

Excepting Thereout All Mines and Minerals

Area: 1.71 Hectares (4.23 Acres) More or Less

9301-49th Street NW, Edmonton

Title Nos. 002 324 280, 002 324 280 +1, 002 324 280 +2

Plan 7622073

Block 4

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Lot 10

Excepting Thereout All Mines And Minerals

Area: 0.967 Hectares (2.39 Acres) More or Less

Plan 7622073

Block 4

Lot 11

Excepting Thereout All Mines And Minerals

Area: 0.967 Hectares (2.39 Acres) More or Less

Plan 7622073

Block 4

Lot 12

Excepting Thereout All Mines And Minerals

Area: 0.967 Hectares (2.39 Acres) More or Less

10006 - 101 Street, NW, Edmonton (the "*101 Street Edmonton Freehold Property*")

Title Nos. 002 324 280 +4, 002 324 280 +5

Ground Strata Parcel:

Plan 9023625

Block 1

Lot A

Excepting Thereout:

Hectares (Acres) More or Less

A) Plan 9023628 Strata Part

Excepting Thereout All Mines and Minerals

Tower Strata Parcel:

Plan 9023628

Strata Block B

Excepting Thereout All Mines and Minerals

BRITISH COLUMBIA PROPERTIES (the "BC Properties")

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30887 Peardonville Road, Abbotsford

Parcel Identifier: 013-673-858

Lot 1 Section 24 Township 13 New Westminster District Plan 80917

45951 Trethewey Avenue, Chilliwack

Parcel Identifier: 002-374-781

Lot 330 District Lot 27 Group 2 New Westminster District Plan 49612

5731 No. 3 Road. Richmond

Parcel Identifier: 009-137-173

Lot 19 Except: Parcel "E" (Reference Plan 34061); Section 5 Block 4 North Range 6 West New

Westminster District Plan 29857

12091-88th Avenue. Surrey

Parcel Identifier: 023-290-510

Lot 1 Section 31 Township 2 Group 2 New Westminster District Plan LMP26311

2615 Douglas Street, Victoria

Parcel Identifier: 003-149-021

Lot 2, Section 4, Victoria District, Plan 23740

SASKATCHEWAN PROPERTIES (the "Saskatchewan Properties")

1964 Park Street. Regina

Surface Parcel #107245638

Lot A Blk/Par 98 Plan No 63R26570

Extension 0

As described on Certificate of Title 00RA24907

Mineral Parcel #111734029

Lot A Blk/Par 98 Plan No 63R26570

Extension 0

As described on Certificate of Title 00RA24907

Mineral Parcel 111734030

Plan No. 65R04343

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Extension 1

As described on Certificate of Title 00RA24907, description 1

535 East 12th Avenue. Regina

Surface Parcel #107245908

Lot 4A Blk/Par 98 Plan No FV5010

Extension 0

As described on Certificate of Title 00RA24906

Mineral Parcel #111783630

Lot 4A Blk/Par 98 Plan No FV5010

Extension 0

As described on Certificate of Title 00RA24906

204-5th Avenue, North, Saskatoon

Surface Parcel #120283253

Lot 26 Blk/Par 171 Plan No 99SA32572

Extension 0

As described on Certificate of Title 00SA29247

Surface Parcel #120282858

Lot 27 Blk/Par 171 Plan No 99SA32572

Extension 0

As described on Certificate of Title 00SA29247

Surface Parcel #120282870

Lot 28 Blk/Par 171 Plan No 99SA32572

Extension 0

As described on Certificate of Title 00SA29247

219-5th Avenue, North, Saskatoon

Surface Parcel #120283017

Lot 16 Blk/Par 170 Plan No E2335

Extension 0

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As described on Certificate of Title 00SA29246

QUEBEC PROPERTY (the "Quebec Property")

7001 rue St. Jacques. Montreal

A property fronting on Saint-Jacques Street in the City of Montreal, Province of Quebec, known and designated as being composed of:

(i) lot number FOUR MILLION THREE HUNDRED AND SIXTY-TWO THOUSAND NINE HUNDRED AND FOURTEEN (4 362 914) of the Cadastre of Québec, Registration Division of Montréal, and

(ii) lot number FOUR MILLION THREE HUNDRED AND SIXTY-TWO THOUSAND NINE HUNDRED AND FIFTEEN (4 362 915) of the Cadastre of Québec, Registration Division of Montréal.

With building thereon erected bearing civic address 7001 Saint-Jacques, in the said City of Montreal, Province of Quebec

SCHEDULE "C.1" REAL AND PERSONAL PROPERTY ENCUMBRANCES

Real Property Encumbrances:

TORONTO PROPERTY

1450 Don Mills Road, Toronto (PIN No. 10117-0593 (LT))

1. Instrument No. AT940557 registered on October 4, 2005 being an Application to Change Name-Owner from Southam Publications ULC to Canwest MediaWorks Publications Inc.

2. Instrument No. AT1566480 registered on September 5, 2007 being a Charge in favour of CIBC Mellon Trust Company in the principal amount of $3,000,000,000.00

3. Instrument No. AT2293933 registered on January 29, 2010 being an Application to Change Name-Owner from Canwest MediaWorks Publications Inc. to Canwest Publishing Inc.

4. Instrument No. AT2299702 registered on February 5, 2010 being a Charge in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00

5. Instrument No. AT2304756 registered on February 16, 2010 being an Application for Court Order

OTTAWA PROPERTY

1101 Baxter Road. Ottawa (PIN No. 03956-0003 (LT))

1. Instrument No. LT1358206 registered on January 31, 2001 being an Application to Change Name-Owner from Ottawa Citizen Group ULC to Ottawa Citizen Group Inc.

2. Instrument No. OC518913 registered on October 4, 2005 being an Application to Change Name-Owner from Ottawa Citizen Group Inc. to Canwest MediaWorks Publications Inc.

3. Instrument No. OC769092 registered on September 5, 2007 being a Charge in favour of CIBC Mellon Trust Company in the principal amount of $3,000,000,000.00

4. Instrument No. OC1074941 registered on January 29, 2010 being an Application to Change Name-Owner from Canwest MediaWorks Publications Inc. to Canwest Publishing Inc.

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5. Instrument No. OC1077178 registered on February 5, 2010 being a Charge in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00

6. Instrument No. OC1079017 registered on February 16, 2010 being an Application for Court Order

WINDSOR PROPERTIES

167 Ferry Street, Windsor (PIN No. 01194-0257 (LT)

1. Instrument No. LT290267 registered on December 5, 2000 being an Application to Change Name-Owner from Canwest-Windsor R.P. Holdings ULC to Canwest-Windsor R.P. Holdings Inc.

2. Instrument No. LT294590 registered on February 5, 2001 being an Application to Change Name-Owner from Canwest-Windsor R.P. Holdings ULC to Canwest-Windsor R.P. Holdings Inc.

3. Instrument No. CE174649 registered on October 4, 2005 being an Application to Change Name-Owner from Canwest-Windsor R.P. Holdings Inc. to Canwest MediaWorks Publications Inc.

4. Instrument No. CE411421 registered on February 1, 2010 being an Application to Change Name-Owner from Canwest MediaWorks Publications Inc. to Canwest Publishing Inc.

5. Instrument No. CE412312 registered on February 5, 2010 being a Charge in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00

6. Instrument No. CE413175 registered on February 16, 2010 being an Application for Court Order

3000 Starway Avenue. Windsor (PIN No. 01352-0043 (LT))

1. Instrument No. LT294591 registered on February 5, 2001 being an Application to Change Name-Owner from Windsor Star Group ULC to Windsor Star Group Inc.

2. Instrument No. CE174644 registered on October 4, 2005 being an Application to Change Name-Owner from Windsor Star Group Inc. to Canwest MediaWorks Publications Inc.

3. Instrument No. CE291617 registered on September 5, 2007 being a Charge in favour of CIBC Mellon Trust Company in the principal amount of $3,000,000,000.00

4. Instrument No. CE411421 registered on February 1, 2010 being an Application to Change Name-Owner from Canwest MediaWorks Publications Inc. to Canwest Publishing Inc.

5. Instrument No. CE412312 registered on February 5, 2010 being a Charge in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00

6. Instrument No. CE413175 registered on February 16, 2010 being an Application for Court Order

2605 Temple Drive, Windsor (PIN No. 01352-0021 (LT))

1. Instrument No. LT294591 registered on February 5, 2001 being an Application to Change Name-Owner from Windsor Star Group ULC to Windsor Star Group Inc.

2. Instrument No. CE174644 registered on October 4, 2005 being an Application to Change Name-Owner from Windsor Star Group Inc. to Canwest MediaWorks Publications Inc.

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3. Instrument No. CE411421 registered on February 1, 2010 being an Application to Change Name-Owner from Canwest MediaWorks Publications Inc. to Canwest Publishing Inc.

4. Instrument No. CE413175 registered on February 16, 2010 being an Application for Court Order.

ALBERTA PROPERTIES

215-16 th Street SE, Calgary (Title No. 001 313 350)

1. Registration No. 071 451 815 registered on September 10, 2007 being a Mortgage in favour of CIBC Mellon Trust Company in the principal amount of $3,000,000,000.00

2. Registration No. 101 039 503 registered on February 8, 2010 being a Mortgage in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00

3. Registration No. 101 085 550 registered on March 24, 2010 being a Caveat re: Agreement Charging Land with The Bank of Nova Scotia as Caveator

1790-3 rd Avenue. Calgary (Title No. 001 313 350 +1)

1. Registration No. 071 451 815 registered on September 10, 2007 being a Mortgage in favour of CIBC Mellon Trust Company in the principal amount of $3,000,000,000.00

2. Registration No. 101 039 503 registered on February 8, 2010 being a Mortgage in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00

3. Registration No. 101 085 550 registered on March 24, 2010 being a Caveat re: Agreement Charging Land with The Bank of Nova Scotia as Caveator

315-16 th Street SE, Calgary (Title No. 001 313 350 +2)

1. Registration No. 071 451 815 registered on September 10, 2007 being a Mortgage in favour of CIBC Mellon Trust Company in the principal amount of $3,000,000,000.00

2. Registration No. 101 039 503 registered on February 8, 2010 being a Mortgage in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00

3. Registration No. 101 085 550 registered on March 24, 2010 being a Caveat re: Agreement Charging Land with The Bank of Nova Scotia as Caveator

9301-49 th St. Edmonton (Title Nos. 002 324 280. 002 324 280 +1, 002 324 280 +2)

1. Registration No. 072 544 023 registered on September 10, 2007 being a Mortgage in favour of CIBC Mellon Trust Company in the principal amount of $3,000,000,000.00

2. Registration No. 102 043 635 registered on February 8, 2010 being a Mortgage in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00

3. Registration No. 102 096 437 registered on March 24, 2010 being a Caveat re: Agreement Charging Land with The Bank of Nova Scotia as Caveator

10006-101 Street. NW. Edmonton (Title Nos. 002 324 280 +4, 002 324 280 +5)

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1. Registration No. 102 096 437 registered on March 24, 2010 being a Caveat re: Agreement Charging Land with The Bank of Nova Scotia as Caveator

BRITISH COLUMBIA PROPERTIES

30887 Peardonville Road. Abbotsford (PID No. 013-673-858)

1. Instrument No. BB1452403 registered on February 16, 2010 being a Court Order

12091-88th Avenue. Surrey (PID No. 023-290-510)

1. Instrument No. BB543493 registered on August 29, 2007 being a Charge in favour of CIBC Mellon Trust Company

2. Instrument No. BB1099187 registered on August 28, 2009 being a Priority Agreement granting Instrument No. BB1099186 priority over Instrument No. BB543493

3. Instrument No. BB349402 registered on February 8, 2010 being a Charge in favour of The Bank of Nova Scotia

4. Instrument No. BB1452403 registered on February 16, 2010 being a Court Order

45951 Trethewey Avenue, Chilliwack (PIP No. 002-374-781)

1. Instrument No. BB1452403 registered on February 16, 2010 being a Court Order

5731 No. 3 Road. Richmond (PIP No. 009-137-173)

1. Instrument No. BB1452403 registered on February 16, 2010 being a Court Order

2615. 2621-2629 Douglas Street, Victoria (PID No. 003-149-021)

1. Instrument No. FB91840 registered on August 29, 2007 being a charge in favour of CIBC Mellon Trust Company

2. Instrument No. BB349402 registered on February 8, 2010 being a charge in favour of The Bank of Nova Scotia

3. Instrument No. BB1452403 registered on February 16, 2010 being a Court Order

SASKATCHEWAN PROPERTIES

1964 Park Street, Regina

Surface Parcel No. 107245638

1. Interest No. 150460264 registered on February 9, 2010 being a Mortgage in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00 under Interest Register No. 116169688

2. Interest No. 150473077 registered on February 10, 2010 being a Court Order in favour of The Bank of Nova Scotia registered as Miscellaneous Interest under Interest Register No. 116172907

Mineral Parcel No. 111734029

3. Interest No. 150460275 registered on February 9, 2010 being a Mortgage in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00 under Interest Register No. 116169688

4. Interest No. 150473088 registered on February 10, 2010 being a Court Order in favour of The Bank of Nova Scotia registered as Miscellaneous Interest under Interest Register No. 116172907

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Mineral Parcel No. 111734030

5. Interest No. 150460286 registered on February 9, 2010 being a Mortgage in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00 under Interest Register No. 116169688

6. Interest No. 150473099 registered on February 10, 2010 being a Court Order in favour of The Bank of Nova Scotia registered as Miscellaneous Interest under Interest Register No. 116172907

535 East 12th Avenue, Regina

Surface Parcel No. 107245908

1. Interest No. 150473134 registered on February 10, 2010 being a Court Order in favour of The Bank of Nova Scotia registered as Miscellaneous Interest under Interest Register No. 116172907

Mineral Parcel No. 111783630

2. Interest No. 150473145 registered on February 10, 2010 being a Court Order in favour of The Bank of Nova Scotia registered as Miscellaneous Interest under Interest Register No. 116172907

204-5th Avenue, Saskatoon

Surface Parcel No. 120283253

1. Interest No. 150460297 registered on February 9, 2010 being a Mortgage in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00 under Interest Register No. 116169688

2. Interest No. 150473101 registered on February 10, 2010 being a Court Order in favour of The Bank of Nova Scotia registered as Miscellaneous Interest under Interest Register No. 116172907

Surface Parcel No. 120282858

3. Interest No. 150460309 registered on February 9, 2010 being a Mortgage in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00 under Interest Register No. 116169688

4. Interest No. 150473112 registered on February 10, 2010 being a Court Order in favour of The Bank of Nova Scotia registered as Miscellaneous Interest under Interest Register No. 116172907

Surface Parcel No. 120282870

5. Interest No. 150460310 registered on February 9, 2010 being a Mortgage in favour of The Bank of Nova Scotia in the principal amount of $60,000,000.00 under Interest Register No. 116169688

6. Interest No. 150473123 registered on February 10, 2010 being a Court Order in favour of The Bank of Nova Scotia registered as Miscellaneous Interest under Interest Register No. 116172907

219-5th Avenue. Saskatoon (Surface Parcel No. 120283017)

1. Interest No. 150473156 registered on February 10, 2010 being a Court Order in favour of The Bank of Nova Scotia registered as Miscellaneous Interest under Interest Register No. 116172907

QUEBEC PROPERTY

7001 rue St. Jacques, Montreal

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Lot Numbers 4 362 914 and 4 362 915

1. Registration No. 14 424 974 registered on July 9, 2007 being a deed of hypothec in favour of CIBC Mellon Trust Company, as Fonde de Pouvoir

2. Registration No. 16 918 638 registered on February 5, 2010 being a deed of hypothec in favour of The Bank of Nova Scotia

Personal and Movable Property Registrations:

SASKATCHEWAN

1. Registration number 122626768 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 5, 2005.

2. Registration number 300547076 in favour of The Bank of Nova Scotia registered on January 27, 2010.

ONTARIO

3. Reference file number 619418736 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 4, 2005.

4. Reference file number 619418763 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 4, 2005.

5. Reference file number 619418754 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 4, 2005.

6. Reference file number 619418808 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 4, 2005.

7. Reference file number 658954557 in favour of The Bank of Nova Scotia registered on January 27, 2010.

8. Reference file number 658954629 in favour of The Bank of Nova Scotia registered on January 27, 2010.

9. Reference file number 658954485 in favour of The Bank of Nova Scotia registered on January 27, 2010.

10. Reference file number 658954449 in favour of The Bank of Nova Scotia registered on January 27, 2010.

ALBERTA

11. Registration number 05100429561 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 4, 2005.

12. Registration number 07070800037 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on July 8, 2007.

13. Registration number 10012634607 in favour of The Bank of Nova Scotia registered on January 26, 2010.

14. Registration number 10012719639 in favour of The Bank of Nova Scotia registered on January 27, 2010.

BRITISH COLUMBIA

15. Registration number 623390C in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 7, 2005.

16. Registration number 380952F in favour of The Bank of Nova Scotia registered on January 26, 2010.

MANITOBA

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17. Registration number 200518124101 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 6, 2005.

18. Registration number 200518133402 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 6, 2005.

19. Registration number 200518129405 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 6, 2005.

20. Registration number 200518133801 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 6, 2005.

21. Registration number 201001324603 in favour of The Bank of Nova Scotia registered on January 27, 2010.

22. Registration number 201001325200 in favour of The Bank of Nova Scotia registered on January 27, 2010.

23. Registration number 201001325405 in favour of The Bank of Nova Scotia registered on January 27, 2010.

24. Registration number 201001325804 in favour of The Bank of Nova Scotia registered on January 27, 2010.

NOVA SCOTIA

25. Registration number 10228971 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 7, 2005.

26. Registration number 16213571 in favour of The Bank of Nova Scotia registered on January 27, 2010.

NEW BRUNSWICK

27. Registration number 12809265 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 7, 2005.

28. Registration number 18365890 in favour of The Bank of Nova Scotia registered on January 27, 2010.

PRINCE EDWARD ISLAND

29. Registration number 1476085 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 7, 2005.

30. Registration number 2397294 in favour of The Bank of Nova Scotia registered on January 27, 2010.

NEWFOUNDLAND AND LABRADOR

31. Registration number 4508884 in favour of CIBC Mellon Trust Company, as Collateral Agent registered on October 7, 2005.

32. Registration number 7920949 in favour of The Bank of Nova Scotia registered on January 27, 2010.

QUEBEC

33. Registration number 07-0392946-0002 in favour of CIBC Mellon Trust Company registered on July 10, 2007 for an amount of $3,000,000,000 (with interest thereon at the rate of 25% per annum).

34. Registration number 07-0392946-0001 in favour of CIBC Mellon Trust Company registered on July 10, 2007 for an amount of $3,000,000,000 (with interest thereon at the rate of 25% per annum).

35. Registration number 07-0390467-0001 in favour of CIBC Mellon Trust Company registered on July 9, 2007 for an amount of $3,000,000,000 (with interest thereon at the rate of 25% per annum).

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36. Registration number 10-0067592-0001 in favour of The Bank of Nova Scotia registered on February 5, 2010 for an amount of $30,000,000 (with interest thereon at the rate of 25% per annum).

SCHEDULE "C.2"

PROPERTY DESCRIPTION

2575 McCullough Road (Units A1, A2, B1), Nanaimo

Parcel Identifier: 023-317-175

Lot 1 Section 19 Range 8 Mountain District Plan VIP62624

4918 Napier Street. 3486 4th Avenue and 3998 4th Avenue, Port Alberni

Parcel Identifier: 009-259-244

Lot 1, Block 51, District Lot 1, Alberni District, Plan 197B

Parcel Identifier: 009-259-261

Lot 2, Block 51, District Lot 1, Alberni District, Plan 197B

Parcel Identifier: 009-259-287

Lot 3, Block 51, District Lot 1, Alberni District, Plan 197B

ENCUMBRANCES TO BE DISCHARGED

2575 McCullough Road (Units A1, A2 and B1), Nanaimo (PID No. 023-317-175)

1. Instrument No. FB148233 registered on February 25, 2008 being a charge in favour of CIBC Mellon Trust Company

SCHEDULE "D"

Part 1 - BC Registered Leasehold Property

200 Granville Street, Vancouver

Parcel Identification: 023-166-380

Lot 4 District Lot 541 and of the public harbour of Burrard Inlet

Group 1 New Westminster Plan LMP23953

1. Lease No. BL322770 registered on September 19, 1997, as modified by Instrument No. BT170673 registered on May 21, 2002

2. Option to Lease No. BL322771 registered on September 19, 1997

3. Right of First Refusal to Lease No. BL322772 September 19, 1997

Part 2 - Encumbrance to be Discharged

200 Granville Street, Vancouver (PID No. 023-166-380)

1. Instrument No. BB937285 registered on May 4, 2009 being a charge in favour of CIBC Mellon Trust Company.

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Part 3 - Alberta Registered Leasehold Property (the "Edmonton Leasehold Property")

Building Strata Parcel: (Title Standing in the name of London Life Insurance Company)

Plan 9023628

Strata Block A

Excepting Thereout All Mines and Minerals

Part 4 - Encumbrance to be Discharged

10006-101 Street, NW Edmonton

1. Registration No. 022 341 255 registered on November 16, 2000 being a Mortgage in favour of The Bank of Nova Scotia as Caveator

SCHEDULE "E" DRAFT DEED OF TRANSFER (QUEBEC)

DEED OF TRANSFER entered into at the City of Montreal, Province of Quebec, as of ...., two thousand ten (2010).

BETWEEN:	*CANWEST PUBLISHING INC. / PUBLICATIONS CANWEST INC.*, a corporation duly constituted under the •, having its head office at •, herein acting and represented by [•], its authorized representative, hereunto duly authorized for the purposes hereof in virtue of a resolution of the board of directors of the said corporation adopted on the • day of •, two thousand ten (2010) and a vesting order dated the eighteenth (18th) day of June, two thousand ten (2010) by the Honourable Madam Justice Pepall of the Ontario Superior Court of Justice, Court File No CV-10-8533-00CL, a certified extract of which resolution and vesting order remain annexed hereto; (hereinafter called the "*Transferor*"); PARTY OF THE FIRST PART;
AND:	7536321 Canada Inc., a corporation duly incorporated under the laws of •, having its head office at •, herein acting and represented by •, its authorized representative, hereunto duly authorized for the purposes hereof in virtue of a resolution of the board of directors of the said corporation adopted on the • day of •, two thousand ten (2010), a certified extract of which resolution remains annexed hereto; (hereinafter called the "*Transferee*"); PARTY OF THE SECOND PART.

WHICH PARTIES HAVE AGREED AS FOLLOWS:

1. DEFINITIONS

The terms defined herein shall have, for all purposes of this Deed, the following meanings, unless the context expressly or by necessary implication otherwise requires:

1.1 "ETA" means the Excise Tax Act (Canada);

1.2 "GST" means the Goods and Services Tax;

1.3 "Immovable Property" has the meaning ascribed thereto in Article 2 hereof;

1.4 "QST" means the Quebec Sales Tax; and

1.5 "QSTA" means An Act respecting the Quebec sales tax (Quebec).

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2. TRANSFER

The Transferor hereby transfers, assigns, sets over and conveys, with effect as of and from the date hereof, without any warranty whatsoever except for those expressly contained herein, to the Transferee, hereto present and accepting, the following immovable property:

DESCRIPTION

an emplacement located in the City of Montreal, Province of Quebec, known and designated as being lot numbers FOUR MILLION THREE HUNDRED AND SIXTY-TWO THOUSAND NINE HUNDRED AND FOURTEEN (4 362 914) and FOUR MILLION THREE HUNDRED AND SIXTY TWO THOUSAND NINE HUNDRED AND FIFTEEN (4 362 915) of the Cadastre du Québec, Registration Division of Montreal.

With all buildings and improvements thereon erected and, more particularly, the building bearing civic number 7001 Saint -Jacques Street, City of Montreal, Province of Quebec, H4B 1V3.

(the "*Immovable Property*");

3. TITLE

3.1 The Transferor acquired the Immovable Property under the terms of the deed registered at the Land Registry Office for the Registration Division of Montreal under number 5 208 255.

4. POSSESSION

In virtue of these presents, the Transferee shall be the owner of the Immovable Property as of and from the date hereof, with possession as of the same date.

5. TRANSFEROR'S DECLARATIONS

The Transferor hereby represents and warrants to and in favour of the Transferee that, as of the date hereof:

5.1 the Transferor is not a non resident of Canada within the meaning of the Income Tax Act (Canada) and the Taxation Act (Québec); and

5.2 the Transferor is registered under Division V of Part DC of the ETA, as amended, as well as under the corresponding provisions of the QSTA, as amended.

6. NO WARRANTY

The Transferee is purchasing the Immovable Property on an "as is, where is" basis, at the entire risk and peril of the Transferee, and without any express or implied agreement or representation and warranty of any kind whatsoever, legal or conventional, as to the physical or financial condition, suitability for development, fitness for a particular purpose, merchantability, title, physical characteristics, profitability, use or zoning, environmental condition, existence of latent defects, quality or any other aspect or characteristic thereof. For greater certainty, without limiting the generality of the foregoing, the Transferor and the Transferee hereby expressly exclude the legal warranty provided for by article 1716 of the Civil Code of Québec and confirm that the Transferee is purchasing the Immovable Property at its own risk within the meaning of article 1733 of the Civil Code of Québec.

7. GST/QST

7.1 The Transferee declares and warrants that:

7.1.1 it has acquired the Immovable Property for use exclusively in its commercial activities; and

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7.1.2 if any GST and/or QST is payable as a result of its acquisition of the Immovable Property, it shall pay or cause to be paid the same à qui de droit.

7.2 The Transferor and the Transferee declare that:

7.2.1 the purchase price stipulated herein does not include either the GST nor the QST and if either the GST and/or the QST is payable, such tax shall be paid by the Transferee; and

7.2.2 if necessary, they will cause to be filed the prescribed form GST 60 pursuant to Section 228(4) of the ETA and VD438 pursuant to Section 438 of the QSTA and that accordingly, no tax is payable with respect to this transaction.

8. CONSIDERATION

The present transfer is made for and in consideration of the sum of one Dollar ($1), in lawful money of Canada, and other good and valuable consideration, which the Transferor hereby acknowledges to have received from the Transferee, whereof quit.

9. ADJUSTMENTS

The parties declare that they have made or provided for all adjustments between them relating to the present transfer as of the date hereof to their complete and entire satisfaction. The parties hereto undertake to adjust items which have been adjusted on an estimated basis, as soon as the requisite information becomes available.

10. LANGUAGE

The parties have requested that this Deed and any other contracts, documents or notices relating hereto be prepared in English.

Les parties ont exigé que le présent acte et tous autres contrats, documents ou avis y afférents ou accessoires aux présentes soient rédigés en langue anglaise.

11. DECLARATION REQUIRED IN VIRTUE OF ARTICLE 9 OF AN ACT RESPECTING DUTIES ON TRANSFERS OF IMMOVABLES (R.S.Q., c. D-15.1)

The Transferor and the Transferee declare that:

11.1 the name and address of the transferor herein are Canwest Publishing Inc. / Publications Canwest Inc., •;

11.2 the name and address of the transferee herein are 7536321 Canada Inc., •;

11.3 the Immovable Property is located in the City of Montreal;

11.4 according to the transferor and the transferee, the amount of the consideration for the transfer of the Immovable Property is • Dollars ($•);

11.5 according to the transferor and the transferee, the amount constituting the basis of imposition of the transfer duties is, •;

11.6 the amount of the transfer duties is • Dollars ($•); and

11.7 there is not a transfer of both a corporeal immovable and movables referred to in Section 1.0.1 of the Act.

SIGNED by the parties on the date and at the place first hereinbefore set forth.

CANWEST PUBLISHING INC. / PUBLICATIONS CANWEST INC.

Per: ....

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Name:

Title: Authorized Representative

7536321 CANADA INC.

Per: ....

Name:

Title: Authorized Representative

CERTIFICATE

RE: Deed of transfer entered into at the City of Montreal, Province of Quebec, as of the • (•) day of •, two thousand ten (2010) between Canwest Publishing Inc. / Publications Canwest Inc. (the "*Transferor*") and 7536321 Canada Inc. (the "*Transferee*").

I, the undersigned, ..., advocate, certify that:

1. I have verified the identity, quality and capacity of the Transferor;

2. the document represents the will expressed by the Transferor; and

3. the document is valid as to form.

CERTIFIED at the City of Montreal, Province of Quebec, on ...., two thousand ten (2010).

Name:

Quality: Advocate

Address:

....

•, advocate

CERTIFICATE

RE: Deed of transfer entered into at the City of Montreal, Province of Quebec, as of the • (•) day of •, two thousand ten (2010) between Canwest Publishing Inc. / Publications Canwest Inc. (the "*Transferor*") and 7536321 Canada Inc. (the "*Transferee*").

I, the undersigned, ..., advocate, certify that:

1. I have verified the identity, quality and capacity of the Transferee;

2. the document represents the will expressed by the Transferee; and

3. the document is valid as to form.

CERTIFIED at the City of Montreal, Province of Quebec, on ...., two thousand ten (2010).

Name:

Quality: Advocate

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Address:

....

•, advocate

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TAB 13

2012 CarswellOnt 21271
Ontario Superior Court of Justice [Commercial List]

Hartford Computer Hardware, Inc., Re

2012 CarswellOnt 21271

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

APPLICATION OF HARTFORD COMPUTER HARDWARE, INC. UNDER SECTION 46 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

IN THE MATTER OF CERTAIN PROCEEDINGS TAKEN IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION WITH RESPECT TO HARTFORD COMPUTER HARDWARE, INC. NEXICORE SERVICES, LLC, HARTFORD COMPUTER GROUP, INC. AND HARTFORD COMPUTER GOVERNMENT, INC. (COLLECTIVELY, THE "CHAPTER 11 CHAPTER 11 DEBTORS")

Morawetz J.

Judgment: March 9, 2012
Docket: CV-11-9514-00CL

Counsel: Counsel — not provided

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.5 Orders
XVII.5.b Enforcement of orders
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Orders — Enforcement of orders
Table of Authorities
Statutes considered:
Bankruptcy Code, 11 U.S.C.
Chapter 11 — referred to

s. 363 — referred to

s. 365 — referred to
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to
Bulk Sales Act, R.S.O. 1990, c. B.14
Generally — referred to
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
s. 49 — pursuant to
Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5
s. 7(3)(c) — referred to
Personal Property Security Act, R.S.O. 1990, c. P.10
Generally — referred to

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Retail Sales Tax Act, R.S.O. 1990, c. R.31
s. 6 — referred to

MOTION by applicant debtor for recognition of foreign bankruptcy order against bankrupt corporation.

***Morawetz J.*:**

RECOGNITION, APPROVAL AND VESTING ORDER

THIS MOTION, made by Hartford Computer Hardware, Inc. (the "*Applicant*"), in its capacity as the foreign representative (the "*Foreign Representative*") of the Chapter 11 Debtors in the proceedings commenced on December 12, 2011 in the United States Bankruptcy Court for the Northern District of Illinois Eastern Division (the "*U.S. Court*") under Chapter 11 of Title 11 of the United States Code (the "*Chapter 11 Proceeding*"), pursuant to section 49 of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C.-36, as amended (the "*CCAA*") for an Order, substantially in the form enclosed in the Applicant's Motion Record, recognizing the Sale Order (as defined herein) granted by the U.S. Court was heard this day at 330 University Avenue, Toronto, Ontario;

ON READING the notice of motion dated March 2, 2012 (the "*Notice of Motion*"), the affidavit of Brian Mittman sworn on February 28, 2012, the affidavit of Alana Shepherd sworn on March 2, 2012 and the second report of FTI Consulting Canada Inc., in its capacity as Information Officer dated March 2, 2012 (the "*Information Officer's Second Report*"), each filed;

AND UPON HEARING the submissions of counsel for the Foreign Representative, counsel for the Information Officer, and counsel for Avnet, Inc. and Avnet International (Canada) Ltd, (the "*Canadian Purchaser*" and collectively with Avnet, Inc., the "*Purchaser*"), no one appearing for Delaware Street Capital Master Fund, L.P. (the "*DIP Lender*") or for any other person on the Service List although duly served as appears from the affidavit of service of Bobbie-Jo Brinkman sworn on March 5, 2012,

SERVICE

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

RECOGNITION OF FOREIGN SALE ORDER

2 *THIS COURT ORDERS AND DECLARES* that the Order authorizing the sale of property of the estates under U.S. Bankruptcy Code § 363 pursuant to the sale transaction (the "*Transaction*") contemplated by an asset purchase agreement between the Chapter 11 Debtors, Hartford Computer Group, Inc. and Nexicore Services, LLC, and the Purchaser dated December 12, 2011 (the "*Agreement*") and the assumption and assignment of executory contracts and leases under U.S. Bankruptcy Code § 365 (the "Sale Order") of the U.S. Court made in the Chapter 11 Proceeding attached to this Order as Schedule "A" is hereby recognized and given full force and effect in all provinces and territories of Canada pursuant to Section 49 of the CCAA and shall be implemented and become effective in all provinces and territories of Canada upon the issuance of this Order in accordance with its terms.

ADDITIONAL PROVISIONS REGARDING APPROVAL AND VESTING

3 *THIS COURT ORDERS AND DECLARES* that The Chapter 11 Debtors are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and, in particular, for the conveyance of the Canadian Assets (as defined in the Agreement) to the Canadian Purchaser.

4 *THIS COURT ORDERS AND DECLARES* that upon Closing (as defined in the Agreement), all of the Chapter 11 Debtors' right, title and interest in and to the Canadian Assets described in the Agreement shall vest absolutely in the Canadian Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured

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or otherwise (collectively, the "*Claims*") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Supplemental Order of the Honourable Justice Morawetz dated December 21, 2011; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the Personal Property Security Act (Ontario) or any other personal property registry system (all of which are collectively referred to as the "*Encumbrances*") and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Canadian Assets are hereby expunged and discharged as against the Canadian Assets.

5 *THIS COURT ORDERS* that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Canadian Assets shall stand in the place and stead of the Canadian Assets, and that from and after Closing all Claims and Encumbrances shall attach to the net proceeds from the sale of the Canadian Assets with the same priority as they had with respect to the Canadian Assets immediately prior to the sale, as if the Canadian Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

6 *THIS COURT ORDERS* that, pursuant to clause 7(3)(c) of the Personal Information Protection and Electronic Documents Act (Canada), the relevant Chapter 11 Debtors are authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Chapter 11 Debtor's records pertaining to the Chapter 11 Debtor's past and current Canadian employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Chapter 11 Debtors.

7 *THIS COURT ORDERS* that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the Bankruptcy and Insolvency Act (Canada) in respect of any of the Chapter 11 Debtors and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of any Chapter 11 Debtor;

the vesting of the Canadian Assets in the Canadian Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Chapter 11 Debtors and shall not be void or voidable by creditors of the Chapter 11 Debtors, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the Bankruptcy and Insolvency Act (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

8 *THIS COURT ORDERS AND DECLARES* that the Transaction is exempt from the application of the Bulk Sales Act (Ontario), Section 6 of the Retail Sales Tax Act (Ontario) and any equivalent or similar legislation under any province or territory in Canada and that such legislation does not apply to the Transaction.

9 *THIS COURT ORDERS AND DECLARES* that each of the Chapter 11 Debtors and the Purchaser have leave to reapply for a further Order or Orders that may be necessary to carry out the terms of the Transaction.

INFORMATION OFFICER'S REPORT

10 *THIS COURT ORDERS* that the Information Officer's Second Report and the activities of the Information Officer as described therein be and are hereby approved.

Motion granted.

Schedule"A" — Sale Order

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

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In re:	)	Chapter 11
	)	
HARTFORD COMPUTER HARDWARE, INC., *et al.*,[1]	)	Case No. 11-49744 (PSH) (Joint Administration Pending)
	)	
Debtors.	)	Hon. Pamela S. Hollis

ORDER AUTHORIZING THE SALE OF PROPERTY OF THE ESTATES UNDER BANKRUPTCY CODE § 363 AND THE ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS AND LEASES UNDER BANKRUPTCY CODE § 365

This matter comes before the Court for entry of a final order on the *Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 363, 365 and Fed. R. Bankr. P. 2002, 6004, 6006 for (I) Entry of an Order (A) Approving Bidding Procedures; (B) Granting Certain Bid Protections; (C) Approving Form and Manner of Sale Notices; (D) Setting Sale Hearing Date in Connection With Sale of Substantially All of Debtors' Assets; and (II) Entry of an Order (A) Approving the Sale of Debtors' Assets Free and Clear of All Liens, Claims, Encumbrances and Interests; (B) Authorizing the Assumption And Assignment of Certain Executory Contracts and Unexpired Leases; (C) the Assumption of Certain Liabilities; and (D) Granting Certain Related Relief* (the "*Motion*")[2] ; the Court having reviewed the Motion, the *Declaration of Brian Mittman in Support of the Sale Motion*, and the *Declaration of Michael Levy in Support of the Sale Motion*; the Court having found that (a) the Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper in this district pursuant to 28 U.S.C. § 1408 and 1409, (c) this is a core proceeding pursuant to 28 U.S.C. § 157(b), (d) notice of the Motion is sufficient under the circumstances; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted in this order;

THE COURT FINDS AND CONCLUDES that:

1. In accordance with this Court's Order *(i) Approving Bidding Procedures, (ii) Granting Bid Protections, (iii) Approving Form and Manner of Sale Notices, and (iv) Setting Sale Hearing Date in Connection With Sale of Substantially All of the Debtors' Assets* (Docket No. 128) (the "Sale Procedures Order"), the Debtors served notice of, among other things, the Motion, the proposed sale of the Acquired Assets, the proposed assumption and assignment of the Contracts and Leases, the proposed Cure Amounts, the opportunity to submit Competing Bids, the deadline to object to the Court's entry of an order granting the Motion, and the date and time of the final hearing on the Motion on all parties required to receive such notice under the Sale Procedures Order, including, without limitation, all creditors and all counterparties to the Contracts and Leases. (*See* Affidavit of Service filed on February 9, 2012, Docket No. 158; Affidavit of Service filed on February 13, 2012, Docket No. 168.) In addition, pursuant to the Sale Procedures Order, the Debtors caused to be published a notice of the sale, the deadline to object to the Court's entry of an order granting the Motion, and the date and time of the final hearing on the Motion in the national edition of *The Wall Street Journal.* (*See* Affidavit of Publication of Notice of Sale in The Wall Street Journal filed on February 9, 2012, Docket No. 160.) Such notice was adequate under Bankruptcy Rules 2002, 6004, and 6006 and the circumstances of these cases; no additional notice is necessary.

2. The Debtors received one Qualified Bid, which was made by the stalking-horse bidders Avnet, Inc. and Avnet International (Canada) Ltd. (collectively, the "*Purchaser*") pursuant to the *Asset Purchase Agreement* dated December 12, 2011 (the "Agreement").

3. Having received no Qualified Bids from any Qualified Bidders by the deadlines set forth in the Sale Procedures Order, other than the Purchaser's Qualified Bid, the Debtors cancelled the Auction,

4. The Court considered the Motion and conducted a hearing (the "*Sale Hearing*") on February 28, 2012, at which statements of counsel for the Debtors, any objectors, the Official Committee of Unsecured Creditors (the "*Committee*"), Delaware Street Capital Master Fund, L.P. ("*Delaware Street*"), and the Purchaser were heard.

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5. The Debtor has identified, and the Court recognizes, the Purchaser as the prevailing bidder for the Acquired Assets in accordance with the Sale Procedures Order. The Purchaser's bid is the highest and best bid for the Acquired Assets, and the Purchase Price represents the highest value for the Acquired Assets under the circumstances. With the entry of this Order, the Purchaser's bid has no material unsatisfied conditions, is not subject to significant execution risk, and therefore should be able to close pursuant to the terms of the Agreement.

6. The transactions contemplated in the Agreement and this Order (the "*Transaction*"), including an immediate sale of the Acquired Assets to the Purchaser and the Debtors' assumption and assignment to the Purchaser of the Assumed Contracts, are in the best interests of the estates and creditors.

7. The Debtors have demonstrated sufficient and sound business justifications and compelling circumstances for the sale of the Acquired Assets other than in the ordinary course of the Debtors' business under Bankruptcy Code § 363(b) before, and outside of, a plan of reorganization because, among other things, the immediate consummation of the Transaction with the Purchaser is necessary and appropriate to maximize the value of the estates. Entry of an order in the form and substance of this Order is a necessary condition precedent to the Purchaser's consummation of the Transaction.

8. The Purchaser and the Debtors negotiated the sale of the Acquired Assets without collusion, in good faith, and at arm's length. The Purchaser is, therefore, entitled to the protections afforded under Bankruptcy Code § 363(m). There was no agreement among the Purchaser, any of the Qualified Bidders, and any other potential bidder for the Acquired Assets, to control the price to be paid for the Acquired Assets under the Motion. Accordingly, nothing would cause the sale authorized by this Order to be avoided under Bankruptcy Code § 363(n).

9. The Debtors are the sole, lawful owners of the Acquired Assets. The transfer of the Acquired Assets to the Purchaser under the Agreement will be a legal, valid, and effective transfer of the Acquired Assets, vesting the Purchaser with all title to the Acquired Assets free and clear of all liens, claims (as defined in Bankruptcy Code § 101(5)), encumbrances, obligations, liabilities, contractual commitments, or interests of any kind (collectively, the "*Interests*"), including without limitation (i) any Interest that purports to give a party a right to forfeit, modify, or terminate the Debtors' interests in the Acquired Assets, or any similar right, and (ii) any Interest relating to taxes arising under or out of, in connection with, or in any way relating to the operation of the Debtors' business before the closing of the sale authorized in this Order. All Interests shall attach to the proceeds, including, without limitation, all elements of the "Purchase Price" as defined in Section 3.2(a) of the Agreement, attributable to the property against or in which such Interests are asserted, subject to the terms of such Interests, with the same validity and in the same priority that such Interests now have against the Acquired Assets or their proceeds, subject to any rights, claims, and defenses the Debtors or their estates may possess with respect to such Interests, including any ultimately successful "Challenge" (as that term is defined in the *Final Order (I) Authorizing the Debtors to Obtain Post-Petition Financing Pursuant to 11 U.S.C. § 364, (II) Authorizing the Use of Cash Collateral Pursuant to 11 U.S.C. § 363, (III) Granting Adequate Protection to the Prepetition Secured Lender Pursuant to 11 U.S.C. §§ 361 and 363, and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001*, hereinafter the "Final DIP Financing Order") [Dkt. No. 137] asserted by any party ultimately determined to have the requisite standing.

10. The Debtors may sell the Acquired Assets free and clear of all Interests because, with respect to each Interest, one or more of the standards set forth in Bankruptcy Code § 363(f)(1)-(5) is satisfied. Each entity asserting an Interest in the Acquired Assets: (i) has, subject to the terms and conditions of this Order, consented or is deemed to have consented to the sale of the Acquired Assets; (ii) has an Interest that is subject to bona fide dispute; (iii) could be compelled in a legal or equitable proceeding to accept money satisfaction of its Interest; or (iv) otherwise falls within the provisions of Bankruptcy Code § 363(f). Those holders of Interests who did not timely object to the Motion are deemed, subject to the terms of this Order, to have consented under Bankruptcy Code § 363(f)(2). All holders of Interests are adequately protected by having their Interests attach to the proceeds ultimately attributable to the property against or in which such Interests are asserted.

11. The Debtors' assumption and assignment to the Purchaser of the Assumed Contracts is integral to the Agreement and is in the best interests of the Debtors and their estates, creditors, and all other parties in interest, and represents the reasonable

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exercise of the Debtors' business judgment. The Debtors or the Purchaser have, to the extent necessary, cured or provided adequate assurance of cure of any default existing before the date of this Order with respect to the Assumed Contracts within the meaning of Bankruptcy Code § 365(b)(1)(A) and (f)(2)(A). The Purchaser's promise to perform the obligations under the Assumed Contracts after closing constitutes adequate assurance of future performance within the meaning of Bankruptcy Code § 365(b)(1)(C), (b)(3) (to the extent applicable), and (f)(2)(B).

12. The Transaction may include the transfer of Personally Identifiable Information, as defined in Bankruptcy Code § 101(41A). No Consumer Privacy Ombudsman need be appointed because the Purchaser has agreed to adhere to any privacy policies applying to the Debtors.

13. The objections filed by any objectors have been resolved or withdrawn based on the provisions of this Order to which all objectors, the Purchaser, and the Debtors stipulate as indicated by their respective signatures of counsel below.

14. Good cause appears for granting the relief requested in the Motion.

IT IS HEREBY ORDERED as follows:

A. The Motion is GRANTED as provided in this Order.

B. All objections to the Motion or the relief requested in the Motion that have not been made, withdrawn, waived, or settled, and all reservations of rights included any such objection, are overruled on the merits.

C. The Agreement and the Transaction are APPROVED as provided in this Order. The Debtors are authorized and directed to: (a) execute the Agreement, along with any additional documents that may be reasonably necessary or appropriate to implement the Agreement but do not materially change the its terms; (b) consummate the Transaction; and (c) take any action reasonably necessary to implement the Transaction in a manner not inconsistent with this Order. The Agreement and any related agreements and documents may be modified by the parties to it, in writing and in accordance with its terms, without further order of this Court if the modification does not materially and adversely affect the, estates, and upon three (3) business days' prior written notice to the Committee and Delaware Street.

D. The stays of this Order under Bankruptcy Rules 6004(h) and 6006(d) are waived. This Order is effective and enforceable immediately on entry.

E. Except as expressly provided in the Agreement or this Order, the sale of the Acquired Assets to the Purchaser is free and clear of all Interests under Bankruptcy Code § 363(f). All Interests are released, terminated, and discharged as to the Acquired Assets and the Purchaser (and its successors and assigns). Any Interest, if valid, legal, and enforceable, shall attach to, and be satisfied, if at all, from the proceeds of the sale, including, without limitation, all elements of the "Purchase Price" as set forth in Section 3.2(a) of the Agreement, in the same order and priority as the Interest had in the Acquired Assets before the sale.

F. The Transaction, the Agreement, and all of its related documents constitute a duly authorized, legally valid, and binding transfer, specifically performable and enforceable against, and not subject to rejection or avoidance by, the Debtors or any representative of the Debtors' estates under any chapter of the Bankruptcy Code. Every federal, state, and local governmental agency or department is directed to accept any document or instrument necessary and appropriate to consummate the transactions contemplated by this Order. The Transaction may not be avoided under Bankruptcy Code § 363(n).

G. The purchase of the Acquired Assets is undertaken by the Purchaser in good faith, as that term is used in Bankruptcy Code §363(m). Accordingly, the reversal or modification on appeal of the authorization provided in this Order to consummate the Transaction will not affect the validity of the sale of the Acquired Assets to the Purchaser, unless this Order is duly stayed pending such an appeal. The Purchaser, as a purchaser in good faith of the Acquired Assets, is entitled to all protections afforded under Bankruptcy Code § 363(m).

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H. Under no circumstance may the Purchaser or any of its affiliates be deemed a successor of any one of the Debtors for any Interest in the Acquired Assets. Any person holding an Interest in any component of the Acquired Assets is permanently enjoined from asserting, prosecuting, or otherwise pursuing its Interest against the Purchaser, its property, its affiliates, its successors, its assignees, its employees, its agents, or against the Acquired Assets with respect to that Interest. The provisions of this paragraph and all other provisions of this Order are intended to have effect in all federal, state, and local jurisdictions in the United States and, in accordance with the Recognition Orders, in all federal, provincial, and local jurisdictions in Canada.

I. On and after the closing of the Transaction, no holder of an Interest or any claim against any Debtor or its estate may interfere with Purchaser's title to, or use and enjoyment of, the Acquired Assets. All entities, including without limitation the Debtors, their present and former employees, administrative agencies, governmental tax and regulatory authorities, secretaries of state, federal, state, and local officials, lenders, contract parties, bidders, lessors, warehousemen, customs brokers, freight forwarders, carriers, and other parties in possession of any Acquired Assets at any time, all creditors, and all other persons holding Interests of any kind arising under or out of, in connection with, or in any way relating to, the Debtors, the Acquired Assets, the operation of the Debtors' business before the closing of the Transaction, or with respect to any Interests arising out of or related to the Transaction, are forever barred and permanently enjoined from commencing, prosecuting, or continuing in any manner any action or other proceeding of any kind against the Purchaser, its property, its successors and assigns, its employees and agents, its affiliates, or the Acquired Assets. Following the Closing Date, no holder of an Interest in the Debtors may interfere in any way with the Purchaser's title to or use and enjoyment of the Acquired Assets based on or related to such Interest, or any actions that the Debtors may take in these cases.

J. Any entity in possession of or control over any component of the Acquired Assets must surrender such possession or control either to the Debtors before the Transaction's closing or the Purchaser no later than the Transaction's closing.

K. The Debtors are authorized to assume and assign to the Purchaser the Assumed Contracts effective as of the entry of this Order. Each counterparty to an Assumed Contract is forever barred and enjoined from asserting against the Debtors or the Purchaser, or their respective property, any assignment fee, default, breach, claim, pecuniary loss, liability, or obligation arising under or related to the Assumed Contracts existing as of the closing of the Transaction. With respect to the Transaction and the assignment of the Assumed Contracts to the Purchaser as authorized in this Order, any provision in any Assumed Contract that prohibits or conditions the assignment of such Assumed Contract or allows a party to such Assumed Contract to terminate, recapture, impose any penalty, or modify any term on the assignment of such Assumed Contract constitutes an unenforceable anti-assignment provision and is void.

L. If any license or permit necessary for the operation of the acquired business is determined not to be an executory contract assumable and assignable under Bankruptcy Code § 365, the Purchaser must apply for and obtain any necessary license or permit promptly after the Transaction's closing. The Debtors' licenses or permits must remain in place for the Purchaser's benefit until the Purchaser obtains all its necessary licenses and permits.

M. Except as provided in paragraph N below, in accordance with the Agreement, the Purchaser must pay to any counter-party to an Assumed Contract any Cure Amount identified on Exhibit 1 to the Assumption and Cure Notice for that Assumed Contract to cure all monetary defaults and breaches under that Assumed Contract required under Bankruptcy Code § 365(b). The payment of any applicable Cure Amount (a) effects a cure of all defaults existing under the applicable Assumed Contract as of the Transaction's closing, (b) compensates any counter-party to such Assumed Contract for any actual pecuniary loss resulting from such default, and (c) together with the assignment of Assumed Contract to the Purchaser, constitutes adequate assurance of future performance of the Assumed Contract. Any counterparty to an Assumed Contract shall have no remaining claim against the Debtors on account of any alleged breaches under the Assumed Contract.

N. In the event the disputes regarding the proposed cure amounts on Assumed Contracts to which Sony Electronics Inc. and Sony Service Company (collectively, "*Sony*") is a counterparty (the "*Sony Assumed Contracts*") are unresolved prior to the closing of the Transaction, the Sony Assumed Contracts shall be assumed and assigned to the Purchaser (unless the

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Purchaser provides written notice to the Debtors that it does not seek an assumption and assignment of the Sony Assumed Contracts) effective as of the closing of the Transaction, provided (i) the Purchaser will pay into escrow at the closing the disputed portion of the cure amounts with respect to each Sony Assumed Contract (the "*Escrowed Funds*") as set forth in the Stipulation and Order Regarding Procedures to Resolve Proposed Cure Amounts by and among the Debtors and Sony, which the parties are in the process of finalizing (the "*Sony Stipulation*"), (ii) will pay the undisputed portion of the cure amounts in the amount of not less than $34,456.26 with respect to the Sony Assumed Contracts to Sony within two (2) business days after the closing, and (iii) will pay the disputed portion of the cure amounts with respect to each Sony Assumed Contract from the Escrowed Funds within two (2) business days after a determination by agreement or Court order regarding the correct cure amount.

O. Upon the closing of the transactions contemplated by this Order and the Agreement, the Debtors are directed to pay a portion of the proceeds to Delaware Street to pay and indefeasibly satisfy the DIP Obligations, as that term is defined in the Final DIP Financing Order (including, without limitation, the DIP Obligations incurred under paragraph 6 thereof), upon three (3) business days' written notice to the Committee of the amount to be so paid; provided, that the Committee shall have no right to object to such repayment absent mathematical error. All remaining proceeds shall be retained by the Debtor pending further order of this Court.

P. Nothing in any chapter 11 plan confirmed in the Debtors' cases, any order confirming any such plan, or any other order in these cases (including any order entered after any conversion of these cases into cases under chapter 7) may alter, conflict with, or derogate from the provisions of the Agreement or this Order.

Q. This Court retains jurisdiction to enforce and implement the terms and provisions of this Order and any agreements or instruments executed in connection with this Order, including without limitation jurisdiction to resolve any disputes arising under or related to this Order and to interpret, implement, and enforce this Order's provisions.

R. The Purchaser, the Debtors, all holders of Interests, and any objectors are authorized and directed to enter into any agreement or take any action reasonably necessary or appropriate to consummate the Transaction, transfer title in the Acquired Assets to the Purchaser, and otherwise effect and implement the Agreement and the provisions of this Order.

Dated: FEB 28 2012, 2012

Graphic 1

Footnotes

1 The Debtors are Hartford Computer Hardware, Inc. (FEIN 27-4297525), Nexicore Services, LLC (FEIN 03-0489686), Hartford Computer Group, Inc. (FEIN 36-2973523), and Hartford Computer Government, Inc (FEIN 20-0845960).

2 Capitalized terms not defined herein shall have the meaning given to them in the Motion.

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TAB 24

2009 CarswellOnt 4467
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4467, [2009] O.J. No. 3169, 179 A.C.W.S. (3d) 265, 55 C.B.R. (5th) 229

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION (Applicants)

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Morawetz J.

Heard: June 29, 2009
Written reasons: July 23, 2009
Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam for Nortel Networks Corporation, et al
Lyndon Barnes, Adam Hirsh for Board of Directors of Nortel Networks Corporation, Nortel Networks Limited
J. Carfagnini, J. Pasquariello for Monitor, Ernst & Young Inc.
M. Starnino for Superintendent of Financial Services, Administrator of PBGF
S. Philpott for Former Employees
K. Zych for Noteholders
Pamela Huff, Craig Thorburn for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P., Matlin Patterson Opportunities Partners (Cayman) III L.P.
David Ward for UK Pension Protection Fund
Leanne Williams for Flextronics Inc.
Alex MacFarlane for Official Committee of Unsecured Creditors
Arthur O. Jacques, Tom McRae for Felske & Sylvain (de facto Continuing Employees' Committee)
Robin B. Schwill, Matthew P. Gottlieb for Nortel Networks UK Limited
A. Kauffman for Export Development Canada
D. Ullman for Verizon Communications Inc.
G. Benchetrit for IBM

Subject: Insolvency; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.6 Sale of assets
XIV.6.f Jurisdiction of court to approve sale
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.1 General principles

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XIX.1.e Jurisdiction
XIX.1.e.i Court

Headnote

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

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Table of Authorities

Cases considered by *Morawetz J.*:

Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership (2009), 2009 BCCA 319, 2009 CarswellBC 1738 (B.C. C.A.) — followed

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 ONCA 587, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 240 O.A.C. 245, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 296 D.L.R. (4th) 135, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 47 B.L.R. (4th) 123 (Ont. C.A.) — considered

ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp. (2008), 2008 CarswellOnt 5432, 2008 CarswellOnt 5433 (S.C.C.) — referred to

Boutiques San Francisco Inc., Re (2004), 2004 CarswellQue 10918, 7 C.B.R. (5th) 189 (C.S. Que.) — referred to

Calpine Canada Energy Ltd., Re (2007), 2007 CarswellAlta 1050, 2007 ABQB 504, 35 C.B.R. (5th) 1, 415 A.R. 196, 33 B.L.R. (4th) 68 (Alta. Q.B.) — referred to

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co. (2008), 2008 CarswellOnt 4046, 45 C.B.R. (5th) 87 (Ont. S.C.J.) — referred to

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 434 W.A.C. 187, 258 B.C.A.C. 187, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — distinguished

Consumers Packaging Inc., Re (2001), 150 O.A.C. 384, 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482, 12 C.P.C. (5th) 208 (Ont. C.A.) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

PSINET Ltd., Re (2001), 28 C.B.R. (4th) 95, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]) — considered

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

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Stelco Inc., Re (2004), 2004 CarswellOnt 4084, 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) — referred to

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

Winnipeg Motor Express Inc., Re (2008), 2008 CarswellMan 560, 2008 MBQB 297, 49 C.B.R. (5th) 302 (Man. Q.B.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

s. 363 — referred to

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

Generally — referred to

s. 11 — referred to

s. 11(4) — considered

MOTION by company for approval of bidding procedures for sale of business and asset sale agreement.

***Morawetz J.*:**

Introduction

1 On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

2 I also approved the Asset Sale Agreement dated as of June 19, 2009 (the "Sale Agreement") among Nokia Siemens Networks B.V. ("Nokia Siemens Networks" or the "Purchaser"), as buyer, and Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks, Inc. ("NNI") and certain of their affiliates, as vendors (collectively the "Sellers") in the form attached as Appendix "A" to the Fourteenth Report and I also approved and accepted the Sale Agreement for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

3 An order was also granted sealing confidential Appendix "B" to the Fourteenth Report containing the schedules and exhibits to the Sale Agreement pending further order of this court.

4 The following are my reasons for granting these orders.

5 The hearing on June 29, 2009 (the "Joint Hearing") was conducted by way of video conference with a similar motion being heard by the U.S. Court. His Honor Judge Gross presided over the hearing in the U.S. Court. The Joint Hearing was conducted in accordance with the provisions of the Cross-Border Protocol, which had previously been approved by both the U.S. Court and this court.

6 The Sale Agreement relates to the Code Division Multiple Access ("CMDA") business Long-Term Evolution ("LTE") Access assets.

7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

Background

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8 The Applicants were granted CCAA protection on January 14, 2009. Insolvency proceedings have also been commenced in the United States, the United Kingdom, Israel and France.

9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

10 The stated purpose of Nortel's filing under the CCAA was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. The Monitor reported that a thorough strategic review of the company's assets and operations would have to be undertaken in consultation with various stakeholder groups.

11 In April 2009, the Monitor updated the court and noted that various restructuring alternatives were being considered.

12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

13 In deciding to pursue specific sales processes, Mr. Riedel also stated that Nortel's management considered:

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

14 Mr. Riedel notes that while the Business possesses significant value, Nortel was faced with the reality that:

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

16 In addition to the assets covered by the Sale Agreement, certain liabilities are to be assumed by the Purchaser. This issue is covered in a comprehensive manner at paragraph 34 of the Fourteenth Report. Certain liabilities to employees are included on this list. The assumption of these liabilities is consistent with the provisions of the Sale Agreement that requires the Purchaser to extend written offers of employment to at least 2,500 employees in the Business.

17 The Monitor also reports that given that certain of the U.S. Debtors are parties to the Sale Agreement and given the desire to maximize value for the benefit of stakeholders, Nortel determined and it has agreed with the Purchaser that the Sale Agreement is subject to higher or better offers being obtained pursuant to a sale process under s. 363 of the U.S. Bankruptcy Code and that the Sale Agreement shall serve as a "stalking horse" bid pursuant to that process.

18 The Bidding Procedures provide that all bids must be received by the Seller by no later than July 21, 2009 and that the Sellers will conduct an auction of the purchased assets on July 24, 2009. It is anticipated that Nortel will ultimately seek a final sales order from the U.S. Court on or about July 28, 2009 and an approval and vesting order from this court in respect of the Sale Agreement and purchased assets on or about July 30, 2009.

19 The Monitor recognizes the expeditious nature of the sale process but the Monitor has been advised that given the nature of the Business and the consolidation occurring in the global market, there are likely to be a limited number of parties interested in acquiring the Business.

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20 The Monitor also reports that Nortel has consulted with, among others, the Official Committee of Unsecured Creditors (the "UCC") and the bondholder group regarding the Bidding Procedures and is of the view that both are supportive of the timing of this sale process. (It is noted that the UCC did file a limited objection to the motion relating to certain aspects of the Bidding Procedures.)

21 Given the sale efforts made to date by Nortel, the Monitor supports the sale process outlined in the Fourteenth Report and more particularly described in the Bidding Procedures.

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

23 The objections were considered in the hearing before Judge Gross and, with certain limited exceptions, the objections were overruled.

Issues and Discussion

24 The threshold issue being raised on this motion by the Applicants is whether the CCAA affords this court the jurisdiction to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. If the question is answered in the affirmative, the secondary issue is whether this sale should authorize the Applicants to sell the Business.

25 The Applicants submit that it is well established in the jurisprudence that this court has the jurisdiction under the CCAA to approve the sales process and that the requested order should be granted in these circumstances.

26 Counsel to the Applicants submitted a detailed factum which covered both issues.

27 Counsel to the Applicants submits that one of the purposes of the CCAA is to preserve the going concern value of debtors companies and that the court's jurisdiction extends to authorizing sale of the debtor's business, even in the absence of a plan or creditor vote.

28 The CCAA is a flexible statute and it is particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and a myriad of interests.

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] S.C.C.A. No. 337 (S.C.C.). ("ATB Financial").

30 The jurisprudence has identified as sources of the court's discretionary jurisdiction, *inter alia*:

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 43; *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 5, *ATB Financial*, *supra*, at paras. 43-52.

31 However, counsel to the Applicants acknowledges that the discretionary authority of the court under s. 11 must be informed by the purpose of the CCAA.

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> Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* (2005), 9 C.B.R. (5 th) 135 (Ont. C.A.) at para. 44.

32 In support of the court's jurisdiction to grant the order sought in this case, counsel to the Applicants submits that Nortel seeks to invoke the "overarching policy" of the CCAA, namely, to preserve the going concern. *Residential Warranty Co. of Canada Inc., Re* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

33 Counsel to the Applicants further submits that CCAA courts have repeatedly noted that the purpose of the CCAA is to preserve the benefit of a going concern business for all stakeholders, or "the whole economic community":

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3 rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc*. (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

34 Counsel to the Applicants further submits that the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose, including the preservation of the going concern for the benefit of all stakeholders and further that it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met.

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, *Re PSINet*, *supra*, *Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], *supra*, *Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) at para. 1, *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* (2008), 45 C.B.R. (5th) 87 (Ont. S.C.J.) and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

36 In *Re Consumers Packaging*, *supra*, the Court of Appeal for Ontario specifically held that a sale of a business as a going concern during a CCAA proceeding is consistent with the purposes of the CCAA:

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> ...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

37 Similarly, in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, Blair J. (as he then was) expressly affirmed the court's jurisdiction to approve a sale of assets in the course of a CCAA proceeding before a plan of arrangement had been approved by creditors. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, at paras. 43, 45.

38 Similarly, in *PSINet Limited*, *supra*, the court approved a going concern sale in a CCAA proceeding where no plan was presented to creditors and a substantial portion of the debtor's Canadian assets were to be sold. Farley J. noted as follows:

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> [If the sale was not approved,] there would be a liquidation scenario ensuing which would realize far less than this going concern sale (which appears to me to have involved a transparent process with appropriate exposure designed to maximize the proceeds), thus impacting upon the rest of the creditors, especially as to the unsecured, together with the material enlarging of the unsecured claims by the disruption claims of approximately 8,600 customers (who will be materially disadvantaged by an interrupted transition) plus the job losses for approximately 200 employees. *Re PSINet Limited*, *supra*, at para. 3.

39 In *Re Stelco Inc*., *supra*, in 2004, Farley J. again addressed the issue of the feasibility of selling the operations as a going concern:

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc*, *supra*, at para. 1.

40 I accept these submissions as being general statements of the law in Ontario. The value of equity in an insolvent debtor is dubious, at best, and, in my view, it follows that the determining factor should not be whether the business continues under the debtor's stewardship or under a structure that recognizes a new equity structure. An equally important factor to consider is whether the case can be made to continue the business as a going concern.

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.), *Winnipeg Motor Express Inc., Re* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.) at para. 75.

42 Counsel to the Applicants also directed the court's attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor's assets where the debtor's plan "will simply propose that the net proceeds from the sale...be distributed to its creditors". In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* (2008), 46 C.B.R. (5th) 7 (B.C. C.A.) ("*Cliffs Over Maple Bay*"), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

43 In addressing this matter, it appears to me that the British Columbia Court of Appeal focussed on whether the court should grant the requested relief and not on the question of whether a CCAA court has the jurisdiction to grant the requested relief.

44 I do not disagree with the decision in *Cliffs Over Maple Bay*. However, it involved a situation where the debtor had no active business and did not have the support of its stakeholders. That is not the case with these Applicants.

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership*, 2009 BCCA 319 (B.C. C.A.).

46 At paragraphs 24 - 26 of the *Forest and Marine* decision, Newbury J.A. stated:

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for

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senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4 th) 576 (Alta. Q.B.):

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged...

26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the means contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary...

47 It seems to me that the foregoing views expressed in *Forest and Marine* are not inconsistent with the views previously expressed by the courts in Ontario. The CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and a sale by the debtor which preserves its business as a going concern is, in my view, consistent with those objectives.

48 I therefore conclude that the court does have the jurisdiction to authorize a sale under the CCAA in the absence of a plan.

49 I now turn to a consideration of whether it is appropriate, in this case, to approve this sales process. Counsel to the Applicants submits that the court should consider the following factors in determining whether to authorize a sale under the CCAA in the absence of a plan:

(a) is a sale transaction warranted at this time?

(b) will the sale benefit the whole "economic community"?

(c) do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

51 Counsel to the Applicants summarized the facts in support of the argument that the Sale Transaction should be approved, namely:

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(a) Nortel has been working diligently for many months on a plan to reorganize its business;

(b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;

(c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

52 The objections of MatlinPatterson and the UCC have been considered. I am satisfied that the issues raised in these objections have been addressed in a satisfactory manner by the ruling of Judge Gross and no useful purpose would be served by adding additional comment.

53 Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16.

Disposition

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

55 Accordingly, I approve the Bidding Procedures as described in the Riedel Affidavit and the Fourteenth Report of the Monitor, which procedures have been approved by the U.S. Court.

56 I am also satisfied that the Sale Agreement should be approved and further that the Sale Agreement be approved and accepted for the purposes of conducting the "stalking horse" bidding process in accordance with the Bidding Procedures including, without limitation the Break-Up Fee and the Expense Reimbursement (as both terms are defined in the Sale Agreement).

57 Further, I have also been satisfied that Appendix B to the Fourteenth Report contains information which is commercially sensitive, the dissemination of which could be detrimental to the stakeholders and, accordingly, I order that this document be sealed, pending further order of the court.

58 In approving the Bidding Procedures, I have also taken into account that the auction will be conducted prior to the sale approval motion. This process is consistent with the practice of this court.

59 Finally, it is the expectation of this court that the Monitor will continue to review ongoing issues in respect of the Bidding Procedures. The Bidding Procedures permit the Applicants to waive certain components of qualified bids without the consent of the UCC, the bondholder group and the Monitor. However, it is the expectation of this court that, if this situation arises, the Applicants will provide advance notice to the Monitor of its intention to do so.

Motion granted.

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TAB 26

Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
  VII.6 Conduct and liability of receiver
    VII.6.a General conduct of receiver
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.

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Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.
The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.
To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.
The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.
Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.
Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.
Table of Authorities
Cases considered:

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

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

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

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

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

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

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air

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Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it

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negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

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

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

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

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

[Emphasis added.]

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

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

[Emphasis added.]

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

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not*

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> *be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I

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am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a

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similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

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

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

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

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

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

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

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

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

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

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

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

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I agree.

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

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

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

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

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

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

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

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

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

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

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

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

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

***McKinlay J.A.* :**

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

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

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

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

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

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

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

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

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

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

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

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

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the

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amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

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

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

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

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

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

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

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

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

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

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership

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proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

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

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

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

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

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

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

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

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

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

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

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

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

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

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

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

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

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

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

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

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

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

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

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

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

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

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

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

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

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

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

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

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

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

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

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

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

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

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

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

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

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

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

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

Appeal dismissed.

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TAB 27

2015 CarswellOnt 4745
Ontario Superior Court of Justice [Commercial List]

Target Canada Co., Re

2015 CarswellOnt 4745, 251 A.C.W.S. (3d) 376, 30 C.B.R. (6th) 341

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

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

Morawetz R.S.J.

Judgment: March 30, 2015 [*]
Docket: CV-15-10832-00CL

Counsel: Counsel — not provided

Subject: Insolvency
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
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.e Miscellaneous

Headnote

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

Applicants brought motion pursuant to Companies' Creditors Arrangement Act for order approving asset purchase (transaction) contemplated by Asset Purchase Agreement (APA) among vendor and purchaser — Motion granted — Transaction was approved and ratified — Execution of APA was approved and ratified with minor amendments — Upon delivery of Monitor's certificate to purchaser, all of vendor's right, title and interest in purchased assets was to vest absolutely in purchaser free and clear of and from any and all interests.

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

Applicants brought motion pursuant to Companies' Creditors Arrangement Act for order approving asset purchase (transaction) contemplated by Asset Purchase Agreement (APA) among vendor and purchaser — Motion granted — Transaction was approved and ratified — Execution of APA was approved and ratified with minor amendments — Upon delivery of Monitor's certificate to purchaser, all of vendor's right, title and interest in purchased assets was to vest absolutely in purchaser free and clear of and from any and all interests.

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

Applicants brought motion pursuant to Companies' Creditors Arrangement Act for order approving asset purchase (transaction) contemplated by Asset Purchase Agreement (APA) among vendor and purchaser — Motion granted — Transaction was approved and ratified — Execution of APA was approved and ratified with minor amendments — Upon delivery of Monitor's certificate to purchaser, all of vendor's right, title and interest in purchased assets was to vest absolutely in purchaser free and clear of and from any and all interests.

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Generally — referred to

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

Generally — referred to

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

Generally — referred to

Retail Sales Tax Act, R.S.O. 1990, c. R.31

s. 6 — considered

MOTION by applicants pursuant to *Companies' Creditors Arrangement Act* for order approving asset purchase contemplated by asset purchase agreement.

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

1 THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "*CCAA*") for an order approving the asset purchase (the "*Transaction*") contemplated by an Asset Purchase Agreement (the "*Asset Purchase Agreement*") among Target Canada Co. ("*TCC*"), as Vendor, Target Corporation, as Purchaser (the "*Purchaser*"), and Target Brands, Inc. dated March 23, 2015 and certain related relief, was heard this day at 330 University Avenue, Toronto, Ontario.

2 ON READING the Notice of Motion of the Applicants, the Affidavit of Mark J. Wong sworn on March 23, 2015 including the exhibits thereto (the "*Wong Affidavit*"), and the Seventh Report (the "*Monitor's Seventh Report*") of Alvarez & Marsal Canada Inc., in its capacity as Monitor (the "*Monitor*"), filed, and on hearing the submissions of respective counsel for the Applicants and the Partnerships listed on Schedule "A" hereto, the Monitor, the Purchaser, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Robert Carson sworn March 25, 2015, filed:

Service and Definitions

3 1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record herein is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

4 2. THIS COURT ORDERS that any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Amended and Restated Initial Order in these proceedings dated January 15, 2015 [2015 CarswellOnt 4305 (Ont. S.C.J. [Commercial List])] (the "*Initial Order*"), or in the Asset Purchase Agreement, as applicable.

Approval of the Asset Purchase Agreement

5 3. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved and ratified and that the execution of the Asset Purchase Agreement by TCC is hereby approved and ratified with such minor amendments as TCC (with the consent of the Monitor) and the Purchaser may agree to in writing. TCC is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser and the Monitor shall be authorized to take such additional steps in furtherance of its responsibilities under the Asset Purchase Agreement.

6 4. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "B" hereto (the "*Monitor's Certificate*"), all of TCC's right, title and interest

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in and to the Purchased Assets shall vest absolutely in the Purchaser free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, Claims (as defined in the Asset Purchase Agreement), or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "*Claims*"), including, without limiting the generality of the foregoing:

(a) the Administration Charge, the KERP Charge, the Directors' Charge, the Financial Advisor Subordinated Charge, the DIP Lender's Charge, and the Agent's Charge and Security Interest (collectively, the "*CCAA Charges*"); and

(b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system;

7 (all of which are collectively referred to as the "*Encumbrances*")

8 and, for greater certainty, this Court orders that all of the Claims and Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

9 5. THIS COURT ORDERS that for the purposes of determining the nature and priority of Claims, the net proceeds received from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets and that from and after the delivery of the Monitor's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the Closing of the Transaction, as if the Transaction had not been completed.

10 6. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

11 7. THIS COURT ORDERS that, in accordance with Section 9.8(c) of the Asset Purchase Agreement, the Purchaser shall repair, or shall cause to be repaired, in either case at its sole cost and expense, any damage to TCC's locations resulting from the transfer and delivery or destruction, as applicable, of the Purchased Assets.

General Provisions

12 8. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of TCC and any bankruptcy order issued pursuant to any such applications; and

(c) any assignment in bankruptcy made in respect of TCC;

13 the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of TCC and shall not be void or voidable by creditors of TCC, nor shall it constitute nor be deemed to be a fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

14 9. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario) and any equivalent legislation in any other jurisdiction in which all or any part of the Purchased Assets are located and that the Transaction is exempt from the application of Section 6 of the *Retail Sales Tax Act* (Ontario) and any equivalent or corresponding provisions under any other applicable tax legislation.

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15 10. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal, regulatory or administrative bodies, having jurisdiction in Canada or in the United States of America, to give effect to this Order and to assist TCC, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to TCC and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist TCC and the Monitor and their respective agents in carrying out the terms of this Order.

Schedule "A"

Partnerships

Target Canada Pharmacy Franchising LP

Target Canada Mobile LP

Target Canada Property LP

Schedule "B"

Court File No. CV-15-10832-00CL

Ontario Superior Court of Justice Commercial List

THE HONOURABLE	)	MONDAY, THE 30{th}
	)	
REGIONAL SENIOR JUSTICE MORAWETZ	))	DAY OF MARCH, 2015

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP., and TARGET CANADA PROPERTY LLC (collectively the "*Applicants*")

Monitor's Certificate

Recitals

A. All undefined terms in this Monitor's Certificate have the meanings ascribed to them in the Order of the Court dated March 30, 2015 (the "*Approval and Vesting Order*") approving the Asset Purchase Agreement entered into among Target Canada Co. ("*TCC*"), Target Corporation (the "*Purchaser*") and Target Brands, Inc. dated March 23, 2015 (the "*Asset Purchase Agreement*"), a copy of which is attached as Exhibit D to the Affidavit of Mark J. Wong dated March 23, 2015.

B. Pursuant to the Approval and Vesting Order, the Court approved the Asset Purchase Agreement and provided for the vesting in the Purchaser of TCC's right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Monitor to the Purchaser and TCC of a certificate confirming (i) the conditions to Closing as set out in Articles 7, 8 and 9 of the Asset Purchase Agreement have been satisfied or waived by the Purchaser and TCC, as applicable; and (ii) the Transaction has been completed to the satisfaction of the Monitor.

THE MONITOR CERTIFIES the following:

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1. The conditions to Closing as set out in Articles 7, 8 and 9 of the Asset Purchase Agreement have been satisfied or waived by the Purchaser and TCC, as applicable; and

2. The Transaction has been completed to the satisfaction of the Monitor.

3. This Certificate was delivered by the Monitor at __________ [TIME] on __________ [DATE].

ALVAREZ & MARSAL CANADA INC., in its capacity as Court-appointed Monitor of Target Canada Co., *et al.* and not in its personal or corporate capacity

Per: __________

Name:

Title:

Motion granted.

Footnotes

* Full reasons reported at *Target Canada Co., Re* (2015), 2015 ONSC 2066, 2015 CarswellOnt 5211 (Ont. S.C.J. [Commercial List]).

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LOYALTYONE, CO.

Court File No.: CV-23-00696017-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE APPLICANT
(Approval and Vesting Order, Assignment Order and Ancillary Relief Order)

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