Court File No.: CV-11-9283-00CL

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 UNIQUE BROADBAND SYSTEMS INC.

BRIEF OF AUTHORITIES OF UNIQUE BROADBAND SYSTEMS INC. AND UBS WIRELESS SERVICES INC.

Dated: 12 February 2013

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TAB 1

CITATION: Unique Broadband Systems (Re), 2012 ONSC 6366
COURT FILE NO.: CV-11-9283-00CL
DATE: 2012-11-09

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, c. C-36, AS AMENDED and IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS, INC.

BEFORE: Mr. Justice H.J. Wilton-Siegel

COUNSEL: *E. Patrick Shea*, for the Applicant, Unique Broadband Systems, Inc.

Joseph P. Groia, for Jolian Investments Limited and Gerald McGoey

Peter Roy, for DOL Technologies Inc. and Alex Dolgonos

Matthew P. Gottlieb, for the Monitor, Duff & Phelps Canada Restructuring Inc.

HEARD: November 8, 2012

ENDORSEMENT

[1] The applicant seeks an order approving a process for marketing the shares of LOOK Communications Inc. ("LOOK") owned by UBS Wireless Services Inc., a subsidiary of the applicant. The proposed sales process is set out in the Eleventh Report of the Monitor, Duff & Phelps Canada Restructuring Inc. (the "Monitor"). The application is opposed on several issues by Jolian Investments Limited and Gerald McGoey (the "McGoey respondents") and by DOL Technologies Inc. and Alex Dolgonos (the "Dolgonos respondents").

[2] The proposed sales process contemplates that two directors of the applicant, Kenneth Taylor ("Taylor") and Victor Wells ("Wells"), will constitute a committee that will have decision-making responsibility for the sales process. It is contemplated that this committee will engage the Monitor to act as its sales agent in marketing the LOOK shares to the public and in managing the negotiation process in respect of offers for the shares. The third director of the applicant, Robert Ulicki ("Ulicki"), has expressed an interest in making an offer for the LOOK shares, either personally or through a corporation related to him. Accordingly, he has not participated in the approval of the sales process and will not participate in any meetings of the board of the applicant pertaining to the sales process or in any meetings of the committee overseeing the sales process.

[3] The McGoey respondents and the Dolgonos respondents (collectively, the "respondents") raise three specific issues which will be addressed in turn.

[4] First, these respondents allege that Ulicki should be prevented by Court order from making an offer for the LOOK shares in the sales process. Ulicki was a director of LOOK from July 2010 to October 2010. In his capacity as a director of the applicant, Ulicki is also aware of expressions of interest made to the applicant prior to a decision being made by the board of the applicant to offer the LOOK shares for sale, as set out in an affidavit that he has filed in connection with this motion. Among other things, in addition to meetings with two prospective investment dealers in May 2012, Ulicki has also reviewed six letters from parties expressing an interest in acquiring the LOOK shares, either directly from the applicant or as part of a partial takeover bid of LOOK or other business combination transaction with LOOK. The timing of this involvement is not clear in respect of all of these third party approaches to the applicant. However, it is clear that, in some if not all instances, Ulicki is aware of the indicative range of values for the LOOK shares proposed by these interested parties.

[5] In considering this matter, the litmus test of the applicant and the Court must be the establishment of a sales process that is likely to maximize the value received by the applicant for its LOOK shares. The respondents allege that permitting Ulicki to participate in the sales process as a prospective purchaser will deter all other interested parties from making an offer. This case has not, however, been established on the record before the Court on this motion.

[6] LOOK is a public company. The progress of the litigation between LOOK and the respondents, among others, is public knowledge. The respondents have not demonstrated that Ulicki has received any information regarding LOOK, either during the short period in which he was a LOOK director or in his capacity as a director of the applicant, that has not been disclosed to the public or is not otherwise available from the litigation record.

[7] The respondents have also failed to demonstrate that the information Ulicki has received to date regarding the parties who have previously expressed an interest in the LOOK shares would deter those parties, or other parties, from making an offer for the LOOK shares. There is no direct evidence before the Court on this issue apart from the respondents' assertion, which amounts to speculation at this stage. Moreover, there is some inherent protection against such an occurrence in the present circumstances. In the event that Ulicki were the only offeror, the applicant would need to satisfy the Court that such circumstances did not reflect a flawed sales process and the decision-making of the directors in persisting with such a sales process would also be subject to review.

[8] I wish to note, however, that in concluding that it is not appropriate for the Court to order that Ulicki should refrain from participating in the sales process, the Court is not determining that Ulicki is entitled to participate in the sales process. That remains a decision of the committee of directors who will oversee the sales process and who have access to more information than was presented to the Court. While section 36 of the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, (the "CCAA") does contemplate related parties purchasing assets of a debtor subject to CCAA proceedings, this provision does not establish an automatic right in favour of a related party to participate in a sales process. Ultimately, the committee of Taylor and Wells bears a continuing responsibility to be satisfied that the sales process is conducted in a

manner that will maximize the value to the stakeholders and to demonstrate the integrity of that process when Court approval of a proposed transaction is sought. As part of that responsibility, the committee must be satisfied that Ulicki's participation in the sales process will not, and did not, impair that objective. The decision of the Court is limited to facts before it. The fact that the respondents have failed to satisfy the onus on them to establish evidence that prospective purchasers will be deterred from making an offer for the LOOK shares does not relieve the applicant from its obligation to be satisfied that this will not occur based on the facts before it and any other facts that may subsequently come to the attention of the committee members.

[9] Second, the respondents seek the appointment of representatives to the committee of the applicant overseeing the sales process. This relief is denied for a general reason as well as reasons specific to each of McGoey and Dolgonos.

[10] The principal reason is that the respondents' request is inconsistent with the concept of a debtor-in-possession under the CCAA. Under CCAA proceedings, absent special circumstances, the debtor, rather than any third party, remains responsible for, and in control of, the debtor's business and any sale of its assets as part of an eventual reorganization. That control rests with the directors of the debtor. The respondents have failed to establish any special circumstances in this case that compel a different arrangement. As a related matter, it is unclear to whom such representatives would owe a duty. The only reasonable basis would be to impose the duties of directors upon any such representative. Such an arrangement would only make sense, however, if there were reason to doubt that the current committee members were unable to fulfil their functions without further assistance. In this case, the committee members, Taylor and Wells, are acknowledged to be independent directors. They are experienced business people. They are also advised by legal counsel. There is no suggestion that they will be influenced in some manner by Ulicki. There is no evidence that they are unable to perform the necessary oversight function without further assistance.

[11] In addition, McGoey is a contingent creditor but not a shareholder to any material extent in the applicant. There is no evidence that this interest is affected in any way by the sales process. The McGoey respondents believe any sale would be at a gross undervalue at the present time and seek a representative to, among other things, attempt to convince the applicant not to proceed with the sales process. However, special circumstances specific to a creditor, or a class of creditors, must be demonstrated before the Court would give consideration to the appointment of a representative. In this case, it would be premature to consider whether such circumstances exist until the claims of the McGoey respondents are quantified in the applicant's claims process. Even then, the mere fact of being the largest unsecured creditor is, by itself, insufficient to justify such relief. In addition, the McGoey respondents have a potential conflict in that, as defendants in the litigation commenced by LOOK, they may have an interest in the identity and intentions of any purchaser of the applicant's controlling interest in LOOK. If the proposed purchaser were unacceptable to McGoey, they might also have an additional reason for preventing such a sale. For these reasons specific to the McGoey respondents, it would be inappropriate to appoint a representative of the McGoey respondents to the committee overseeing the sales process.

[12] While Dolgonos is entitled to protection in respect of the conduct of the sales process as a shareholder, he approved the selection and appointment of Taylor and Wells pursuant to a settlement of his litigation against the applicant. As these parties form the present committee, he

has already had a significant say in the composition of the committee overseeing the sales process. He has failed to demonstrate circumstances entitling him to a personal representative on the committee. There is no reason to conclude that the independence of these two directors has been compromised since their appointment such that the shareholders generally require a representative on the committee to protect their interests. The fact that Dolgonos is a large, if not the largest, shareholder of the applicant does not give him any greater rights in respect of a proposed sale. Moreover, the Dolgonos respondents are also defendants in the action commenced by LOOK. As such, the same issue of a potential conflict of interest as was addressed in respect of the McGoey respondents arises in respect of the Dolgonos respondents.

[13] Third, the respondents challenge the intended engagement of the Monitor as the applicant's sales agent in lieu of the engagement of an investment dealer. There are two separate but related issues here – the identity of the applicant's sales agent and the manner of its remuneration.

[14] There is a reasonable basis for the appointment of the Monitor as the sales agent in the present circumstances. The evidence is that it is probable that the proposed transaction is too small to attract the interest of an investment banking firm unless a substantial success fee were paid. In these circumstances, the applicant considers it appropriate to engage the Monitor on a fee-for-service basis. The record states that the Monitor has experience in similar transactions and access to investment banking expertise from an affiliate. There is nothing in the record that contradicts this evidence. There is also nothing in principle that prevents a court-appointed monitor under the CCAA from also acting as a sales agent if there are good business reasons for doing so.

[15] With respect to remuneration, the applicant's decision to go with a fee-for-service arrangement is supportable in the present circumstances, given the magnitude of any success fee that would be required by an investment dealer. It is important to note that the applicant has the ability, and the responsibility, to control the extent of the Monitor's activities as sales agent, and its consequential fees, as the sales process unfolds. There is therefore a basis for ensuring that the sales agency fees stay within the parameters contemplated in the alternative scenarios of success or failure of the sales process. Further, the Monitor's fees remain subject to Court approval at a future date, at which time the creditors have the right to comment on the reasonableness of the services provided and the related fees.

[16] Accordingly, I conclude that the applicant's decision to engage the Monitor as its sales agent in respect of the proposed sales process is reasonable in the present circumstances.

[17] The applicant's proposed sales process, as described in the Monitor's Eleventh Report is therefore approved. For clarity, such approval does not, however, constitute the granting by the Court at this time of any approvals or exemption orders that may be required under corporate or securities legislation in respect of any proposed transaction that may result from such sales process.

[18] In addition, the stay of proceedings in the Initial Order of this Court dated July 5, 2011 is hereby extended to February 1, 2013 to permit completion of such sales process.

[19] If the parties are unable to agree on costs, they shall have thirty days from the date of this Endorsement to submit a costs outline and to make written submissions not exceeding five pages in length.

W. Wilton-Siegel J.

Wilton-Siegel J.

Date: November 9, 2012

TAB 2

SUPERIOR COURT

(Commercial division)

The Companies' Creditors Arrangement Act

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-038474-108

DATE: 15 October 2010

UNDER THE PRESIDENCY OF: THE HONOURABLE ROBERT MONGEON, J.S.C.

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

WHITE BIRCH PAPER HOLDING COMPANY
-and-
WHITE BIRCH PAPER COMPANY
-and-
STADACONA GENERAL PARTNER INC.
-and-
BLACK SPRUCE PAPER INC.
-and-
F.F. SOUCY GENERAL PARATNER INC.
-and-
3120772 NOVA SCOTI COMPAPNY
-and-
ARRIMAGE DE GROS CACOUNA INC.
-and-
PAPIER MASSON LTÉE

Petitioners

-and-
ERNST & YOUNG INC.

Monitor

-and-
STADACONA LIMITED PARTNERSHIP
-and-
JM1838 **F.F. SOUCY LIMITED PARTNERSHIP**

-and-
F.F. SOUCY INC. & PARTNERS, LIMITED PARTNERSHIP
Mises-en-cause
-and-
SERVICE D'IMPARTITION INDUSTRIEL INC.
-and-
KSH SOLUTIONS INC.
-and-
BD WHITE BIRCH INVESTMENT LLC
Intervenant
-and-
SIXTH AVENUE INVESTMENT CO. LLC
DUNE CAPITAL LLC
DUNE CAPITAL INTERNATIONAL LTD
Opposing parties

REASONS FOR JUDGMENT GIVEN ORALLY ON SEPTEMBER 24, 2010

BACKGROUND

[1] On 24 February 2010, I issued an Initial Order under the CCAA protecting the assets of the Debtors and Mis-en-cause (the WB Group). Ernst & Young was appointed Monitor.

[2] On the same date, Bear Island Paper Company LLC (Bear Island) filed for protection of Chapter 11 of the US Bankruptcy code before the US Bankruptcy Court for the Eastern District of Virginia.

[3] On April 28, 2010, the US Bankruptcy Court issued an order approving a Sale and Investor Solicitation Process ("SISP") for the sale of substantially all of the WB Group's assets. I issued a similar order on April 29, 2010. No one objected to the issuance of the April 29, 2010 order. No appeal was lodged in either jurisdiction.

[4] The SISP caused several third parties to show some interest in the assets of the WG Group and led to the execution of an Asset Sale Agreement (ASA) between the WB Group and BD White Birch Investment LLC ("BDWB"). The ASA is dated August 10, 2010. Under the ASA, BDWB would acquire all of the assets of the Group and would:

a) assume from the Sellers and become obligated to pay the Assumed Liabilities (as defined in the ASA);

b) pay US$90 million in cash;

c) pay the Reserve Payment Amount (as defined);

d) pay all fees and disbursements necessary or incidental for the closing of the transaction; and

e) deliver the Wind Down Amount (as defined).

the whole for a consideration estimated between $150 and $178 million dollars.

[5] BDWB was to acquire the Assets through a Stalking Horse Bid process. Accordingly, Motions were brought before the US Bankruptcy Court and before this Court for orders approving:

a) the ASA

b) BDWB as the stalking horse bidder

c) The Bidding Procedures

[6] On September 1, 2010, the US Bankruptcy Court issued an order approving the foregoing without modifications.

[7] On September 10, 2010, I issued an order approving the foregoing with some modifications (mainly reducing the Break-Up Fee and Expense Reimbursement clauses from an aggregate total sought of US$5 million, down to an aggregate total not to exceed US$3 million).

[8] My order also modified the various key dates of implementation of the above. The date of September 17 was set as the limit to submit a qualified bid under stalking horse bidding procedures, approved by both Courts and the date of September 21st was set as the auction date. Finally, the approval of the outcome of the process was set for September 24, 2010[1].

[9] No appeal was lodged with respect to my decision of September 10, 2010.

[10] On September 17, 2010, Sixth Avenue Investment Co. LLC ("Sixth Avenue") submitted a qualified bid.

[11] On September 21, 2010, the WB Group and the Monitor commenced the auction for the sale of the assets of the group. The winning bid was the bid of BDWB at US$236,052,825.00.

[12] BDWB's bid consists of:

i) US$90 million in cash allocated to the current assets of the WB Group;

[1] See my Order of September 10, 2010.

ii) $4.5 million of cash allocated to the fixed assets;

iii) $78 million in the form of a credit bid under the First Lien Credit Agreement allocated to the WB Group's Canadian fixed assets which are collateral to the First Lien Debt affecting the WB Group;

iv) miscellaneous additional charges to be assumed by the purchaser.

[13] Sixth Avenue's bid was equivalent to the BDWB winning bid less US$500,000.00, that is to say US$235,552,825.00. The major difference between the two bids being that BDWB used credit bidding to the extent of $78 million whilst Sixth Avenue offered an additional $78 million in cash. For a full description of the components of each bid, see the Monitor's Report of September 23, 2010.

[14] The Sixth Avenue bidder and the BDWB bidder are both former lenders of the WB Group regrouped in new entities.

[15] On April 8, 2005, the WB Group entered into a First Lien Credit Agreement with Credit Suisse AG Cayman Islands and Credit Suisse AG Toronto acting as agents for a number of lenders.

[16] As of February 24, 2010, the WB Group was indebted towards the First Lien Lenders under the First Lien Credit Agreement in the approximate amount of $438 million (including interest). This amount was secured by all of the Sellers' fixed assets. The contemplated sale following the auction includes the WB Group's fixed assets and unencumbered assets.

[17] BDWB is comprised of a group of lenders under the First Lien Credit Agreement and hold, in aggregate approximately 65% of the First Lien Debt. They are also "Majority Lenders" under the First Lien Credit Agreement and, as such, are entitled to make certain decisions with respect to t he First Lien Debt including the right to use the security under the First Lien Credit Agreement as tool for credit bidding.

[18] Sixth Avenue is comprised of a group of First Lien Lenders holding a minority position in the First Lien Debt (approximately 10%). They are not "Majority Lenders" and accordingly, they do not benefit from the same advantages as the BDWB group of First Lien Lenders, with respect to the use of the security on the fixed assets of the WB Group, in a credit bidding process[2].

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[2] For a more comprehensive analysis of the relationship of BDWB members and Sixth Avenue members as lenders under the original First Lien Credit Agreement of April 8, 2005, see paragraphs 15 to 19 of BDWB's Intervention.

[19] The bidding process took place in New York on September 21, 2010. Only two bidders were involved: the winning bidder (BDWB) and the losing bidder[3] (Sixth Avenue).

[20] In its Intervention, BDWB has analysed all of the rather complex mechanics allowing it to use the system of credit bidding as well as developing reasons why Sixth Avenue could not benefit from the same privilege. In addition to certain arguments developed in the reasons which follow, I also accept as my own BDWB's submissions developed in section (e), paragraphs [40] to [53] of its Intervention as well as the arguments brought forward in paragraphs [54] to [60] validating BDWB's specific right to credit bid in the present circumstances.

[21] Essentially, BDWB establishes its right to credit bid by referring not only to the September 10 Court Order but also by referring to the debt and security documents themselves, namely the First Lien Credit Agreement, the US First Lien Credit Agreement and under the Canadian Security Agreements whereby the "Majority Lender" may direct the "Agents" to support such credit bid in favour of such "Majority Lenders". Conversely, this position is not available to the "Minority Lenders". This reasoning has not been seriously challenged before me.

[22] The Debtors and Mis-en-cause are now asking me to approve the sale of all and/or substantially all the assets of the WB Group to BDWB. The disgruntled bidder asks me to not only dismiss this application but also to declare it the winning bidder or, alternatively, to order a new auction.

[23] On September 24, 2010, I delivered oral reasons in support of the Debtors' Motion to approve the sale. Here is a transcript of these reasons.

<u>REASONS</u> (delivered orally on September 24, 2010)

[24] I am asked by the Petitioners to approve the sale of substantially all the WB Group's assets following a bid process in the form of a "Stalking Horse" bid process which was not only announced in the originating proceedings in this file, I believe back in early 2010, but more specifically as from May/June 2010 when I was asked to authorise the Sale and Investors Solicitation Process (SISP). The SISP order led to the canvassing of proposed bidders, qualified bidders and the eventual submission of a "Stalking Horse" bidder. In this context, a Motion to approve the "Stalking Horse" Bid process to approve the assets sale agreement and to approve a bidding procedure for the sale of substantially all of the assets of the WB Group was submitted and sanctioned by my decision of September 10, 2010.

[25] I note that throughout the implementation of this sale process, all of its various preliminary steps were put in place and approved without any contestation whatsoever

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[3] Sometimes referred to as the "bitter bidder" or "disgruntled bidder" See Re: *Abitibi Bowater* [2010] QCCS 1742 (Gascon J.)

by any of the interested stakeholders except for the two construction lien holders KSH[4] and SIII[5] who, for very specific reasons, took a strong position towards the process itself (not that much with the bidding process but with the consequences of this process upon their respective claims.

[26] The various arguments of KSH and SIII against the entire Stalking Horse bid process have now become moot, considering that both BDWB and Sixth Avenue have agreed to honour the construction liens and to assume the value of same (to be later determined).

[27] Today, the Motion of the Debtors is principally contested by a group which was identified as the "Sixth Avenue" bidders and more particularly, identified in paragraph 20 of the Motion now before me. The "Stalking Horse" bidder, of course, is the Black Diamond group identified as "BD White Birch Investment LLC". The Dune Group of companies who are also secured creditors of the WB Group are joining in, supporting the position of Sixth Avenue. Their contestation rests on the argument that the best and highest bid at the auction, which took place in New York on September 21, should not have been identified as the Black Diamond bid. To the contrary, the winning bid should have been, according to the contestants, the "Sixth Avenue" bid which was for a lesser dollar amount ($500,000.00), for a larger cash amount (approximately $78,000,000.00 more cash) and for a different allocation of the purchase price.

[28] Notwithstanding the foregoing, the Monitor, in its report of August 23, supports the "Black Diamond" winning bid and the Monitor recommends to the Court that the sale of the assets of the WB Group be made on that basis.

[29] The main argument of "Sixth Avenue" as averred, sometimes referred to as the "bitter bidder", comes from the fact that the winning bid relied upon the tool of credit bidding to the extent of $78,000,000.00 in arriving at its total offer of $236,052,825.00.

[30] If I take the comments of "Sixth Avenue", the use of credit bidding was not only a surprise, but a rather bad surprise, in that they did not really expect that this would be the way the "Black Diamond" bid would be ultimately constructed. However, the possibility of reverting to credit bidding was something which was always part of the process. I quote from paragraph 7 of the Motion to Approve the Sale of the Assets, which itself quotes paragraph 24 of the SISP Order, stating that:

> **"24. Notwithstanding anything herein to the contrary, including without limitation, the bidding requirements herein, the agent under the White Birch DIP Facility (the "DIP Agent") and the agent to the WB Group's first lien term loan lenders (the First Lien Term Agent"), on behalf of the lenders under White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be deemed Qualified Bidders and any bid**

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[4] KSH Solutions Inc.

[5] Service d'Impartition Industriel Inc.

submitted by such agent on behalf of the respective lenders in respect of all or a portion of the Assets shall be deemed both Phase 1 Qualified Bids and Phase 2 Qualified Bids. The DIP Agent and First Lien Term Agent, on behalf of the lenders under the White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be permitted in their sole discretion, to credit bid up to the full amount of any allowed secure claims under the White Birch DIP Facility and the first lien term loan agreement, respectively, to the extent permitted under Section 363(k) of the Bankruptcy Code and other applicable law."

[31] The words "and other applicable law" could, in my view, tolerate the inclusion of similar rules of procedure in the province of Quebec.[6]

[32] The possibility of reverting to credit bidding was also mentioned in the bidding procedure sanctioned by my decision of September 10, 2010 as follows and I now quote from paragraph 13 of the Debtors' Motion:

13. "Notwithstanding anything herein to the contrary, the applicable agent under the DIP Credit Agreement and the application agent under the

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[6] The concept of credit bidding is not foreign to Quebec civil law and procedure. See for example articles 689 and 730 of the Quebec code of Civil Procedure which read as follows:

689. The purchase price must be paid within five days, at the expiry of which time interest begins to run. Nevertheless, when the immovable is adjudged to the seizing creditor or any hypothecary creditor who has filed an opposition or whose claim is mentioned in the statement certified by the registrar, he may retain the purchase-money to the extent of the claim until the judgment of distribution is served upon him.

730. A purchaser who has not paid the purchase price must, within ten days after the judgment of homologation is transmitted to him, pay the sheriff the amounts necessary to satisfy the claims which have priority over his own; if he fails to do so, any interested party may demand the resale of the immovable upon him for false bidding.
When the purchaser has fulfilled his obligation, the sheriff must give him a certificate that the purchase price has been paid in full.

See also Denis Ferland and Benoit Emery, 4ème edition, volume 2 (Éditions Yvon Blais (2003)):

"La loi prévoit donc que, lorsque l'immeuble est adjugé au saisissant ou à un créancier hypothécaire qui a fait opposition, ou dont la créance est portée à l'état certifié par l'officier de la publicité des droits, l'adjudicataire peut retenir le prix, y compris le prix minimum annoncé dans l'avis de vente (art. 670, al. 1, e), 688.1 C.p.c.), jusqu'à concurrence de sa créance et tant que ne lui a pas été signifié le jugement de distribution prévu à l'article 730 C.p.c. (art. 689, al 2 C.p.c.). <u>Il n'aura alors à payer, dans les cinq jours suivant la signification de ce jugement, que la différence entre le prix d'adjudication et le montant de sa créance pour satisfaire aux créances préférées à la sienne (art. 730, al. 1 C.p.c.).</u> La Cour d'appel a déclaré, à ce sujet, que puisque le deuxième alinéa de l'article 689 C.p.c. est une exception à la règle du paiement lors de la vente par l'adjudicataire du prix minimal d'adjudication (art. 688.1, al. 1 C.p.c.) et à celle du paiement du solde du prix d'adjudication dans les cinq jours suivants (art. 689, al. 1 C.p.c.), il doit être interprété de façon restrictive. Le sens du mot «créance», contenu dans cet article, ne permet alors à l'adjudicataire de retenir que la partie de sa créance qui est colloquée ou susceptible de l'être, tout en tenant compte des priorités établies par la loi."

See, finally, *Montreal Trust vs Jori Investment Inc.* (J.E. 80-220 (C.S.)), *Eugène Marcoux Inc. v. Côté (1990) R.J.Q. 1221 (C.A.)*

First Lien Credit Agreement shall each be entitled to credit bid pursuant to Section 363(k) of the Bankruptcy Code and other applicable law.

[33] I draw from these excerpts that when the "Stalking Horse" bid process was put in place, those bidders able to benefit from a credit bidding situation could very well revert to the use of this lever or tool in order to arrive at a better bid[7].

[34] Furthermore, many comments were made today with respect to the dollar value of a credit bid versus the dollar value of a cash bid. I think that it is appropriate to conclude that if credit bidding is to take place, it goes without saying that the amount of the credit bid should not exceed, but should be allowed to go as, high as the face value amount of the credit instrument upon which the credit bidder is allowed to rely. The credit bid should not be limited to the fair market value of the corresponding encumbered assets. It would then be just impossible to function otherwise because it would require an evaluation of such encumbered assets, a difficult, complex and costly exercise.

[35] Our Courts have always accepted the dollar value appearing on the face of the instrument as the basis for credit bidding. Rightly or wrongly, this is the situation which prevails.

[36] Many arguments were brought forward, for and against the respective position of the two opposing bidders. At the end of the day, it is my considered opinion that the "Black Diamond" winning bid should prevail and the "Sixth Avenue" bid, the bitter bidder, should fail.

[37] I have dealt briefly with the process. I don't wish to go through every single step of the process but I reiterate that this process was put in place without any opposition whatsoever. It is not enough to appear before a Court and say: "Well, we've got nothing to say now. We may have something to say later" and then, use this argument to reopen the entire process once the result is known and the result turns out to be not as satisfactory as it may have been expected. In other words, silence sometimes may be equivalent to acquiescence. All stakeholders knew what to expect before walking into the auction room.

[38] Once the process is put in place, once the various stakeholders accept the rules, and once the accepted rules call for the possibility of credit bidding, I do not think that,

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[7] The SISP, the bidding procedure and corresponding orders recognize the principle of credit bidding at the auction and these orders were not the subject of any appeal procedure.
See paragraphs 24, 25 and 26 of BDWB's Intervention.
As for the right to credit bid in a sale by auction under the CCAA, see Re: *Maax Corporation* (QSC. no. 500-11-033561-081, July 10, 2008, , Buffoni J.)
See also Re: *Brainhunter* (OSC Commercial List, no.09-8482-00CL, January 22, 2010)

at the end of the day, the fact that credit bidding was used as a tool, may be raised as an argument to set aside a valid bidding and auction process.

[39] Today, the process is completed and to allow "Sixth Avenue" to come before the Court and say: "My bid is essentially better than the other bid and Court ratify my bid as the highest and best bid as opposed to the winning bid" is the equivalent to a complete eradication of all proceedings and judgments rendered to this date with respect to the Sale of Assets authorized in this file since May/June 2010 and I am not prepared to accept this as a valid argument. Sixth Avenue should have expected that BDWB would want to revert to credit bidding and should have sought a modification of the bidding procedure in due time.

[40] The parties have agreed to go through the bidding process. Once the bidding process is started, then there is no coming back. Or if there is coming back, it is because the process is vitiated by an illegality or non-compliance of proper procedures and not because a bidder has decided to credit bid in accordance with the bidding procedures previously adopted by the Court.

[41] The Court cannot take position today which would have the effect of annihilating the auction which took place last week. The Court has to take the result of this auction and then apply the necessary test to approve or not to approve that result. But this is not what the contestants before me ask me to do. They are asking me to make them win a bid which they have lost.

[42] It should be remembered that "Sixth Avenue" agreed to continue to bid even after the credit bidding tool was used in the bidding process during the auction. If that process was improper, then "Sixth Avenue" should have withdrawn or should have addressed the Court for directions but nothing of the sort was done. The process was allowed to continue and it appears evident that it is only because of the end result which is not satisfactory that we now have a contestation of the results.

[43] The arguments which were put before me with a view to setting aside the winning bid (leaving aside those under Section 36 of the CCAA to which I will come to a minute) have not convinced me to set it aside. The winning bid certainly satisfies a great number of interested parties in this file, including the winning bidders, including the Monitor and several other creditors.

[44] I have adverse representations from two specific groups of creditors who are secured creditors of the White Birch Group prior to the issue of the Initial Order which have, from the beginning, taken strong exceptions to the whole process but nevertheless, they constitute a limited group of stakeholders. I cannot say that they speak for more interests than those of their own. I do not think that these creditors speak necessarily for the mass of unsecured creditors which they allege to be speaking for. I see no benefit to the mass of creditors in accepting their submissions, other than

the fact that the Monitor will dispose of US$500,000.00 less than it will if the winning bid is allowed to stand.

[45] I now wish to address the question of Section 36 CCAA.

[46] In order to approve the sale, the Court must take into account the provisions of Section 36 CCAA and in my respectful view, these conditions are respected.

[47] Section 36 CCAA reads as follows:

> **36. (1) A debtor company in respect of which an order has been made under this Act <u>may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court</u>. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.**
>
> **(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.**
>
> **(3) In deciding whether to grant the authorization, the court is to <u>consider, among other things,</u>**
>
> **(*a*) whether the process leading to the proposed sale or disposition was <u>reasonable in the circumstances</u>;**
>
> **(*b*) whether the <u>monitor approved the proc</u>ess leading to the proposed sale or disposition;**
>
> **(*c*) whether the monitor <u>filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;</u>**
>
> **(*d*) the <u>extent to which the creditors were consulted</u>;**
>
> **(*e*) the effects of the proposed sale or disposition on the creditors and other interested parties; and**
>
> **(*f*) whether the <u>consideration to be received for the assets is reasonable and fair</u>, taking into account their market value.**
>
> **(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that**
>
> **(*a*) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and**

(*b*) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

(5) For the purpose of subsection (4), a person who is related to the company includes

(*a*) a director or officer of the company;

(*b*) a person who has or has had, directly or indirectly, control in fact of the company; and

(*c*) a person who is related to a person described in paragraph (*a*) or (*b*).

(6) The court may authorize a sale or <u>disposition free and clear of any security, charge or other restriction</u> and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.

2005, c. 47, s. 131; 2007, c. 36, s. 78.

(added underlining)

[48] The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.

[49] The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.

[50] Nevertheless, I was given two authorities as to what should guide the Court in similar circumstances, I refer firstly to the comments of Madame Justice Sarah Peppall in *Canwest* [2002], CarswellOnt 3509, and she writes at paragraph 13:

"The proposed disposition of assets meets the Section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.* decision. Indeed, to a large degree, the criteria overlap. The process was reasonable as the Monitor was content with it (and this is the case here). **Sufficient efforts were made to attract the best possible bid** (this was done here through the process, I don't have to review this in detail); **the SISP was widely publicized** (I am given to understand that, in this present instance, the SISP was publicized enough to generate the interest of many interested bidders and then a smaller group of Qualified Bidders which ended up in the choice of one "Stalking Horse" bidder); **ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy** (this was all done in the present case.) **The logical extension of that conclusion is that the AHC Transaction is as well** (and, of course, understand that the words "preferable to a bankruptcy" must be added to this last sentence). **The effect of the proposed sale on other interested parties is very positive.** (It doesn't mean by saying that, that it is positive upon all the creditors and that no creditor will not suffer from the process but given the representations made before me, I have to conclude that the proposed sale is the better solution for the creditors taken as a whole and not taken specifically one by one) **Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors.**

[51] Here, we may have an argument that the sale will not provide significant recoveries for unsecured creditors but the question which needs to be asked is the following: "Is it absolutely necessary to provide interest for all classes of creditors in order to approve or to set aside a "Stalking Horse bid process"?

[52] In my respectful view, it is not necessary. It is, of course, always better to expect that it will happen but unfortunately, in any restructuring venture, some creditors do better than others and sometimes, some creditors do very badly. That is quite unfortunate but it is also true in the bankruptcy alternative. In any event, in similar circumstances, the Court must rely upon the final recommendation of the Monitor which, in the present instance, supports the position of the winning bidder.

[53] In *Nortel Networks*, Mister Justice Morawetz, in the context of a Motion for the Approval of an Assets Sale Agreement, Vesting Order of approval of an intellectual Property Licence Agreement, etc. basically took a similar position (2009, CarswellOnt 4838, at paragraph 35):

> **"The duties of the Court in reviewing a proposed sale of assets are as follows:**
>
> > **1) It should consider whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;**
> >
> > **2) It should consider the interests of all parties;**
> >
> > **3) It should consider the efficacy and integrity of the process by which offers have been obtained;**

> **4) and it should consider whether there has been unfairness in the working out of the process."**

[54] I agree with this statement and it is my belief that the process applied to the present case meets these criteria.

[55] I will make no comment as to the standing of the "bitter bidder". Sixth Avenue mayo have standing as a stakeholder while it may not have any, as a disgruntled bidder.

[56] I am, however, impressed by the comments of my colleague Clément Gascon, j.s.c. in *Abitibi Bowater*, in his decision of May 3rd, 2010 where, in no unclear terms he did not think that as such, a bitter bidder should be allowed a second strike at the proverbial can.

[57] There may be other arguments that could need to be addressed in order to give satisfaction to all the arguments provided to me by counsel. Again, this has been a long day, this has been a very important and very interesting debate but at the end of the whole process, I am satisfied that the integrity of the "Stalking Horse" bid process in this file, as it was put forth and as it was conducted, meets the criteria of the case law and the CCAA. I do not think that it would be in the interest of any of the parties before me today to conclude otherwise. If I were to conclude otherwise, I would certainly not be able to grant the suggestion of "Sixth Avenue", to qualify its bid as the winning bid; I would have to eradicate the entire process and cause a new auction to be held. I am not prepared to do that.

[58] I believe that the price which will be paid by the winning bidder is satisfactory given the whole circumstances of this file. The terms and conditions of the winning bid are also acceptable so as a result, I am prepared to grant the Motion. I do not know whether the Order which you would like me to sign is available and I know that some wording was to be reviewed by some of the parties and attorneys in this room. I don't know if this has been done. Has it been done? Are KSH and SIII satisfied or content with the wording?

Attorney:
I believe, Mister Justice, that KSH and SIII have.........their satisfaction with the wording. I believe also that Dow Jones, who's present, ...their satisfaction. However, AT&T has communicated that they wish to have some minor adjustments.

The Court:
Are you prepared to deal with this now or do you wish to deal with it during the week-end and submit an Order for signature once you will have ironed out the difficulties, unless there is a major difficulty that will require further hearing?

Attorney:
I think that the second option you suggested is probably the better one. So, we'd be happy to reach an agreement and then submit it to you and we'll recirculate everyone the wording.

The Court:
Very well.

The Motion to Approve the Sale of substantially all of the WB Group assets (no. 87) is **granted,** in accordance with the terms of an Order which will be completed and circulated and which will be submitted to me for signature as of Monday, next at the convenience of the parties;

The Motion of Dow Jones Company Inc. (no. 79) will be continued sine die;

The Amended Contestation of the Motion to Approve the Sale (no. 84) on behalf of "Sixth Avenue" is **dismissed** without costs (I believe that the debate was worth the effort and it will serve no purpose to impose any cost upon the contestant);

Also for the position taken by Dunes, there is no formal Motion before me but Mr. Ferland's position was important to the whole debate but I don't think that costs should be imposed upon his client as well;

The Motion to Stay the Assignment of a Contract from AT&T (no. 86) will be continued sine die;

The Intervention and Memorandum of arguments of BD White Birch Investment LLC is **granted**, without costs.

ROBERT MONGEON, J.S.C.

Counsel and parties present: see attendance list annexed to the Procès-Verbal

Date of hearing: 24 September 2010

TAB 3

1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321

Royal Bank v. Soundair Corp.

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

Ontario Court of Appeal

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

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

Receivers — Sale of debtor's assets — Approval by court — Court appointing receiver to sell airline as going concern — Court considering its position when approving sale recommended by receiver.

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

Held:

The appeal was dismissed.

Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not

participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

23 On March 8, 1991, the receiver had two offers. One was the OEL offer, which it considered satisfactory but which could be withdrawn by OEL at any time before it was accepted. The receiver also had the 922 offer,

which contained a condition that was totally unacceptable. It had no other offers. It was faced with the dilemma of whether it should decline to accept the OEL offer and run the risk of it being withdrawn, in the hope that an acceptable offer would be forthcoming from 922. An affidavit filed by the president of the receiver describes the dilemma which the receiver faced, and the judgment made in the light of that dilemma:

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstand-

ing 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 Sound-Air.

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

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

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

2. Consideration of the Interests of all Parties

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

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

think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which

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

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

63 There can be no doubt that the interests of the creditor are an important consideration in determining whether the receiver has properly conducted a sale. The opinion of the creditors as to which offer ought to be accepted is something to be taken into account. But if the court decides that the receiver has acted properly and

providently, those views are not necessarily determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

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

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

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

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

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

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

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

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

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

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

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

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

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

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale

to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

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

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

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

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

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

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

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

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is

not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

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

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

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

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

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

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

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

> There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of

> sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner. Court approval must involve the delicate balancing of competing interests and not simply a consideration of the interests of the creditors.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer

from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

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

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

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

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

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

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

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

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth

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

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

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

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

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

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

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

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

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

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

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

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

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

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

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that

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

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

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

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

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

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

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the man-

ner 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 4

C

1986 CarswellOnt 172, 58 C.B.R. (N.S.) 245

Selkirk, Re

Re SELKIRK

Ontario Supreme Court, In Bankruptcy

Saunders J.

Judgment: February 21, 1986
Docket: No. 844-60

Counsel: *R. Shour* , for sheriff of Judicial District of York.

R.J. Morris , for 266741 Ontario Limited.

M. Templeton , for Attorney General of Canada.

E. Olkovich , for Dennis Leung Enterprises Inc.

Sydney Morayniss in person.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Bankruptcy --- Administration of estate — Sale of assets.

Court approving offer accepted by sheriff despite later receipt of higher offer.

In bankruptcy proceedings, the sheriff applied for court approval of a sale of vacant land with development potential. Pursuant to a court order, certain property was held by the sheriff as a receiver on condition that the sheriff list the property for sale with any agreement for sale being subject to the approval of the court. The sheriff entered into an exclusive listing agreement with a real estate firm under which the property was listed for six months at a price of $340,000. The sheriff accepted, subject to court approval, a cash offer for the price of $360,000. Subsequent to the acceptance, another offer was submitted for $381,800 in cash. The sheriff applied for approval of the sale at $360,000.

Held:

Earlier offer approved.

The sheriff had properly conducted and carried out his function as contemplated by the court order in that he engaged an experienced and reputable real estate firm to appraise the property and act as agent on the sale. He considered the offers that were made and accepted the highest unconditional offer of which he had any knowledge. No circumstances existed indicating a defect in the sale process, nor was the second offer so substantially higher as to call into question the receiver's actions.

Cases considered

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.) — *applied*

Application for court approval of sale of real property.

***Saunders J.* (orally):**

1 This is an application for court approval of a sale of real property in the town of Markham. It is vacant land with development potential. Pursuant to an order the property has been held by the sheriff of the Judicial District of York as a receiver, and on 9th October 1985 Trainor J. ordered that the sheriff list the property for sale and provided that any agreement should be subject to the approval of this court.

2 The issue involves the determination of the criteria that the court should employ in determining whether or not to grant the approval.

3 The sheriff had the property appraised by a recognized real estate firm. He then entered into an exclusive listing agreement with that firm under which the property was listed for six months at a listing price of $340,000. It was decided to use the more common method of negotiating a private sale rather than inviting tenders. At least ten offers were received, some of which were in excess of the listing price. The sheriff accepted, subject to court approval, an offer from 266741 Ontario Limited for the price of $360,000 in cash. There were two offers at that price and none were higher. The offer that was not accepted contained additional conditions.

4 Subsequent to the acceptance, an offer from Dennis Leung Enterprises Inc. ("Leung") was submitted for $381,800 in cash.

5 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 consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

6 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.

7 The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. 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. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

8 In this case the price offered by Leung, in my opinion, is not so much greater as to put in question the efforts of the receiver. The only suggested defect in the process is that Leung was denied an opportunity to submit an offer and its position is set out in an affidavit filed by Mr. Leung. He was well aware that the property was offered for sale and was even provided with a form of offer by the real estate agent. For reasons that are indicated in his affidavit, he did not submit the offer until after the sheriff had accepted the offer of 266741 Ontario Limited.

9 On reading the affidavit, I respectfully agree with the submissions by Mr. Morris that it does not indicate that Mr. Leung was misled or that the sale process was in any way defective. In my opinion the sheriff has properly conducted and carried out his function as contemplated by the order of Trainor J. in that he engaged an experienced and reputable real estate firm to appraise the property and act as agent on the sale; he considered the offers that were made and accepted the highest unconditional offer of which he had any knowledge. On that basis there is no reason why the sale in my view ought not to be approved and, accordingly, I will approve it on behalf of the court.

10 With respect to the other items in the notice of motion, an order can go in accordance with para. 2 and in accordance with para. 5, which permits the receiver to hold back the sum of $40,000.

11 Paragraph 6 will be varied to provide for interim fees and disbursements of the receiver subject to assessment.

12 Paragraph 7 is modified to provide simply for the payment of the proceeds of any sale into an interest-bearing account preserving the rights of the Attorney General of Canada and the other execution creditors as to its ultimate distribution, which will probably have to be dealt with by further court application.

13 With respect to para. 10, an order will go in terms of that paragraph, subject to the approval of the purchaser of any contractual extensions and with a time limit of 30th June 1986.

14 There will be an order in the terms of para. 11 so far as they affect the property to be sold under the contract which has been approved.

15 There will be an order in accordance with para. 4 for legal fees and disbursements subject to assessment.

16 If there is any difficulty in preparing the order to give effect to these reasons, then counsel will have to attend. I will simply endorse the record: "Order to go in accordance with reasons dictated. Costs to purchaser and to sheriff out of the estate, those of the sheriff on a solicitor-and-client basis."

Order accordingly.

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TAB 5

C

1986 CarswellOnt 527, 22 C.P.C. (2d) 122, 60 O.R. (2d) 87 at 119

Crown Trust Co. v. Rosenberg

CROWN TRUST CO. et al. v. ROSENBERG

Ontario Supreme Court, High Court of Justice

Anderson J.

Judgment: October 23, 1986
Docket: No. 1380/83

Counsel: *P.S.A. Lamek*, Q.C. and *I.V.B. Nordheimer*, for Interim Receiver.

W.G. Horton, for the plaintiffs.

H.T. Strosberg, Q.C. and *R.E. Carr*, for Leonard Rosenberg.

B.P. Bellmore, Q.C., for Maysfield Property Management Inc.

D. Stockwood, Q.C. and *N.J. Spies*, for Prousky.

C.L. Campbell, Q.C., *G.D. Lemon*, and *M.M. Thomson*, for Larco Enterprises Inc.

F.T. Richmond, *R.L. Falby*, Q.C. and *L. Walton*, for Green Door Investments.

J.B. Laskin, for Canada Deposit Insurance.

Subject: Civil Practice and Procedure

Receivers — Equitable execution — Court-appointed Receiver and Manager moving for order approving sale — Consideration of new offer during hearing of motion — Refusal to consider new offer.

The notice of motion brought by the Receiver and Manager to approve certain sales was dated October 10, 1986, and was served on that date on agents for the solicitors for the defendant, R. It was made returnable on October 20. Also made returnable on that date was a motion by L for status as an intervenor in the motion for approval. Allegedly, L knew that its offer was not being recommended by the Receiver and Manager. The supporting material was prepared not later than October 17. On October 22, the Receiver and Manager requested leave to adduced viva voce evidence of an officer of the Receiver company. The representative was examined-in-chief in the morning. After the luncheon recess, a new offer from L was tendered by counsel for R. Counsel for R and some other defendants urged the Court to receive the offer in evidence and to consider it upon a disposition of the motion. The new offer was said to be some $15,000,000 higher than that which was proposed by the Receiver and Manager for acceptance and amounted to something in excess of 3 per cent of the aggregate amount of the purchase price of all of the properties.

Held:

The new offer should not be considered.

The sale procedure had been carefully devised and carefully applied. L knew early in the procedure that its offer was perceived by the Receiver and Manager to present difficulties.

To admit or consider the entirely new offer would be to make a farce and mockery of the elaborate process devised and followed in the marketing of these properties. It would make completion of a sale such as this potentially impossible because it would deprive the process of any formalities. A Judge was not equipped by training nor required in the nature of his office to assess immediately the merits of an offer so complex as this without previous analysis and advice. Inevitably, therefore, when such an offer was presented at this stage, the Judge was either required to do that which he was not properly able to do, or was required to direct to the Receiver and Manager to do so. The latter of course was the only rational manner of proceeding if it was to be dealt with at all. The potential for confusion and delay if that were done in this case was so obvious as not to require elaboration. L's offer was a belated and blatant effort to circumvent the bidding process and to acquire the property over the heads of those who had dealt according to the rules prescribed. Only most extraordinary circumstances would justify the Court in putting its approval on such conduct. No such circumstances existed here.

Annotation

For a ruling by Anderson J. dated October 21, 1986, dismissing a motion by Larco Enterprises Inc. for leave to intervene in a motion brought by the Receiver and Manager for approval of other offers. see ante, p. 115.

For the judgment of Anderson J. dated November 6, 1986, on the Receiver and Manager's motion for approval of other offers, see post, p. 131.

Cases considered:

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

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

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

RULING regarding consideration of new offer on motion by Receiver and Manager to approve the sale of assets.

***Anderson J.*:**

1 The ruling which I must make this morning involves what disposition is to be made of a new offer by Larco Enterprises Inc., an offer delivered by counsel for the defendant Rosenberg to the counsel for the Receiver

during the luncheon recess on Wednesday, October 22, 1986.

2 Before proceeding to the substance of my ruling, I wish to review briefly the progress of this motion to date. The notice of motion, the substantive motion that is to approve sales, is dated October 10, 1986, and it was on that date served on agents for the solicitors for the defendant Rosenberg. It was made returnable on Monday, October 20th and according to its return date came before me.

3 Also made returnable on that date was a motion by Larco for status as an Intervenor in the application for approval. The supporting material filed upon that motion indicates that it was prepared not later than October the 17th when the affidavit of Nolan was sworn. It is an inescapable inference that Larco knew by that time at least that the Receiver was not recommending its offer and knew the bases advanced by the Receiver for refusing to do so. It would not be unfair to surmise that Larco knew some time before that.

4 In the affidavit of Nolan filed in support of that motion to intervene there is no reference made to any new offer, or to the possibility of any new offer, but only an intention to address the concerns of the liquidator about the offer which was then under consideration.

5 The disposition of that motion to intervene was not without difficulty. It came before me as a matter of first impression. It had obvious implications whatever its disposition was and for that reason I reserved my judgment and made my ruling on the following morning at 10 a.m. on Tuesday, October 21, 1986.

6 At the request of counsel, I adjourned to chambers to discuss what method of proceeding with the substantive motion should be followed in light of that ruling, and in light of the possibility that an appeal would be taken from that ruling. After considerable discussion and the submissions of counsel, I decided not to resume the argument that day but to do so on the morning of Wednesday, October 22nd.

7 At the opening of Court on Wednesday, October 22nd, Mr. Lamek, as counsel for the Receiver, requested leave to adduce viva voche evidence of an officer of the Receiver Company, the vice-president of Clarkson and such leave was granted.

8 Mr. Shaver was examined-in-chief during the forenoon, and it was after the luncheon recess, as I have indicated, that the new offer of Larco was tendered by counsel for Rosenberg. The precise time of its tendering I do not know, but it was first drawn to my attention when the Court resumed in the afternoon.

9 I am urged by counsel for Rosenberg and for some other defendants to receive this offer in evidence and to consider it upon the disposition of this motion. The new offer, the details of which I have not reviewed, is said to be some $15,000,000 higher than that which is proposed by the Trustee for acceptance. This amounts to something in excess of 3 per cent of the aggregate amount of the purchase price of all of the properties.

10 It is the submission of counsel for the defendant Rosenberg and some other defendants that I should receive the offer in evidence, permit the representative of the Receiver to be cross-examinated with respect to it, and, at the conclusion of the motion, decide whether it should be accepted in place of that recommended by the Receiver.

11 I do not intend to do either. The conclusion I may say I have reached without hesitation or doubt, the reasons I am now expressing are expressed only because there is some public interest in the question, and it should be made manifest that I am deciding what I am deciding and, of course, it should be available to a re-

viewing Court should such a Court review the discretion which I have now exercised.

12 The sale procedure in this case was carefully devised and carefully applied. I need not review either the details of the plan or its application. They are matters of record.

13 Larco knew early in the procedure that its offer was perceived by the Receiver to present difficulties. Various efforts were made to resolve those difficulties. They were not successful. Larco moved to intervene in these proceedings and failed.

14 On the third day of the motion an entirely new offer was tendered. My reasons for refusing to admit or consider that offer are simple and basic. To do so would make a farce and a mockery of the elaborate process devised and followed in the marketing of these properties. Indeed, it would make completion of the sale such as this potentially impossible as it would deprive the process of any finality.

15 A Judge is not equipped by training nor required in the nature of his office to assess immediately the merits or demerits of an offer so complex as this without previous analysis and advice. Inevitably, therefore, when such an offer is presented at this stage, the Judge is either required to do that which he is not properly able to do, or must direct the Receiver to do so. The latter, of course, is the only rational manner of proceeding if it is to be dealt with at all.

16 The potential for confusion and delay, if that were done in this case, is so obvious as not to require elaboration. The dilemma with which I am presented is not new, although it has not perhaps been presented before in circumstances so adverse and so complex as those which are before me.

17 It was dealt with by the Honourable Mr. Justice Saunders of this Court in two judgments to which I was referred in argument, the first being the judgment in *Re Selkirk*, a report of which is in 58 C.B.R. (N.S.) 245. There the circumstances under consideration involved the sale by the sheriff and the appearance after the sheriff had accepted an offer of a new and higher offer.

18 Mr. Justice Saunders in dealing with the matter says at pp. 246 and 247 of his reasons the following:

> 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 consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

19 He then quotes a judgment of the Nova Scotia Court of Appeal [*Cameron v. Bank of N.S.* (1981), 45 N.S.R. (2d) 303, 38 C.B.R. (N.S.) 1, 86 A.P.R. 303 (N.S. C.A.)] in the following terms:

> 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.

20 Continuing with Mr. Justice Saunders' judgment:

> 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.
>
> The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. 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. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

21 The second judgment of Mr. Justice Saunders is one in *Re Beauty Counsellors of Can. Ltd.*, again in 58 C.B.R. (N.S.) at 237. There the facts were very similar to those in the Selkirk case. At p. 242 Mr. Justice Saunders makes the following observation:

> I must conclude that the final Noevir offer when compared with the numbered company offer is better for the creditors of the bankrupt to a significant extent. The matter then, as I see it, resolves into two issues:
>
> 1. Should the appeal be allowed because the Noevir offer is significantly better than the offer accepted by the trustee from the numbered company; or
>
> 2. If not, should the appeal be allowed because the process which resulted in the contract between the trustee and the numbered company was unfair to Noevir?

At p. 243 he says:

> Leaving aside for a moment the question of unfairness, if a purchaser is able to wait until the approval of the sale comes before the court before submitting his best offer, then no prudent purchaser will make a final offer until that time. Every offer accepted or recommended by a trustee will be vulnerable. The court will be then required to enter into the marketplace and perform the function that up to now has been the function of the trustee. That is an undesirable situation which would make court-supervised sales very difficult to carry out.

22 I consider that the concluding observation made by Mr. Justice Saunders in that context was something of an understatement.

> 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. 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.

In this case, while the difference in the two offers may be significant, I do not consider the difference to be of such a magnitude as to warrant the disruption of the process. To refuse approval and reopen the negotiations at this time could, on the evidence, be extremely costly and might reduce or even destroy the difference between the two offers. In this particular situation time is of critical importance.

23 I consider that these cases should be followed in this case. I refer especially to what I just read from the judgment of Mr. Justice Saunders. The logic is, in my view, impeccable and, in application to this case, unanswerable. The processes discussed there apply with even greater force in a case such as this where the process of sale has been so complex, so demanding and so exhausting.

24 No question of fairness as raised by Mr. Justice Saunders arises in respect to Larco. If there is a wont of fairness involved it has been exhibited by Larco. The present offer is a belated and blatant effort to circumvent the bidding process and to acquire the property over the heads of those who have dealt according to the rules prescribed. Only most extraordinary circumstances would justify the Court in putting its approval on such conduct. No such circumstances exist here.

25 Counsel for the defendant Rosenberg submits with his customary vigour that $15,000,000 is a lot of money: that the Court must have regard for commercial reality; that this last offer represents the current state of a buoyant real estate market; and, that it is notorious that Court conducted sales always realize less than the full potential value of the subject property.

26 Let me deal with those submissions in order. $15,000,000 is a lot of money in absolute terms even in the debased currency of 1986, but in relative terms it is something over 3 per cent of the aggregate value of the properties. There is no such shortfall or disproportion as to call in question the fundamental soundness of the sale procedure ordered by the Court, or the application of that procedure by the Receiver.

27 The Court must, of course, have regard for commercial reality. One aspect of commercial reality is that there are certain inherent limitations in a court sale, limitations which are unavoidable. The Court has not the capacity to wheel and deal as an individual entrepreneur is able to do, and the Court must have regard not only for commercial reality but for commercial morality, a conditioning factor which is not always apparent in private deals.

28 This last offer may represent the current market. It may also represent simply the desire of the offeror to acquire an advantage over other bidders. It is customary that court sales and sales in foreclosure or liquidation or under other constraint, tend to obtain less advantageous prices than those which might be obtained by a skilful and unfettered vendor free to manoeuvre in an open market. But it must not be forgotten that court sales or other liquidation or forced sales are symptoms of a commercial collapse or dispute or disease of some kind, and the sale cannot wholely escape the consequences of the disease.

29 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.

30 Some suggestion was made by counsel for the defendant Rosenberg that the extra recovery which this new offer purports to make available might significantly reduce the ambit of the litigation of which this motion is an offshoot. That would be a consummation much to be desired. But in my view, this prospect is too indefinite, too amorphous, and too remote to be given weight in the disposition of the matter which is now before me.

31 When the offer was produced I said to Mr. Lamek with what may have been an unfortunate air of flippancy that it would not go away, nor will it. But it will have no role in the conduct of this motion so long as I am seized with the motion.

32 The offer or a copy will be marked Ex. A to these proceedings for the purpose of identification only and so that it may be available to any other Court in any review of the discretion which I have exercised in excluding it from present consideration. It will not be the subject of examination or cross-examination of any witness.

Order accordingly.

END OF DOCUMENT

TAB 6

CITATION: Terrace Bay Pulp Inc. (Re), 2012 ONSC 4247
COURT FILE NO.: CV-12-9566-00CL
DATE: 20120727

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

RE: **IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TERRACE BAY PULP INC., Applicant**

BEFORE: **MORAWETZ J.**

COUNSEL: **Pamela Huff, Marc Flynn and Kristina Desimini, for the Applicant, Terrace Bay Pulp Inc.**

Alec Zimmerman and James Szumski, for Birchwood Trading, Inc.

M. Starnino, for the United Steelworkers

Alan Merksey, for Tangshan Sanyu Group Xingda Chemical Fiberco Limited

Alex Ilchenko, for Ernst & Young Inc, Monitor

Jacqueline L. Wall, for Her Majesty The Queen in Right of Ontario as represented by the Ministry of Northern Development and Mines

Janice Quigg, for Skyway Canada Ltd.

Fred Myers, for the Township of Terrace Bay

Peter Forestell, Q.C., for Aditya Birla Group and AV Terrace Bay Inc.

HEARD: **JULY 16, 2012**

ENDORSED: **JULY 19, 2012**

REASONS: **JULY 27, 2012**

<u>ENDORSEMENT</u>

[1] Terrace Bay Pulp Inc. (the "Applicant") brought this motion for, among other things, approval of the Sales Transaction (the "Transaction") contemplated by an asset purchase agreement dated as of July 5, 2012 (the "Purchase Agreement") between the Applicant, as seller, and AV Terrace Bay Inc., as purchaser (the "Purchaser").

[2] The Applicant also seeks authorization to take additional steps and to execute such additional documents as may be necessary to give effect to the Purchase Agreement.

[3] Further, the Applicant seeks a Vesting Order, approval of the Fifth Report of the Monitor dated June 12, 2012 and a declaration that the subdivision control provisions contained in the *Planning Act*, R.S.O. 1990, c. P.13 (the "*Planning Act*") do not apply to the vesting of title to the Real Property (as defined in the Purchase Agreement) in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer.

[4] Finally, the Applicant sought an amendment to the Initial Order to extend the Stay of Proceedings to October 31, 2012.

[5] Argument on this matter was heard on July 16, 2012. At the conclusion of argument, on an unopposed basis, I extended the Stay of Proceedings to October 31, 2012. This decision was made after a review of the record which, in my view, established that the Applicant has been and continues to work in good faith and with due diligence such that the requested extension was appropriate in the circumstances.

[6] On July 19, 2012, I released my decision approving the Transaction, with reasons to follow. These are the reasons.

[7] With respect to the motion to approve the Transaction, the Applicant's position was supported by the United Steelworkers and the Township of Terrace Bay. Counsel to Her Majesty The Queen in Right of Ontario, as Represented by the Ministry of Northern Development and Mines, consented to the Transaction and also supported the motion.

[8] The motion was opposed by Birchwood Trading, Inc. ("Birchwood") and by Tangshan Sanyu Group Xingda Chemical Fiberco Limited ("Tangshan").

[9] Counsel to the Applicant challenged the standing of Tangshan on the basis that it was "bitter bidder". Argument was heard on this issue and I reserved my decision, indicating that it would be addressed in this endorsement. For the purposes of the disposition of this motion, it is not necessary to address this issue.

[10] The Applicant seeks approval of the Transaction in which the Purchaser will purchase all or substantially all of the mill assets of the Applicant for a price of $2 million plus a $25 million concession from the Province of Ontario. The Monitor has recommended that this Transaction be approved.

[11] Birchwood submits that the Applicant and the Monitor have taken the position that a competing offer from Tangshan for a purchase price of $35 million should not be considered, notwithstanding that the Tangshan offer (i) is subject to terms and conditions which are as good or better than the Transaction; (ii) would provide dramatically greater recovery to the creditors of the Applicant, and (iii) offers significant benefits to other stakeholders, including the employees of the Applicant's mill.

[12] Birchwood is a creditor of the Applicant. It holds a beneficial interest in the Subordinated Secured Plan Notes (the "Notes") in the face amount of approximately $138,000 and is also the fourth largest trade creditor of the Applicant. If the Transaction is approved, Birchwood submits that it expects to receive less than 6% recovery on its holdings under the Notes and no recovery on its trade debt. In contrast, if the Tangshan offer were accepted, Birchwood expects that it would receive full recovery under the Notes, and that it may also receive a distribution with respect to its trade debt.

[13] Birchwood also submits that the Tangshan offer provides substantial benefits to the creditors and other stakeholders of the Applicant which would not be realized under the Transaction. These include:

(a) an increase in the purchase price for the mill assets, from an effective purchase price of $27 million to a cash purchase price of $35 million;

(b) the potential for the Province of Ontario to be repaid in full or, if the Province is prepared to offer the same debt forgiveness concession under the Tangshan offer that it is providing to the Purchaser, the potential to increase the "effective" purchase price of the Tangshan offer to $60 million;

(c) as a consequence of (a) and (b), additional proceeds available for distribution to creditors subordinate to the Province of Ontario of between $8 million and $33 million;

(d) employment of approximately 75 additional employees, plus the existing management of the mill;

(e) conversion of the mill into a dissolving pulp mill in 18 months, rather than 4 years, with a higher expected yield once the conversion is complete and a business plan which calls for the production of a more lucrative interim product during the conversion process.

[14] Counsel to Birchwood submits that the substantial increase in the consideration offered by the Tangshan offer, which is a binding offer with terms and conditions that are at least as favourable as the Transaction, is sufficient to call into question the integrity and efficacy of the Sales Process (defined below). Counsel suggests that the market for the mill assets was not sufficiently canvassed, and provides evidence to support a finding that the criteria for approval of the sale as set out in s. 36 (3) of the CCAA and *Royal Bank v. Soundair Corp.* (1991) 7 C.B.R. (3d) 1 (C.A.) has not been met.

[15] Birchwood requests an adjournment of the Applicant's request for approval of the Transaction, or a refusal to approve the Transaction and a varying of the Sales Process to allow the Tangshan offer to be considered and, if appropriate, accepted by the Applicant. Tangshan supports the position of Birchwood.

[16] For the following reasons, I decline Birchwood's request and grant approval of the Transaction.

FACTS

[17] The Applicant filed the affidavit of Wolfgang Gericke in support of this motion. In addition, there is considerable detail provided in the Sixth Report of the Monitor and in the Supplemental Sixth Report of the Monitor.

[18] On January 25, 2012, the Initial Order was granted in the CCAA proceedings. The Initial Order authorized the Applicant to conduct, with the assistance of the Monitor and in consultation with the Province of Ontario, a sales process to solicit offers for all or substantially all of the assets and properties of the Applicant used in connection with its pulp mill operations (the "Sales Process").

[19] The Applicant and the Monitor conducted a number of activities in furtherance of the Sales Process, as outlined in detail in the Sixth Report.

[20] The Monitor received 13 non-binding Letters of Intent by the initial deadline of February 15, 2012. All of the parties that submitted Letters of Intent were invited to do further due diligence and submit binding offers by the March 16, 2012 deadline provided for in the Sales Process Terms (the "Bid Deadline").

[21] The Monitor received eight binding offers by the Bid Deadline and, based on the analysis of the offers received, the Monitor and the Applicant, in consultation with the Province, determined that the offer of AV Terrace Bay Inc. was the best offer. The ultimate parent of the Purchaser is Aditya Birla Management Corporation Private Ltd. ("Aditya"), one of the largest conglomerates in India.

[22] After identifying the Purchaser's offer as the superior offer in the Sales Process, and after extensive negotiations, the Applicant entered into the Purchase Agreement; executed July 5, 2012 for an effective purchase price in excess of $27 million.

[23] Counsel to the Applicant submits that in assessing the various bids, the Applicant and the Monitor, in consultation with the Province, considered the following factors:

(a) the value of the consideration proposed in the Transaction;

(b) the level of due diligence required to be completed prior to closing;

(c) the conditions precedent to closing of a sale transaction;

(d) the impact on the Corporation of the Township of Terrace Bay (the "Township"), the community and other stakeholders;

(e) the bidder's intended use for the mill site including any future capital investment into the mill; and

(f) the ability to close the Transaction as soon as possible, given the company's limited cash flow.

[24] Four parties expressed an interest in Terrace Bay after the Bid Deadline.

[25] The unchallenged evidence is that the Monitor informed each of the late bidders that they could conduct due diligence, but their interest would only be entertained if the Applicant could not complete a Transaction with the parties that submitted their offers in accordance with the Sales Process Terms (*i.e.* prior to the Bid Deadline).

[26] The Monitor states in its Sixth Report that it reviewed materials submitted by each late bidder. Tangshan, as one of the late bidders, submitted a non-binding offer on July 5, 2012 (the "Late Offer"). The terms of the Late Offer were subject to change, and Tangshan required final approval from regulatory authorities in China before entering into a transaction.

[27] It is also unchallenged that, before submission of the Late Offer, the Monitor had advised Recovery Partners Ltd., which submitted the Late Offer on Tangshan's behalf, that the Bid Deadline passed months before and that the Applicant was far advanced in negotiating and settling a purchase agreement with a prospective purchaser who submitted an offer in accordance with the Sales Process Terms.

[28] As indicated above, the Applicant executed the Purchase Agreement on July 5, 2012.

[29] The Monitor received a second non-binding offer from Recovery Partners Ltd., on behalf of Tangshan, on July 10, 2012 and a binding offer on July 12, 2012 (the "July Tangshan Offer") for a purchase price of $35 million.

[30] In its Sixth Report, the Monitor stated that it was of the view that it is not appropriate to vary the Sales Process Terms or to recommend the July Tangshan Offer for a number of reasons:

(a) the Applicant, in consultation with the Province, had entered into a binding purchase agreement with the Purchaser, which does not permit termination by Terrace Bay to entertain a new offer;

(b) the fairness and integrity of the Sales Process is paramount to these proceedings and to alter the terms of the court-approved Sales Process Terms at this point would be unfair to the Purchaser and all of the other parties who participated in the Sales Process in compliance with the Sales Process Terms;

(c) the Sales Process terms have been widely known by all bidders and interested parties since the outset of the Sales Process in January 2012;

(d) the Sales Process Terms provide no bid protections for the potential Purchaser;

(e) the Purchaser had incurred, and continues to incur, significant expenses in negotiating and fulfilling conditions under the Purchase Agreement. The Applicant has advised the Monitor that there is a significant risk that the Purchaser would drop out of the Sales Process if there were an attempt to amend the Sales Process Terms to pursue an open auction at this stage;

(f) to consider any new bids might result in a delay in the timing of the sale of the assets of the mill which, in the view of the Monitor, poses a risk due to the Applicant's minimal cash position;

(g) the Province, with whom the Applicant is required to consult, and which has entered into an agreement with the Purchaser, supports the completion of the Transaction;

(h) the Purchaser has made progress satisfying the conditions to closing, including meeting with the Applicant's employees and negotiating collective bargaining agreements with the unions.

[31] As set out in the affidavit of Mr. Gericke, the Purchaser is an affiliate of Aditya, a Fortune 500 company that intends to make a significant investment to restart the mill by October 2012 and invest more than $250 million to convert the mill to produce dissolving grade pulp.

[32] The purchase price payable is the aggregate of: (i) $2 million, plus or minus adjustments on closing, and (ii) the amount of the assumed liabilities.

[33] The obligation of the Applicant to complete the Transaction is conditional upon, among other things, all amounts owing by the Applicant to the Province pursuant to a Loan agreement dated September 15, 2010 (the "Province Loan Agreement") being forgiven by the Province and all related security being discharged (the "Province Loan Forgiveness").

[34] The Province is the first secured creditor of the Applicant, and is owed in excess of $24 million. The Province Loan Forgiveness is an integral part of the Transaction.

[35] The Applicant submits that as the net sale proceeds, subject to any super-priority claims, flow to the Province in priority to other creditors upon completion, the effective consideration for the Transaction is in excess of $27 million, namely the cash portion of the purchase price plus the Province Loan Forgiveness, plus the value of the assumed liabilities.

[36] The Monitor recommends approval of the Transaction for the following reasons:

(a) the market was broadly canvassed by the Applicant, with the assistance of the Monitor;

(b) the Purchase Agreement will result in a cash purchase price of $2 million, and will see the forgiveness of amounts outstanding, plus accrued interest and costs, under the Province Loan Agreement;

(c) the Transaction contemplated by the Purchase Agreement will result in significant employment in the region, as well as a substantial capital investment;

(d) the Transaction will also see a major multi-national corporation acquiring the mill, which will greatly improve the stability of the mill operations;

(e) the Transaction involves the expected re-opening of the mill in October 2012 and the Applicant will be rehiring the employees of the mill;

(f) the Monitor is aware of the late bids, including the July Tangshan Offer and has consulted the company and the Province in relation to same. The Monitor maintains that the Sales Process was conducted in accordance with the Sales Process Terms and provided an adequate opportunity for interested parties to participate, conduct due diligence, and submit binding purchase agreements and deposits within court-approved deadlines; and

(g) several further factors have been considered by the Monitor including, without limitation: the importance of maintaining the fairness and integrity of the Sales Process in relation to all parties, including the Purchaser; the terms of the Purchase Agreement; the fact that it has taken many weeks to negotiate various issues, and; the importance of certainty in relation to closing and the closing date.

[37] In its Supplement to the Sixth Report, the Monitor commented on the efforts that were made to canvass international markets. This Supplemental Report was prepared after the Monitor reviewed the affidavit of Yu Hanjiang (the "Yu Affidavit"), filed by Birchwood. The Yu Affidavit raised issues with the efficacy of the Sales Process. The Monitor stated, in response, that it is satisfied that the Sales Process was properly conducted and that international markets were canvassed for prospective purchasers. Specifically, one of the channels used by the Monitor to market the assets was a program managed by the Ministry of Economic Development in Innovation ("MEDI") for the Province of Ontario which had established an "international business development representative program" ("IBDR"). The IBDR program operates a network of contacts and agents throughout the world, including China, to enable the MEDI to disseminate information about investment opportunities in Ontario to a worldwide investment audience. The Monitor further advised that IBDR representatives provided the Sales Process documents to a global network of agents for worldwide dissemination, including in China.

[38] The Monitor restated that it was satisfied that the Sales Process adequately canvassed the market, and continues to support the approval of the Transaction.

[39] The Monitor also provided in the Supplemental Report an update with respect to the position of the Purchaser.

[40] The Purchaser advised the Monitor that it has negotiated an agreement in principle with executives of the Terrace Bay union locals regarding the terms of revised collective bargaining agreements. The Purchaser further advised that it is confident that the revised collective bargaining agreements will be ratified. Ratification of the collective agreements will remove one of the last conditions to closing, exclusive of court approval. It is noted that s. 9.2(e) of the Purchase Agreement specifically provides that a condition precedent to performance by the Purchaser is that on or before July 24, 2012, the Purchaser shall have obtained a five (5) year extension of the existing collective bargaining agreements on terms acceptable to the Purchaser acting reasonably.

[41] The Purchaser has further advised the Monitor that it is critical to complete the Transaction by the end of July 2012 in order that the mill can be restarted by October, prior to the onset of winter, to avoid increased carrying costs.

[42] The Purchaser also advised the Monitor directly that, if the Sales Process and the Sales Process Terms were varied, it would terminate its interest in Terrace Bay.

LAW AND ANALYSIS

[43] Section 36 of the CCAA provides the authority to approve a sale transaction. Section 36(3) sets out a non-exhaustive list of factors for the court to consider in determining whether to approve a sale transaction. It provides as follows:

> 36(3) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the Monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the Monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than the sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[44] I agree with the submission of counsel on behalf of the Applicant that the list of factors set out in s. 36(3) largely overlaps with the criteria established in *Royal Bank of Canada v.*

Soundair Corp. (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*]. *Soundair* summarized the factors the court should consider when assessing whether to approve a transaction to sell assets:

(a) whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;

(b) the interests of all parties;

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

(d) whether there has been unfairness in the working out of the process.

[45] In considering the first issue, namely, whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently, it is important to note that Galligan J. A. in *Soundair* stated, at para. 21, as follows:

> When deciding whether a receiver has 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 Trustco v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 112 [*Crown Trustco*]:
>
>> 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.

[46] In this case, the offer was accepted on July 5, 2012. At that point in time, the offer from Tangshan was of a non-binding nature. The consideration proposed to be offered by Tangshan

appears to be in excess of the amount of the Purchaser's offer. The Tangshan offer is for $35 million, compared with the Purchaser's offer of $27 million.

[47] The record establishes that the Monitor did engage in an extensive marketing program. It took steps to ensure that the information was disseminated in international markets. The record also establishes that a number of parties expressed interest and a number of parties did put forth binding offers.

[48] Tangshan takes the position, through Birchwood, that it was not aware of the opportunity to participate in the Sales Process. This statement was not challenged. However, it seems to me that this cannot be the test that a court officer has to meet in order to establish that it has made sufficient effort to get the best price and has not acted improvidently. In my view, what can be reasonably expected of a court officer is that it undertake reasonable steps to ensure that the opportunity comes to the attention of prospective purchasers. In this respect, I accept that reasonable attempts were made through IBDR to market the opportunity in international markets, including China.

[49] I now turn to consider whether the Monitor acted providently in accepting the price contained in the Purchaser's offer.

[50] It is important to note that the offer was accepted after a period of negotiation and in consultation with the Province. The Monitor concluded that the Purchaser's offer "was the superior offer, and provided the best opportunity to position the mill, once restarted, as a viable going concern operation for the long term".

[51] Again, it is useful to review what the Court of Appeal stated in *Soundair*. After reviewing other cases, Galligan J.A. stated at 30 and 31:

> 30. What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered *bona fide* into an agreement with the receiver, can only lead to chaos, and must be discouraged.
>
> 31. If, however, the subsequent offer is so substantially higher than the sale recommended by the receiver, then it may be that the receiver has not conducted the sale properly. In such circumstances, the court would be justified itself in entering into the sale process by considering competitive bids. However, I think that that process should be entered into only if the court is satisfied that the receiver has not properly conducted the sale which it has recommended to the court.

[52] In my view, based on the information available at the time the Purchaser's offer was accepted, including the risks associated with a Tangshan non-binding offer at that point in time, the consideration in the Transaction is not so unreasonably low so as to warrant the court entering into the Sales Process by considering competitive bids.

[53] It is noteworthy that, even after a further review of the Tangshan proposal as commented on in the Supplemental Report, the Monitor continued to recommend that the Transaction be approved.

[54] I am satisfied that the Tangshan offer does not lead to an inference that the strategy employed by the Monitor was inadequate, unsuccessful, or improvident, nor that the price was unreasonable.

[55] I am also satisfied that the Receiver made a sufficient effort to get the best price, and did not act improvidently.

[56] The second point in the *Soundair* analysis is to consider the interests of all parties.

[57] On this issue, I am satisfied that, in arriving at the recommendation to seek approval of the Transaction, the Applicant and the Monitor considered the interests of all parties, including the Province, the impact on the Township and the employees.

[58] The third point from *Soundair* is the consideration of the efficacy and integrity of the process by which the offer was obtained.

[59] I have already commented on this issue in my review of the Sales Process. Again, it is useful to review the statements of Galligan J.A. in *Soundair*. At paragraph 46, he states:

> 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 the receiver and entering into an agreement with it, a court will not likely interfere with the commercial judgment of the receiver to sell the asset to them.

[60] At paragraph 47, Galligan J.A. referenced the comments of Anderson J. in *Crown Trustco*, at p. 109:

> 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.

[61] In my view, the process, having been properly conducted, should be respected in the circumstances of this case.

[62] The fourth point arising out of *Soundair* is to consider whether there was unfairness in the working out of the process.

[63] There have been no allegations that the Monitor proceeded in bad faith. Rather, the complaint is that the consideration in the offer by Tangshan is superior to that being offered by the Purchaser so as to call into question the integrity and efficacy of the Sales Process.

[64] I have already concluded that the actions of the Receiver in marketing the assets was reasonable in the circumstances. I have considered the situation facing the Monitor at the time that it accepted the offer of the Purchaser and I have also taken into account the terms of the Late Offer. Although it is higher than the Purchaser's offer, the increase is not such that I would consider the accepted Transaction to be improvident in the circumstances.

[65] In all respects, I am satisfied that there has been no unfairness in the working out of the process.

[66] In my opinion, the principles and guidelines set out forth in *Soundair* have been adhered to by the Applicant and the Monitor and, accordingly, it is appropriate that the Transaction be approved.

[67] In light of my conclusion, it is not necessary to consider the issue of whether Tangshan has standing. The arguments put forth by Tangshan were incorporated into the arguments put forth by Birchwood.

[68] I have concluded that the Approval and Vesting Order should be granted.

[69] I do wish to comment with respect to the request of the Applicant to obtain a declaration that the subdivision control provisions contained in the *Planning Act* do not apply to a vesting of title to real property in the Purchaser and that such vesting is not, for the purposes of s. 50(3) of the *Planning Act* a conveyance by way of deed or transfer.

[70] The Purchase Agreement contemplates the vesting of title in the Purchaser of the real property. Some of the real property abuts excluded real property (as defined in the Purchase Agreement), which excluded real property is subsequently to be realized for the benefit of stakeholders of Terrace Bay.

[71] The authorities cited, *Lama v. Coltsman* (1978) 20 O.R. (2d) 98 (CO.CT.) [*Lama*] and *724597 Ontario Inc. v. Merol Power Corp.*, (2005) O.J. No. 4832 (S.C.J.) are helpful. In *Lama*, the court found that the vesting of land by court order does not constitute a "conveyance" by way of "deed or transfer" and, therefore, "a vesting order comes outside the purview of the *Planning Act*".

[72] For the purposes of this motion, I accept the reasoning of *Lama* and conclude that the granting of a vesting order is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer. However, I do not think that it is necessary to comment on or to

issue a specific declaration that the subdivision control provisions contained in the *Planning Act* do not apply to the vesting of title.

[73] The Applicants also requested a sealing order. I have considered the *Sierra Club* principle and have determined that disclosure of the confidential information could be harmful to stakeholders such that it is both necessary and appropriate to grant the requested sealing order.

DISPOSITION

[74] In the result, the motion is granted subject to the adjustment with respect to aforementioned *Planning Act* declaration and an order shall issue approving the Transaction.

MORAWETZ J.

Date: July 27, 2012

TAB 7

C

2010 CarswellOnt 1077, 2010 ONSC 1176, 64 C.B.R. (5th) 221

Canwest Global Communications Corp., Re

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS

Ontario Superior Court of Justice [Commercial List]

Pepall J.

Judgment: March 1, 2010
Docket: CV-09-8396-00CL

Counsel: Lyndon Barnes, Jeremy Dacks, Shawn Irving for CMI Entities

Mario Forte for Special Committee of the Board of Directors

David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.

Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate

Benjamin Zarnett, Logan Willis for Ad Hoc Committee of Noteholders

Robin B. Schwill, Vincent A. Mercier for Shaw Communication Inc.

Kevin McElcheran, Malcolm Mercer for GS Parties

Gavin Finlayson, S.R. Orzy for Catalyst Capital Group Inc.

Edmond Lamek for Leonard Asper et al.

Steve Weisz for CIT Business Credit Canada Inc.

Hugh O'Reilly for Canwest Retirees / Canadian Media Guild

Subject: Insolvency; Civil Practice and Procedure

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

Applicant companies filed for protection from creditors under Companies' Creditors Arrangement Act (CCAA) — Companies' anticipated plan of arrangement was to implement recapitalization transaction whereby creditors compromised would receive shares in restructured CG Co. — With assistance of RBC Capital Markets, companies commenced equity solicitation process (process) — RBC contacted 90 potential investors; list was generated by RBC through its own sources, and through consultation with companies and their largest creditor group — 52 potential investors expressed interest, and were sent "teaser" documents and non-disclosure agreement (NDA) to sign — 22 potential investors executed NDAs, then received more comprehensive information and were invited to submit non-binding proposals — C Inc. submitted commitment letter, but did not execute NDA; RBC advised C Inc. that it could not participate further in process unless it executed NDA — C Inc. refused to execute NDA, and ultimately companies selected bid from S Inc. as best overall offer received — S Inc. and CG Co. signed subscription agreement, a condition of which was amendment or disclaimer of shareholders' agreement (SA) to which companies and shareholders GS were parties — Applicants applied for approval of subscription agreement; GS opposed application — Application granted — Companies made sufficient effort to obtain best offer; process was fair and thorough, and there was nothing stopping C Inc. from participating in it — Interests of all parties, including GS, were considered; subscription agreement provided that companies, their creditors and GS could pursue agreement to amend SA that was not agreed to by S Inc. — Monitor was supportive of subscription agreement, and there was reasonable basis for such support — S Inc.'s offer had substantially higher implied equity value than C Inc.'s, and subscription agreement would accomplish major objective underpinning companies' initial CCAA filing.

Cases considered by *Pepall J.*:

Air Canada, Re (2004), 2004 CarswellOnt 469, 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]) — 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

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

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

Sammi Atlas Inc., Re (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

s. 36 — referred to

APPLICATION under *Companies' Creditors Arrangement Act* for approval of subscription agreement and related documents, and for other ancillary relief.

***Pepall J.*:**

Introduction

1 When the CMI Entities filed for *Companies' Creditors Arrangement Act*[FN1] protection, their stated intention was to pursue a recapitalization transaction. The anticipated plan of arrangement or compromise would implement the recapitalization transaction and creditors compromised, including the 8% Senior Subordinated Noteholders, would receive shares in a restructured Canwest Global Corporation Corp. ("Canwest Global"). To that end, in November, 2009, the CMI Entities commenced an equity solicitation process. RBC Capital Markets ("RBC") assisted them with that process. The extensive process resulted in a bid from Shaw Communications Inc. ("Shaw") that was acceptable to the CMI Entities and others. The CMI Entities now seek approval of the subscription agreement dated February 11, 2010 between Shaw and Canwest Global and other related documents (the "Shaw Definitive Documents") and other ancillary relief. The approval motion was served on February 12, 2010 returnable February 19, 2010. If not approved by the court, the Shaw bid expired on February 19, 2010. The Monitor served its 10th Report on February 14, 2010. In its Report, the Monitor expressed support for the relief requested by the CMI Entities.

2 A condition of completion of the Shaw transaction is amendment or disclaimer of the CW Investments Shareholders' Agreement to which GS Capital Partners VI Fund L.P. and its affiliates (collectively the "GS Parties") and Canwest Media Inc. ("CMI") are parties. The GS Parties oppose any such amendment or disclaimer.

3 The GS Parties served materials opposing the relief sought in the late afternoon of February 18, 2010. In addition, in the wee hours of the morning of February 19, 2010 (3:38 a.m. to be exact according to the Monitor), counsel for Catalyst Capital Group Inc. ("Catalyst") served an affidavit enclosing a competing bid to that of Shaw. The Catalyst bid required no amendment or disclaimer of the CW Investments Shareholders' Agreement and was supported by the GS Parties.

4 Given the afternoon and twilight hour service of the GS Parties' and Catalyst materials, the CMI Entities and the Ad Hoc Committee of 8% Senior Subordinated Noteholders ("the Ad Hoc Committee") then responded with service of numerous affidavits and materials of their own including an affidavit of Richard Grudzinski of RBC and a factum from the CMI Entities. These were emailed to the court commencing at about 5:30 the morning of the motion. Such was the state of play when court commenced at 10 o'clock. Some might call this real time litigation; others surreal time litigation. In my view, this late breaking flurry of activity was unnecessary.

5 Perhaps not surprisingly, the GS Parties and Catalyst requested an adjournment of the CMI Entities' approval motion for at least two weeks. The adjournment would allow the Monitor, the court and interested parties to review the terms of the Catalyst proposal with a view to determining whether the terms contained therein were superior to the terms of the Shaw subscription agreement. The CMI Entities, the Special Committee, the Ad Hoc Committee and Shaw all opposed the adjournment request. The Monitor took no position. I heard extensive argument on the request for an adjournment[FN2]. As mentioned, the Shaw bid was conditional on court approval by February 19, 2010, the date of the hearing. Shaw was not prepared to extend its deadline. The issue was expressly raised with Shaw in court but Shaw maintained its position. I refused the adjournment request but in the absence of evidence of the Monitor's position, asked the Monitor to provide evidence on its position with

respect to the Catalyst proposal. Counsel could then make inquiries and submissions once the Monitor had done so. In a certain sense, so-called real time litigation begets more real time litigation.

6 The Monitor proceeded to prepare a supplementary Report. Perhaps in keeping with the subject matter of this CCAA proceeding, the supplementary Report contained more "late breaking news" including correspondence from Quebcor Media Inc. to the effect that it would be prepared to consider an alternative proposal if the solicitation process was reordered and transparent.

7 Following receipt of the Monitor's supplementary Report and completion of argument, I granted the relief requested with reasons to follow. These are they.

8 I do not propose to embark on a review of the history of the CMI Entities' CCAA proceeding nor the players all of which has been discussed in detail in past decisions. By way of introduction, it will be recalled that the CMI Entities entered into a Support Agreement with members of the Ad Hoc Committee and that Agreement had attached to it the Restructuring Term Sheet that set out the summary terms and conditions of a consensual recapitalization transaction. The Support Agreement provided that the CMI Entities would pursue a Plan on the terms set out in the Restructuring Term Sheet in order to implement the recapitalization transaction as part of the CCAA proceeding. An equity investment of at least $65 million was to be pursued. This brings me to the equity solicitation process.

Equity Solicitation

9 On November 2, 2009, RBC commenced the equity solicitation process to identify potential new investors. They had to be Canadian so as to satisfy the ownership requirements that apply to parent corporations of a corporation that is in receipt of a television license from the Canadian Radio-Television and Telecommunications Commission. It was contemplated that the new investment would amount to at least $65 million. The process was run by RBC, not the Monitor, although the Monitor did receive periodic updates during the process. RBC had been working with Canwest Global since December 10, 2008, and therefore had developed detailed and intimate knowledge of the business of the CMI Entities.

10 The process proceeded in two phases. In the first phase, RBC contacted about 90 potential investors to inquire whether they would be interested in making a minimum 20% equity investment. During the course of initial discussions with potential investors, it was recognized that alternative proposals would be considered. The list of potential investors included both strategic and financial investors and qualified high net worth individuals in Canada and was generated by RBC through its own internal sources and in consultation with the CMI Entities, the CMI CRA, and the Ad Hoc Committee. 52 potential investors expressed interest and were sent "teaser" documents. These included an overview of the investment opportunity and a form of non-disclosure agreement ("NDA") to sign. According to Mr. Grudzinski of RBC, the form of NDA was standard for a process such as this equity solicitation and restrictions on discussions with entities involved in the business are commonplace. Ultimately, 22 potential investors executed NDAs, a take up Mr. Grudzinski viewed as being generally in line with similar investment processes. They then received a more comprehensive confidential information memorandum and access to an internet-based data room containing further confidential information. Those investors were then invited to submit non-binding proposals along with a markup of a proposed equity investment term sheet by December 2, 2009. By that date, six potential investors had submitted initial proposals, five of whom were invited to participate in phase two of the process.

11 Catalyst, a private equity firm specializing in investments in distressed companies, submitted a commit-

ment letter on December 2, 2009. It reflected a $65 million investment representing 25% of the total equity of a restructured Canwest Global. Catalyst was prepared to increase the equity investment up to $165 million for an additional pro rata equity percentage acceptable to Catalyst in conjunction with potential transactions related to CW Investments Co. The cover email described the spirit of the deal as being "a fully funded, fully executable proposal in order to get the Estate out of insolvency protection as soon as possible" and that its transaction had "no due diligence requirement, no financing conditions and no CW Investments Co. condition." This latter reference presumably referred to the CW Investments Shareholders' Agreement with the GS Parties. The commitment was also stated to be in accordance with the Support Agreement negotiated between the CMI Entities and the Ad Hoc Committee. The cover e-mail enclosing the commitment letter stated: "We also understand and adopt the terms and the fact that the Board, management and the other stakeholders have set up a process and the terms of a Plan which we certainly support." The proposal was to be considered withdrawn if Catalyst had not received an executed counterpart to the commitment letter by December 8, 2010.

12 Catalyst had not executed an NDA. Gabriel De Alba of Catalyst states that notwithstanding Catalyst's attempts to open a dialogue with RBC, its proposal expired and other than an acknowledgement of receipt, Catalyst was not contacted.

13 On December 21, 2009, Mr. Grudzinski of RBC advised Catalyst that it would not be permitted to participate further in the process unless it executed an NDA. Catalyst states that it would not agree to this for two reasons. Firstly, its proposal was not conditional on due diligence and as it did not need confidential information, there was no reason for it to execute an NDA. Secondly, the NDA included "offensive and problematic provisions that did not appear appropriate as conditions precedent to submitting a bid including one that would have precluded Catalyst from having discussions with a number of parties, including the GS parties. Given the GS parties' importance to any deal involving Canwest Global, that provision was highly inappropriate in this context and would have severely limited the ability of Catalyst"... "to complete a transaction."

14 RBC commenced phase two shortly after receipt of the non-binding initial proposals. As part of phase two, RBC and the senior management team of CMI Entities met with and provided each phase two participant with a detailed management presentation and confidential information and ongoing access to business and legal due diligence sessions. RBC also advised the phase two participants that they would have the opportunity to meet with members of the Ad Hoc Committee before submitting their proposals. One of the five participants withdrew. On January 20, 2010, RBC advised the remaining four that formal binding offers were required by January 27, 2010, and provided them with a proposed equity subscription agreement and attached term sheet. RBC also advised the phase two participants of criteria Canwest Global and RBC would consider in evaluating offers. These included confirmation that the proposed investor would be willing to proceed with its investment on the basis that the CW Shareholders' Agreement with the GS Parties would be amended on terms acceptable to the proposed investor.

15 Two bids were received by January 27, 2010, and RBC and the CMI Entities had discussions with those bidders.

16 Mr. De Alba of Catalyst states that Catalyst directly and through counsel complained to RBC about the process. He states that because the process was not being overseen by the court, Catalyst had no recourse until the next time the process was referred to the court which was this motion.

17 Ultimately, the CMI Entities selected Shaw's bid as the best overall offer received. The bid contemplates

that:

• Canwest Global will be a private company the shareholders of which will be Shaw or its subsidiary and those noteholders and other creditors who elect to receive equity shares and who would hold at least 5% of the equity shares following completion of the transaction.

• Creditors holding less than 5% of the equity shares on completion of the recapitalization transaction (the "non-participating creditors") and existing shareholders would receive cash to extinguish their interests to be effected pursuant to the Plan. The cash the non-participating creditors would receive would be equal to the value of the equity they would have received under the originally proposed recapitalization transaction but using the higher implied equity value contained in Shaw's bid.

• Shaw will subscribe for Class A voting shares representing a 20% minimum equity subscription in the capital of a restructured Canwest Global and an 80% voting interest. A portion of the proceeds will be distributed to the noteholders pursuant to the Plan in partial payment of the secured intercompany note and the balance will be for working capital purposes.

• In addition to this amount, Shaw would subscribe for an additional commitment of shares at the same price per share to fund the cash payments to the non-participating creditors and the existing shareholders subject to the right of members of the Ad Hoc Committee to elect to participate *pro rata* with Shaw in funding this additional commitment.

• Shaw meets the Canadian requirement, has adequate financial resources on hand to complete the recapitalization transaction, and there are no financing conditions in favour of Shaw.

• A $5 million termination fee may be paid by Canwest Global to Shaw in certain circumstances. It is payable in the event that the Shaw subscription agreement is terminated by Shaw if the closing has not occurred on or before August 11, 2010, solely because of a failure to satisfy certain closing conditions. It is also payable if the agreement is terminated by Canwest Global prior to the implementation of the recapitalization transaction in order to enter into a definitive amendment and restatement of the CW Investment Shareholders' Agreement with the GS Parties that is acceptable to both Canwest Global and the Ad Hoc Committee but that is not acceptable to Shaw. In the event that a termination event has occurred, the Shaw subscription agreement provides that in addition to the termination fee, Canwest Global will reimburse Shaw in an amount of up to $2.5 million for any out-of-pocket fees and expenses relating to negotiation of the transaction. The subscription agreement contemplates that the termination fee and expense reimbursement fee will be secured by a charge over all of the assets, property and undertaking of the CMI Entities ranking after the existing charges.

18 RBC advised the CMI Entities that the bid submitted by Shaw was the best overall offer received considering various criteria. The bid provided significant value to Canwest Global in exchange for the equity investment, gave affected creditors the opportunity to get cash rather than shares, and provided a long-term solution and stability for a restructured Canwest Global through the involvement of a strategic investor with significant experience in the media industry.

19 The Special Committee of the Board of Directors of Canwest Global considered the bids having regard to the best interests of Canwest Global and recommended for approval the Shaw Definitive Documents to the

Board of Directors of Canwest Global. The Board provided approval. All of the CMI Entities' senior management, the CMI CRA, and the Ad Hoc Committee supported the entering into of the Shaw Definitive Documents.

20 Catalyst's late February 19, 2010 offer arose outside the process adopted by RBC and the CMI Entities. Catalyst's bid this time was stated to contemplate a fully funded unconditional investment of $120 million representing 32% of the total equity of a restructured Canwest Global. The proposal again did not require any amendment or disclaimer of the CW Investments Shareholders' Agreement.

21 In court on February 19, 2010, counsel for the CMI Entities, the Special Committee and the Ad Hoc Committee all expressed continued support for the Shaw Definitive Documents. Counsel for the Monitor advised that the CMI CRA also was in favour. In addition, an affidavit of Mr. Grudzinski of RBC was filed stating, amongst other things, that the Shaw transaction represented the best transaction available to Canwest Global in the circumstances. The material non-financial terms of the Shaw Definitive Documents were disclosed in the materials before the court but the Definitive Documents themselves were filed on a confidential basis. The CMI Entities were of the view that disclosure would be extremely detrimental if the approval order was not provided.

Absence of Standstill Agreement

22 There had been recent without prejudice negotiations between the Ad Hoc Committee and the GS Parties. The GS Parties thought that the negotiations were subject to a standstill agreement which provided that absent seven days' notice, neither the Ad Hoc Committee nor the GS Parties would initiate or encourage any other person including Canwest Global to initiate any proceeding with respect to the insolvency proceeding of Canwest Global. Negotiations between the GS Parties and the Ad Hoc Committee were ongoing when the GS Parties were served with the CMI Entities' motion on February 12, 2009. In argument, counsel for the GS Parties did not press this point. It appeared from the materials filed by counsel for the Ad Hoc Committee that due to a computer glitch, agreement was not reached on any seven day standstill. It is fair to conclude from all of the evidence on this issue that firstly, the Ad Hoc Committee had not agreed to a seven day standstill and secondly, the GS Parties reasonably believed that it had. In any event, the GS Parties knew by February 12, 2010 that the CMI Entities were seeking approval of the Shaw Definitive Documents on February 19, 2010.

Monitor's 10th Report

23 The Monitor reported extensively on the Shaw transaction in its 10th Report. Dealing firstly with the subject of the CW Investments Shareholders' Agreement, the Monitor noted that Shaw, Canwest Global, and the Ad Hoc Committee had agreed to jointly pursue in good faith an amendment to the CW Investments Shareholders' Agreement with the GS Parties and to cooperate with each other in those negotiations. The Monitor also observed that a resolution of outstanding issues with the GS Parties is a material condition of the CMI Entities' successful emergence from CCAA protection on a going concern basis and that the introduction of other stakeholders may be a complicating factor.

24 Secondly, the Monitor stated that RBC had circulated to phase two participants a proposed form of subscription agreement that contained a fiduciary out provision that would allow Canwest Global to accept an offer that it determined in good faith to be superior to the offer submitted by the winning bidder and, following payment of a $2.5 million topping fee, be released from its obligations to the winning bidder under the subscription agreement. The Monitor observed that the Shaw subscription agreement did not include this fiduciary out provision.

25 The Monitor reported that the Shaw transaction if completed would satisfy one of the major requirements of the original recapitalization transaction, assist with the CMI Entities' successful emergence from CCAA protection, and allow them to continue operating on a going concern basis thereby preserving, *inter alia*, enterprise value for their numerous stakeholders.

26 The Monitor concluded by stating that it supported approval of the transaction agreements reflecting the Shaw proposal. At the time of the filing of the 10th Report, the February 19, 2010, Catalyst proposal had of course not yet been received by the Monitor.

Monitor's Supplementary Report

27 In its supplementary Report, the Monitor stated that its support of the Shaw transaction was unaffected by the Catalyst proposal.

28 The Monitor observed that the Shaw subscription agreement including the amount of the proposed equity investment had a higher implied equity value than did the Catalyst proposal. On the other hand, the Catalyst proposal did not require an amendment or disclaimer of the CW Investments Shareholders' Agreement which is a condition of the Shaw transaction. The Monitor noted that the Catalyst proposal was subject to the negotiation and entering into of definitive documentation.[FN3] The Catalyst proposal was subject to approval pursuant to a Plan which must be approved by the majority of the CMI Entities' creditors and the Ad Hoc Committee had informed the Monitor that it would not support any Plan that included Catalyst's proposal. The Monitor noted that no Plan can be approved by the creditors of the CMI Entities without the support of the Ad Hoc Committee because, amongst other things, it holds a blocking vote. The GS Parties have stated that the amount of their claim that would result from any disclaimer would result in the GS Parties holding a blocking vote in any vote on the Plan proposed by the CMI Entities. No request for the Monitor's consent to a disclaimer has been forthcoming and the Monitor was not in a position to estimate the quantum of any such claim by the GS Parties. The Monitor also reported that the Ad Hoc Committee disagrees with the GS Parties' assessment in this regard.

29 The Monitor also reported on the concerns it had expressed about the removal of the fiduciary out provision in the Shaw subscription agreement. Although each of the Ad Hoc Committee, RBC and the CMI Entities had used their best efforts to include such a provision in the Shaw subscription agreement, Shaw had refused to include such a provision. In spite of its absence, RBC, the CMI Entities' Board of Directors, the Special Committee and the Ad Hoc Committee all concluded that the Shaw subscription agreement was the best that had resulted from the process. The form of subscription agreement with a fiduciary out provision was only provided to the four phase two participants so there could be no suggestion of reliance on same by Catalyst or the GS Parties. The Monitor noted Mr. Grudzinski's representation that the potential market for Canadian equity investors to invest had been fully canvassed. The Monitor also observed that the NDA requested to be executed by potential bidders was customary for an equity solicitation process. In spite of these factors, the Monitor continued to be supportive of the Shaw Definitive Documents.

Issues

30 The issues for me to consider were:

a) Should I grant the adjournment requested?

b) What is the applicable legal test for approval of the Shaw Definitive Documents?

c) Should I approve the Shaw Definitive Documents and the request for ancillary relief?

Adjournment

31 Having heard extensive submissions, I decided not to grant the adjournment requested by Catalyst and the GS Parties. Firstly, it was clear from the evidence before me that there was no meeting of the minds with respect to any standstill agreement between the GS Parties and the Ad Hoc Committee. As such, the Ad Hoc Committee was not obliged to give seven days' notice before the CMI Entities brought the approval motion. I also note that legitimately, counsel for the GS Parties did not press this argument. While the GS Parties might reasonably have believed that there was a seven day standstill, once the materials were served on February 12, 2010, it was obvious that at least one party did not consider itself bound to any such agreement. Inexplicably, the GS Parties waited until the afternoon of February 18 to serve their materials and Catalyst waited until the wee hours of February 19 to serve its materials. It seems to me that the mayhem of the moment and the false urgency was largely created by the GS Parties and Catalyst.

32 Furthermore, Catalyst opted not to participate in RBC's and the CMI Entities' process. I do not find Catalyst's rational for not having done so to be very persuasive. I do not accept that it had no recourse to address process. The late breaking offer scenario could easily have been avoided by Catalyst. Additionally an adjournment could put the Shaw bid at risk. I concluded that an adjournment was not merited in the circumstances. At the court's request, the Monitor provided evidence to address the Catalyst proposal. In my view, this was a satisfactory approach to the conditions largely created by Catalyst. The court did have some concerns with the deadline imposed by Shaw and agreed to by the CMI Entities and the Ad Hoc Committee. In future, absent compelling reasons, court hearings should not be scheduled for the same day that court approval is required.

Legal Standard

33 The next issue to consider is the standard applicable to the relief requested. The CMI Entities submit in their factum that I should approve the Shaw subscription agreement and the related documents on the basis that they are fair and reasonable, benefit the stakeholders of the CMI Entities as a whole, and do not result in any confiscation of rights held by the GS Parties. In oral argument, without acknowledging that there has been any confiscation of rights, counsel for the CMI Entities refined the standard to the first two elements. In essence the CMI Entities submit that the court should approach the analysis from the perspective of approval of an agreement during a CCAA process. In that regard, they rely on *Air Canada, Re*[FN4], *Calpine Canada Energy Ltd., Re*[FN5] and *Sammi Atlas Inc., Re*[FN6].

34 In contrast the GS Parties and Catalyst submit that although *Royal Bank v. Soundair Corp.*[FN7] dealt with an asset sale, the principles set forth in that case are applicable. Specifically, a court should consider:

a) whether the CMI Entities have made a sufficient effort to get the best price and have not acted improvidently;

b) the interests of all parties;

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

d) whether there has been unfairness in the working out of the process.

35 In addition the GS Parties submit that approval should also be tested against the factors enumerated by Morawetz J. in *Nortel Networks Corp., Re*[FN8] dealing with approval of a sale process under the CCAA, namely:

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?

36 The cases referred to by counsel did not deal with equity solicitations. Given the nature and extent of the equity solicitation in this case, it seems to me that a fair and reasonable test is too limited and the principles enunciated in *Soundair* are more appropriate. To these principles I would add that the court should consider the position of the Monitor. This is a factor to be considered when approval of an asset sale outside the ordinary course of business is sought pursuant to s. 36 of the CCAA. In my view, this is a useful factor to consider in circumstances such as those before me in this case. I do not believe that the *Nortel* process approval factors need be addressed. They are either largely subsumed by the *Soundair* principles or are unhelpful where the result of the equity solicitation process is before the court for approval not the process itself. That said, even if I were to consider the *Nortel*process approval factors, I would reach the same conclusion.

Approval

(a) Parties' Positions

37 In brief, the parties' positions were as follows. The CMI Entities submit that the Shaw transaction is fair and reasonable and that it is beneficial to the stakeholders of the CMI Entities, viewed as a whole. It is the product of a comprehensive equity investment solicitation process conducted by a sophisticated financial advisor and reflects the exercise of the business judgment of the Board of Directors of Canwest Global on the recommendation of the Special Committee and the CMI CRA as to the best interests of the CMI Entities. The CMI Entities state that the GS Parties have no contractual or legal right to dictate the terms of the equity solicitation process and they are advancing objections to obtain further negotiating leverage. They are not creditors and none of their rights will be affected or confiscated if the Shaw Definitive Documents are approved. Those Documents expressly provide that the parties will jointly pursue any consensual amendment to the Shareholders' Agreement; the parties are not required to pursue disclaimer of the Shareholders' Agreement; and the Ad Hoc Committee and the CMI Entities can pursue an agreement to amend the Shareholders' Agreement with the GS Parties that is not agreed to by Shaw. The Shaw transaction satisfies a crucial step in the restructuring. The members of the Ad Hoc Committee are the CMI Entities' largest creditor group and if the CMI Entities hope to emerge from this restructuring successfully, the members of the Ad Hoc Committee must necessarily vote in favour of the Plan. There was nothing unfair or unbalanced about the process and all potential bidders had equal access to information.

38 The Special Committee, the Ad Hoc Committee, and Shaw all supported the position of the CMI Entities.

39 The GS Parties submit that approval is being sought on an incomplete record and in circumstances where

there are significant issues about the integrity of the process and whether the best available transaction has emerged. It is premature to conclude that the Shaw transaction represents the best available agreement taking into account the interests of all stakeholders. They complain about the absence of a fiduciary out-provision. Furthermore, they state that they were completely shut out from the process even though any restructuring transaction must ultimately contend with their rights in CW Investments Co. The transaction structure appears to have been controlled by the Ad Hoc Committee to serve its own interests. The GS Parties state that the Shaw transaction enables the Ad Hoc Committee to extract certain minimum cash levels immediately. They also complain that the treatment of the noteholders' claims is proposed to be very different than the treatment of other affected creditors. There are powerful incentives for the CMI Parties to adhere to the terms of the agreements negotiated with the Ad Hoc Committee and in these circumstances, deference should not be given to the exercise of business judgment.

40 The GS Parties state that lack of disclosure and discussions have substantially impaired their ability to place an alternative to the Shaw transaction before the court. The process was never approved by the court and the Monitor's involvement has been limited to periodic updates. As such, the process and the result are not entitled to deference and should be carefully scrutinized. Others were not prepared to sign the NDA and this constraint and others limited participation in the process. They were also prohibited from engaging in discussion with the GS Parties as a condition of participation. The GS Parties state that they have a limited interest in who ultimately controls Canwest Global given that control of Canwest Global results in control of CWI and the specialty television business. This interest has been ignored. Furthermore, it is a condition of the Shaw transaction that the CW Investments Agreement be disclaimed or amended in a manner agreed to by Canwest Global, the Ad Hoc Committee and Shaw. The exclusion of the GS Parties from the process, the targeting of the rights and interests of the GS Parties under the CWI Agreement, and the prohibition of discussions between the GS Parties and Shaw before court approval are all fundamental failures to consider the legitimate interest of the GS Parties.

41 Catalyst supported the position of the GS Parties.

(b) Discussion

42 It is clear that the CMI Entities did make a sufficient effort to obtain the best offer. RBC established and published a process with which the GS Parties and Catalyst now take issue. There was nothing stopping either of them from challenging the process at an earlier stage or alternatively, participating in it. Indeed, as evident from the email enclosing its first bid, Catalyst stated that: "We also understand and adopt the terms and the fact that the Board management and other stakeholders have set up a process and the terms of a Plan which we certainly support." RBC fully canvassed the market. It is unnecessary for the court to be given the identity of prospective investors in the face of the overwhelming evidence of an extensive market canvass.

43 As noted by the Monitor and many others, no Plan can be approved by the creditors of the CMI Entities without the support of the Ad Hoc Committee which holds a blocking vote. That said, I am also satisfied that the interests of all parties were considered. While one may reasonably question whether the strategy of postponement of the issues relating to the CW Investments Shareholders' Agreement and the GS Parties is or is not wise, the CW Investments Shareholders' Agreement is unaffected by the Shaw Definitive Documents. The GS Parties are in no worse position with respect to the CW Investments Shareholders' Agreement. The GS Parties are not creditors. In addition, the Definitive Documents provide that the parties will jointly pursue any consensual amendment to the Shareholders' Agreement; the parties are not required to pursue disclaimer of the Shareholders' Agreement; and the Ad Hoc Committee and the CMI Entities can pursue an agreement to amend the Share-

holders' Agreement with the GS Parties that is not agreed to by Shaw. The evidence before me suggests that the CMI Entities did turn their minds to the interests of others and the Board of Directors concluded that the Shaw Definitive Documents were in the best interests of Canwest Global and by inference, given that it was an equity solicitation, its stakeholders.

44 As to the efficacy and integrity of the process by which offers were obtained, there was a fair and thorough canvass of the market and a level playing field. As to whether there has been unfairness in the working out of the process, while the Monitor favoured inclusion of a fiduciary out provision and while one may argue that ideally the fiduciary out provision would not have been negotiated away, this did not constitute unfairness in the working out of the process or a lack of efficacy or integrity in the process. The evidence before me suggests that there were good faith efforts made by RBC, the CMI Entities and the Ad Hoc Committee to maintain that provision but Shaw successfully negotiated for its omission. On balance, all of them were of the view that the merits of the Shaw transaction outweighed the benefit of insisting on the inclusion of the fiduciary out provision. It should also be noted that the Catalyst proposal does not include a fiduciary out provision. Furthermore, in spite of the lack of a fiduciary out provision, the Monitor is supportive of the Shaw Definitive Documents and was not critical of the process. Additionally, there is support from the Special Committee of the Board, the Board of Directors of Canwest Global, the CMI CRA and the Ad Hoc Committee.

45 I should also stress that there appears to be a reasonable basis for this support. Amongst other things, Shaw is experienced in the media industry, financing is not an issue, the offer is for a substantial amount and has a substantially higher implied equity value than that proposed by Catalyst. One should also not overlook the fact that the transaction is necessary at this time. The CMI Entities do not have unlimited time within which to conduct the equity solicitation process and, subject to closing, a major objective underpinning the initial CCAA filing has now been accomplished. The transaction provides some confidence that the CMI Entities will be able to continue as going concerns. I reiterate my view that the Shaw Definitive Documents should be approved and the ancillary relief granted. With respect to the latter, the amounts of the termination fee and the expense fee and the proposed charge itself are fair and reasonable in the circumstances. They are also consistent with giving the CMI Entities leeway to address outstanding issues with the GS Parties but in a manner that is fair to Shaw's commercial interests.

46 Lastly, among other representations and warranties given by Canwest Global to Shaw, Canwest Global has covenanted to use its commercially reasonable efforts to cause its affiliates to terminate the participation of any employee of Canwest LP, CCI and their subsidiaries in a pension or benefit plan of Canwest Global or its other subsidiaries and to terminate all intercompany plan participation agreements between a specified affiliate and Canwest Global and one of its subsidiaries. This covenant is intended to cause the CMI Entities to use commercially reasonable efforts to realign certain employees of the specified affiliates who, for various reasons, participate in a pension plan which is sponsored by the CMI Entities and enable those employees to participate in a pension plan which is sponsored by the specified affiliate. Counsel for the CMI Entities confirmed that they had no intention of terminating pension benefits; this was merely to realign the plans with the appropriate entities.

Conclusion

47 For these reasons, I granted the relief requested. A major question continues to revolve around the CW Investments Shareholders' Agreement and the relationship between the CMI Entities and the GS Parties. As is evident from paragraph 75 of their factum and their counsels' submissions, the GS Parties' key concern is that the CCAA proceeding is designed by the Ad Hoc Committee to achieve a disclaimer of the CW Investment

Shareholders' Agreement and to take value away from the GS Parties. I continue to be of the view that a commercial and negotiated resolution of that issue is in the best interests of all concerned. I have approved the Shaw Definitive Documents and ancillary relief. The parties must now move forward and have a reasonable dialogue.

Application granted.

FN1 R.S.C. 1985, c. C. 36, as amended.

FN2 During which time counsel not yet retained by certain noteholders who are not represented by the Ad Hoc Committee appeared to advise the court that his potential clients might not agree with the position of the Ad Hoc Committee.

FN3 In argument, this condition was waived by Catalyst.

FN4 (2004), 47 C.B.R. (4th) 169 (Ont. S.C.J. [Commercial List]).

FN5 2007 ABQB 504 (Alta. Q.B.).

FN6 (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]).

FN7 (1991), 4 O.R. (3d) 1 (Ont. C.A.).

FN8 (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]) at para. 49.

END OF DOCUMENT

TAB 8

COURT FILE NO.: 05-CL-6103
DATE: 20070131

SUPERIOR COURT OF JUSTICE - ONTARIO
COMMERCIAL LIST

RE: **AMARANTH LLC**, Applicant

A N D:

COUNSEL CORPORATION, Respondent

APPLICATION UNDER SECTION 248(3) OF *THE BUSINESS CORPORATIONS ACT*

BEFORE: MESBUR J.

COUNSEL: Peter Griffin and Michael Hunziker, for the Applicant

Benjamin Zarnett and Graham Smith, for the Respondent

HEARD: December 19 and 20, 2006

REASONS FOR DECISION

Nature of the application:

[1] This is an oppression claim. The fundamental question underlying it is whether, in 2005, in a number of transactions, the respondent Counsel sold substantially all of its assets out of the ordinary course of its business. If it did, it was required to hold a special meeting of shareholders to seek their approval of the sale transactions.[1]

[2] The applicant, Amaranth holds a significant number of shares in Counsel. Amaranth says that the transactions were such a sale. Amaranth suggests that since Counsel failed to hold the special meeting, it deprived Amaranth of its dissent rights and

[1] Section 183(4) of the *Business Corporations Act* (*OBCA*) requires a corporation to obtain the approval of its shareholders for any sale of "all or substantially all the property of a corporation other than in the ordinary course of business of the corporation."

the right to be paid fair value for its shares in Counsel.[2] As a result, Amaranth says it has been oppressed, in the sense that its interests have been unfairly disregarded.[3]

[3] Counsel takes the position that the transactions were not a sale of substantially all of its assets, and even if they were, they were not out of the ordinary course of its business. Thus, it says, there was no obligation to hold a special shareholders' meeting, no deprivation of any dissent rights, and no consequent oppression.

The general background to the application:

[4] Counsel is a Toronto based company, which has been in business for over 27 years. The nature of its business is one of the fundamental questions on this application. Counsel describes itself in its factum as a company "with a long and public history of investing in a wide variety of assets with a view to developing the value of those assets, ultimately disposing of those assets at a profit, and reinvesting the proceeds in new opportunities".

[5] Amaranth is one of the word's largest hedge funds. Amaranth holds, on a fully diluted basis, just over 27% of Counsel's voting shares. Amaranth first acquired an interest in Counsel in December of 2000, when it bought convertible debentures. In 2003, the debentures were paid out in shares. Between that transaction, and other transactions in 2004, Amaranth acquired its current shareholdings. Amaranth describes Counsel's core business as focused on telecommunications and real estate.

[6] In 2005 Counsel entered into the transactions that Amaranth says constituted a sale of substantially all of its assets, outside the ordinary course of business. In these transactions, Counsel divested itself of seven of its eight major real estate holdings. In addition, Acceris, a telecommunications company in which Counsel indirectly holds 92% of the shares, divested itself of its telecommunications assets.

[7] Around the time of the transactions, Counsel's CEO had advised Amaranth of a plan to remake Counsel into a financial services firm. The principals of Amaranth and Counsel had some discussions about this potential change in focus. Amaranth eventually took the position that the proposed divestiture and proposed change in focus would constitute a sale of substantially all of Counsel's assets out of the ordinary course of Counsel's business, and that Ontario's *Business Corporations Act* [4] (*OBCA*) would therefore require a special shareholders' resolution to approve the transactions.

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[2] Section 186(1)(e) of the *OBCA* entitles a shareholder to dissent from a resolution approving the transaction and to be paid fair value for its shares.
[3] Section 248, *OBCA*
[4] R.S.O. 1990 c. B-16, as amended

[8] Counsel did not hold a shareholder vote. Amaranth says that one was required, and the failure to do so deprived Amaranth and the other shareholders of the opportunity to dissent and be paid fair value for their common shares.

The test:

[9] In order to succeed on this application, Amaranth must show the following:

(a) that the transactions in 2005 were sales of Counsel's property;

(b) that they constituted sales of substantially all of Counsel's property;

(c) that they were out of the ordinary course of Counsel's business; and

(d) that if (a) through (c) above are met, the failure to call for shareholder approval actually oppressed Amaranth, or was unduly prejudicial to Amaranth, or unfairly disregarded Amaranth's interests as a Counsel shareholder.

Discussion:

[10] Before even considering the question of oppression, first I must address whether the transactions constituted a sale of Counsel's assets. Next, I will consider whether the transactions constituted a sale of substantially all of Counsel's assets, from both a quantitative and qualitative point of view. Last, I will consider whether the transactions were out of the ordinary course of Counsel's business. This necessitates an examination of the true nature of Counsel's business.

Were the transactions a sale of Counsel's assets?

[11] Counsel concedes the real estate holdings that were sold were clearly Counsel's property. It takes a different view concerning the sale of Acceris' telecommunications assets. Acceris is a publicly traded US company. It shares the same CEO as Counsel. Counsel indirectly owns 92% of Acceris' shares. While Counsel controls Acceris, Acceris cannot be described as a wholly owned subsidiary of Counsel.

[12] Counsel suggests that since it was Acceris, and not Counsel, that sold the telecommunications assets, those assets cannot be viewed as Counsel's assets. Counsel points out that it held 92% of Acceris' shares before the sale of the telecommunications assets, and continues to hold those shares today. Thus it says the sale cannot be viewed as a sale of Counsel's assets. I agree.

[13] First, section 184 of the *OBCA* refers to sale of the *corporation's* assets. In sections 1(2) and 1(4) the *Act* defines a "subsidiary body corporate" and "affiliated body corporate". Acceris would clearly be a subsidiary of Counsel, since Counsel, with 92% of its voting shares, controls it. Section 184, however, does not include a sale of a subsidiary's assets in outlining the circumstances under which a corporation must seek shareholder approval for such a sale. I agree with Counsel's position that the question of section 184's application must be addressed in the context of the *OBCA* itself. Every corporation has a separate legal personality. Even with consolidated financial statements, what is being consolidated is the financial circumstances of separate legal entities. The entities themselves do not merge.

[14] Second, Amaranth relies on the Delaware case *Hollinger Inc. v. Hollinger International, Inc.*[5] to support the view that the assets of a wholly owned subsidiary should be considered to be the assets of the parent corporation for the purpose of addressing the question of whether a sale is of "substantially all" of the parent's assets. In *Hollinger*, in *obiter*, Vice Chancellor Strine recognized that the wording of the Delaware statute only required a vote if a corporation sold its own assets, but felt that this interpretation restricting the ability to "pierce the corporate veil" was too rigid, and that a wholly owned subsidiary's assets should be included for the analysis.

[15] The Delaware statute considered by Vice Chancellor Strine provided that stockholder approval is required for the "sale lease or exchange" of "all or substantially all" of "a corporation's assets". In 2005, following the *Hollinger* decision, the section was amended to include a new subsection that provides that the assets of wholly owned subsidiaries are to be considered to be assets of the parent corporation for the purposes of making the determination of whether assets proposed to be sold constitute "all or substantially all" of the parent's assets.

[16] In words similar to the initial Delaware statute, section 184(3) of the *OBCA* simply says:

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

[17] The *OBCA* contains no similar provision to the amended Delaware statute, including the assets of a wholly owned subsidiary in those of a parent for the purpose of section 184. The fact legislative amendment was required in Delaware suggests to me that including the assets of a wholly owned subsidiary in looking at a corporation's assets was not the case prior to the amendment. There has been no such amendment

[5] 2004 WL 1728003 (Del. Ch., July 29, 2004)

to the *OBCA.* From this I infer that a subsidiary's assets are not included in a corporation's assets under section 184, and must therefore conclude that Acceris' sale of its telecommunications assets was not a sale by Counsel of any of its own assets. In any case, it is clear that Acceris is not a wholly-owned Counsel subsidiary. Even if the Delaware rule applied here, it would not apply to this situation, in which there is no wholly-owned subsidiary.

[18] If I am mistaken, and the telecommunications assets were Counsel's, it is clear that their book value represented about 17% of Counsel's overall book value, expressed on a consolidated basis. I will address whether this constitutes a sale of "substantially all" of Counsel's assets in the section below. This necessitates an analysis of whether the Acceris sale should be considered on its own, or whether it should be considered as part of what Amaranth calls "the overall divestment strategy", in which case it would be added to the other transactions.

Substantially all of Counsel's assets?

[19] Courts have analyzed the phrase "substantially all" of a corporation's assets by looking at the question from both a quantitative and a qualitative approach. The quantitative approach compares the proportion or relative value of the transferred property to the total property of the transferor. The qualitative analysis assesses whether the transferred property was integral to the transferor's core business activity, so that its disposition strikes at the heart of its existence. Thus, the issue of determining the nature of the transferor's business is critical to the qualitative analysis. The law is also clear that regardless of the quantity of the assets sold, the qualitative analysis will govern in ultimately determining the question.[6] The question of the transferor's core business activity is also the key issue for the last question, namely whether the transactions were out of the ordinary course of Counsel's business.

The quantitative approach

[20] There are a number of ways of looking quantitatively at the transactions in question to determine whether they constituted a sale of substantially all of Counsel's assets. Both parties have approached this issue from the point of view of the book value of assets as carried on Counsel's financial statements. Where they differ fundamentally is on the question of adjustments, if any, to be made to the balance sheet entries. Amaranth takes the position that since Counsel's financial statements are prepared on a consolidated basis for its shareholders, it is those consolidated figures

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[6] *Canadian Broadcasting Corp. Pension Plan v. BF Realty Holdings Ltd,* 214 D.L.R. (4^{th}) 121 per Cronk, J.A.at paragraph 48

that should be used, particularly when one is looking at reasonable shareholder expectations. That is because shareholders are only entitled to receive the consolidated financial statements of the corporation, and thus their expectations would be based on these consolidated statements.

[21] On a consolidated basis, the financial statements do not show intercorporate debt. Counsel's investment in Acceris necessitated enormous infusions of capital to Acceris. Acceris owed some $71 million to Counsel at the time of the transactions. Because the $71 million debt owing from Acceris to Counsel is not reflected on the consolidated statements as a Counsel asset, the overall book value of the company is reduced by that figure on a consolidated basis. As a matter of arithmetic, with a lower overall corporate book value, the sale of any asset will result in that sale reflecting a higher proportion of the overall value of the company than if the overall value were higher.

[22] If, as Counsel suggests, one should look at the non-consolidated financial statement of Counsel itself, Counsel's net book value is increased by the $71 million Acceris owed, and thus the value of the sold assets represents a smaller percentage of the overall value of Counsel.

[23] There are other adjustments that each of the parties suggests should be made, but the two I have mentioned are the most significant. The others are not mathematically significant, and thus I will not refer to them.

[24] If I use the Amaranth approach, and look at the real estate transactions as a percentage of Counsel's total consolidated book value, they represent about 50% of that value. If I look at the Acceris transaction alone, the parties agree that it represents about 17% of Counsel's book value. Together, the two sets of transactions represent 67% of Counsel's value. Amaranth suggests that the transactions should be considered as a whole, since they represented part of an overall strategy of divestment. If I accept that approach then from a quantitative point of view the transactions account for a sale of 67% of Counsel's assets.

[25] If I use the Counsel approach, and look at non-consolidated statements, the real estate transactions represent only about 27.5%% of Counsel's value, while Acceris represents 17 %. Together, obviously, they represent 44.5% of Counsel's assets. This figure would not amount to substantially all of Counsel's assets on a quantitative basis. Each figure alone would certainly not constitute a sale of all of Counsel's assets. On the Counsel approach, there can be no sale of substantially all of Counsel's assets on a quantitative basis.

[26] The case law is of no help in determining whether one is to look at non-consolidated or consolidated financial statements in calculating what percentage of the

assets have been sold. For that matter, case law is of no help in determining whether one should look at book value, or fair market value in making the analysis.

[27] In my view, the approach Amaranth suggests makes more sense, that is, that the transactions should be looked at from the point of view of a shareholder when one is looking overall at shareholder expectations. I consider the transactions in the context of the consolidated financial statements. That being the case, the Acceris transaction represented 17%, the real estate transactions represented about 50%, and together they represented 67%. I would view the real estate transactions alone as representing a very significant portion of Counsel's assets. If I were looking only at a quantitative analysis, and looked at the transactions together, I would conclude they represented substantially all of Counsel's assets. The law, however, requires me to consider the transactions from a qualitative approach as well.

[28] The question of whether the transactions should be considered as a whole can only be answered in the context of Counsel's overall core business, and only if the Acceris sale is considered as a sale of Counsel's assets, which it was not. If the transactions were a reflection of a fundamental change in that core business, being out of the ordinary course of Counsel's business, then I would consider them together, as part of an overall plan. If the transactions were not out of the ordinary course, and did not represent a fundamental change in Counsel's core business, then I would look at the transactions independently of one another. Thus, this latter question is dependent on an analysis of the qualitative approach to the transactions as well.

The qualitative approach

[29] The qualitative approach necessitates an analysis of Counsel's core business, to determine whether the assets sold were integral to its core business activity, so that their disposition strikes at the heart of Counsel's existence. The same inquiry is necessary to determine whether the sale of the assets was out of the ordinary course of Counsel's business. In this regard, it is noteworthy that even in circumstances where a company has disposed of 98% of its assets, that alone may be insufficient to trigger the vote/dissent mechanism of the applicable corporate legislation if the transaction has not destroyed the company's business or purpose.[7]

[30] Amaranth suggests that in determining what Counsel's core business is, I should look only at what it was doing at or around the time of the transactions. If that is the case, then it can fairly be said that Counsel's business was primarily real estate and telecommunications. Indeed, around 2005 Counsel was describing its main

[7] *Colwill v. 601999 Saskatchewan Ltd.* (1999), 1 B.L.R.(3d) 300 (Sask. Q.B.); see also *Lindzon v. International Sterling Holdings Inc.* (1989), 45 B.L.R. 57 (B.C.S.C.)

business focus as real estate and telecommunications. In my view, however, looking only at 2005 is too narrow an approach.

[31] Counsel has been in business for more than 27 years. In looking at the company from Amaranth's point of view, it seems to me that I should look at it at the time Amaranth invested, and consider what information was available to Amaranth at that time concerning Counsel's business. Its history up to that time, and indeed up to the date of the transactions in question, is what is relevant in determining the true nature of its business, from the point of view of reasonable shareholder expectations. Objective reasonable shareholder expectations are, of course, at the heart of any oppression claim.[8]

[32] Between its inception in 1979 and 2000, when Amaranth first became a shareholder, Counsel acquired a trust company, bought and sold numerous real estate properties, incorporated a life insurance company to sell retirement products, acquired nursing homes and nursing home companies, sold its trust company and life insurance company and many of its nursing homes, acquired and sold interests in pharmaceutical and medical services companies and laboratories, acquired an interest in an internet direct marketing company, and in software and network service providers. Counsel did not acquire its interests in the company that later became Acceris, which was in the business of voice over internet protocol, as well as various commercial real estate properties until after 2000, when Amaranth was already a significant shareholder.

[33] Counsel's public Annual Reports to its shareholders have described its focus in various ways. In 1995, it said, "Counsel's philosophy is to realize on its asset value creation over time." In 1996 it described its essential focus as "realizing value for its investors. Counsel Corporation is always actively investing on behalf of its shareholders ... Realizing value shapes our strategic plan and informs every decision made."

[34] The 1997 Annual Report described Counsel as "always poised to benefit from new opportunities." The 1998 Report contained the same comment, with the addition of "We will realize the value created and redeploy assets at opportune times so that we continue to maximize shareholder value." In 1999, Counsel described its corporate profile as "poised to benefit from new opportunities by utilizing its core strengths – its dedicated team of business specialists, its financial resources, its flexibility and the speed with which it can embrace and enhance new ideas, new concepts and new business enterprises in a changing economic environment."

[8] *Bank Leu Ag v. Gaming Lottery Corp.* [2003] O.J. No. 3213 (Ont. C.A.) at paragraphs 71 and 72

[35] By 2003 the Annual Report referred to Counsel's real estate investments, and said, "over the short to medium term we will be investigating the opportunity to monetize the increased value of our portfolio for the benefit of Counsel's shareholders".

[36] Counsel points to these statements to support its view that while its various underlying business holdings have changed significantly over the years its core business has not. It suggests that Counsel's core business is, has been, and will remain investing in various types of enterprises, enhancing their value, divesting, and then reinvesting in new ventures.

[37] On the other hand, Amaranth points to other statements in Counsel's Annual Reports and elsewhere to support its view that Counsel's core business was real estate and telecommunications. For example, in Counsel's 2002 Annual Report, the following statement is found: "Counsel is a diversified company focused on acquiring and building businesses in two specific sectors: communications in the United States and real estate in Canada."

[38] At a presentation to the shareholders at the 2002 Annual General Meeting, the company's objective was described as: "To create and realize value by acquiring controlling interests and building operating businesses in a discrete number of market sectors." The presentation went on to say:

> Perhaps most importantly, in 2002 we returned to our fundamental investment principles and more focused approach to business. Our objective is to create and realize value by acquiring controlling interests and building operating businesses in a discrete number of market sectors. To these businesses, we apply our experience and skills to create consistent, sustainable cash flow and positive investment returns. This approach has produced many successes over the past years, and we are confident it will do so once again.

[39] In early January 2003, Counsel made a presentation to Paloma Partners, in which it described Counsel's investment activities as being focused on two specific market sectors with long-term growth potential. It described these sectors as communications and real estate.

[40] In March of 2005 Counsel's Annual Information Form described Counsel as a "diversified company engaged primarily in the ownership and development of companies that provide services and products in the United States and Canada. In 2004 and 2003, the Corporation focused on businesses in three specific sectors: Communications in the United States and real estate and long-term care in Canada."

[41] By June of 2005, in the notes to the Consolidated Financial statements, Counsel had changed the description of its business somewhat, saying that Counsel had, "since its inception in 1979, focused on the acquisition of businesses in various industry sectors and at various states of their business life cycles. Its goal for acquired businesses is to create value within those businesses and to realize on that value creation at the appropriate time. We expect to deploy this strategy in the future. Counsel presently holds assets in three specific sectors: communications in the United States and real estate and long-term care in Canada."

[42] From these statements, Amaranth infers that Counsel's core business was real estate and telecommunications. It bolsters its view by the suggestion that Counsel intended to change its underlying business to financial services. In that regard, it points to the minutes of a Counsel Board meeting on March 17, 2005, in which the minutes reflect a discussion of the "financial services strategy". The minutes say, "plans in this sector were still being formulated and would be subject to developments at Acceris and Counsel Real Estate. He [the Chairman] expects to have a more detailed business plan for the board to consider by May. The board encouraged management to proceed with this initiative."

[43] Amaranth concludes that this shows a fundamental shift and change in Counsel's core business, and that the sale of Acceris assets and real estate assets would thus constitute a sale of substantially all of Counsel's assets, out of the ordinary course of its business.

[44] In response, Counsel points out that the "financial services strategy" never came to fruition. Indeed, the June 2005 Board meeting minutes comment on Counsel's future in the following terms:

> The Chairman said that the Corporation will be much simpler and less expensive to operate in the future. No definitive strategy has been developed yet, with the current focus being on completing the proposed dispositions ... Management is currently looking at a case goods manufacturer in the lodging industry ...

[45] By November 2005 the Board meeting minutes comment that the "real estate environment is still very overheated but there are certain opportunities that can be exploited and the Corporation currently has two offers out. The Corporation is also looking to expand its property management business."

[46] It is noteworthy that although Counsel has moved from a trust company, to real estate investments, to life insurance, into nursing homes, then pharmaceutical and medical services and laboratories, to internet direct marketing, software and network service providers, only once in its 27 years has it obtained special shareholder

approval of any significant divestment. That was in the case of a sale of Counsel's shares in Stadtlander Drug Co. in 1998. Counsel's interest in Stadtlander was held through wholly owned subsidiaries. Its value represented about 66% of Counsel's 1997 annual revenues, and 47.5% of its assets on a consolidated basis.

[47] Amaranth suggests that the 2005 transactions were similar to the Stadtlander sale, and thus should have been subject to shareholder approval. Counsel says the contrary inference should be drawn. Since there is only one instance of shareholder approval being sought, this should suggest that as a general rule, looking at Counsel's business practices, none is necessary.

[48] It is true that Counsel sought shareholder approval to approve the Stadtlander transaction. The notice to the shareholders described the sale as "representing substantially all of the assets of the Corporation." It is not clear what percentage of Counsel's assets on a non-consolidated basis the sale represented.

[49] It is important to note, however, that in the Stadtlander purchase agreement, the purchaser required Counsel to "take all action to convene a special meeting of the shareholders ... and to use its best efforts to obtain the consent and approval of the Canadian Corporation's [Counsel's] shareholders with respect to the transactions contemplated thereby." Counsel points to this requirement on the purchaser's part as being the driving force behind the special meeting, and not that the sale was out of the ordinary course of Counsel's business. I note that the notice to shareholders does not describe the Stadtlander sale as being out of the ordinary course of Counsel's business.

[50] When I look at Counsel historically and objectively, I see Counsel's underlying or core business as the acquisition, operation and then sale of different businesses. The various businesses themselves have changed over time; the essence of the business has not. From a qualitative approach, then, it cannot be said that the sale of assets was integral to Counsel's core business activity, so that their disposition strikes at the heart of Counsel's existence.

Out of the ordinary course of business?

[51] Since Counsel's core business is the acquisition and sale of different businesses these sales represented nothing out of the ordinary. Indeed, it is noteworthy that Counsel did not divest itself of all its real estate assets, and has since acquired more. Its business of property management has continued, unaffected by these transactions. It never proceeded with any plan to "transform" itself into a financial

services business, as Amaranth suggests. In the result, I cannot see that Counsel divested itself of substantially all its assets out of the ordinary course of its business. The transactions were nothing more or less than what Counsel has been doing since 1979 – divesting itself of some business platforms, in order to invest in others.

Oppression?

[52] Amaranth's oppression claim depends on a finding that Counsel sold substantially all of its assets, out of the ordinary course of its business. Since there was no sale out of the ordinary course of business, s. 184 of the *OBCA* is not triggered. No special resolution of shareholders was required, and Amaranth therefore had no dissent rights. As a result, there can be no oppression.

Disposition:

[53] The application is therefore dismissed, and Counsel is entitled to its costs of the application. As the parties have agreed, the costs of the application are fixed at $85,000, plus disbursements and GST.

MESBUR J.

Released: 20070131

TAB 9

DATE: 20011010
DOCKET: M27743

COURT OF APPEAL FOR ONTARIO

McMURTRY C.J.O., FINLAYSON and AUSTIN JJ.A.

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 CONSUMERS PACKAGING INC., CONSUMERS INTERNATIONAL INC. and 164489 CANADA INC.

) Peter F.C. Howard, Patrick O'Kelly and
) Craig Martin, for Ardagh PLC
)
) Robert S. Harrison and Carole J. Hunter,
) for the *Ad Hoc* Noteholders Committee
)
) Daniel V. MacDonald and Paul G.
) Macdonald for Consumers Packaging
) Inc., Consumers International Inc. and
) 164489 Canada Inc.
)
) L. Joseph Latham and Elizabeth Moore,
) for the Toronto-Dominion Bank
) Syndicate
)
) Lily I. Harmer, for the United
) Steelworkers of America
)
) Marc Lavigne, for Anchor Glass
) Container Corp.
)
) Dale Denis, for Owens-Illinois, Inc.
)
) Terrence J. O'Sullivan, for KPMG Inc.
) (Court-appointed monitor)
)

) Heard: September 27, 2001

On appeal from the order of Justice James M. Farley dated August 31, 2001.

BY THE COURT:

[1] Ardagh PLC ("Ardagh"), seeks leave to appeal and if leave is granted appeals the Order of The Honourable Mr. Justice Farley dated August 31, 2001 which approved a sale of certain assets of Consumers Packaging Inc. and Consumers International Inc. and 164489 Canada Inc. (hereinafter collectively "Consumers") to Owens-Illinois, Inc. ("Owens-Illinois").

[2] Consumers had filed for protection under the *Companies' Creditors Arrangement Act* (the "CCAA") on May 23, 2001 and Farley J. made an initial order on that date approving an amendment and forbearance agreement between Consumers and its institutional lenders and arranging interim credit. KPMG Inc. was appointed Monitor under s. 11.7 of the CCAA. On June 18, 2001 Farley J. authorized Consumers through an Independent Restructuring Committee and its Chief Restructuring Officer to fix a date upon which interested third parties were to submit firm, fully financed offers to purchase all or any part of Consumers' business. Both Ardagh and Owens-Illinois participated in the bid process. The Independent Restructuring Committee, the Chief Restructuring Officer and the Monitor agreed on behalf of Consumers that Owens-Illinois was the preferred bid. On the sale approval motion heard August 31, 2001, Farley J. found as a fact that Consumers was "quite sick" and "financially fragile" and that there "exists a material risk that [Consumers] will be destabilized by a withdrawal of funding by the [consortium of lenders] which have been continuously adamant about a September 2001 deadline for pay out."

[3] On the evidence before us, the Owens-Illinois bid approved by Farley J. on August 31, 2001 was the result of a fair and open process developed by Consumers and its professional advisors and carried out, after May 23, 2001, under the supervision of the court and with the participation of Ardagh. The Owens-Illinois bid provides more cash to Consumers' creditors than a proposal from Ardagh, has the least completion risk, is not conditional on financing, is likely to close in a reasonable period of time, is made by a credible purchaser (the largest glass bottle manufacturing company in the world) and will result in the continuation of Consumers' Canadian business, the retention of a vast majority of Consumers' 2,400 Canadian employees and the assumption by the purchaser of significant obligations under Consumers' employee pension plan. It is supported by all parties before this court with the exception of Ardagh.

[4] The respondents on this motion submit that the restructuring proposals put forward by Ardagh were not backed by financing commitments, required further due diligence by Ardagh and its lenders, could not be completed in a timely way, offered less by way of recovery to Consumers' creditors and were no more than proposals to negotiate. It appears to have been the unanimous view of the Monitor, Consumers' Independent Restructuring Committee and Consumers' Chief Restructuring Officer that Ardagh's proposals were not viable and would, if pursued, result in the liquidation of Consumers, resulting in lower return to creditors, loss of jobs and cessation of business operations. This view was accepted by Farley J. who stated in his endorsement approving the Owens-Illinois bid that it was the "only presently viable option better than a liquidation with substantially reduced realization of value".

[5] In our opinion, leave to appeal should not be granted. The authorities are clear that, due to the nature of CCAA proceedings, leave to appeal from orders made in the course of such proceedings should be granted sparingly: see *Algoma Steel Inc. (Re)*, a judgment of the Ontario Court of Appeal, delivered May 25, 2001, [2001] O.J. No. 1943 at p. 3. Leave to appeal should not be granted where, as in the present case, granting leave would be prejudicial to the prospects of restructuring the business for the benefit of the stakeholders as a whole, and hence would be contrary to the spirit and objectives 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. There is a real and substantial risk that granting leave to appeal in the present case will result in significant prejudice to Consumers and its stakeholders, in light of the significant time and financial constraints currently faced by Consumers. Both Farley J. and KPMG Inc., the court-appointed Monitor in the CCAA proceedings, have concluded that the Owens-Illinois bid represents the only presently viable option available to Consumers, which would be better than a liquidation.

[6] The transactions contemplated by the Owens-Illinois bid are expected to close on September 28, 2001. If the Owens-Illinois bid does not close before the end of September, 2001, it is uncertain if, and for how long, Consumers would be able to continue its operations. The financial institutions that are prepared to finance these transactions have appeared before this court and have advised, both before and throughout the CCAA proceedings, that they will not fund the operations of Consumers beyond the end of September, the time at which Consumers' credit requirements seasonally increase on an annual basis. There is no evidence on the record, and certainly none from Ardagh, as to the manner in which the operations of Consumers would be funded until the Ardagh proposal contained in its bid, if successful, could be implemented.

[7] Further, despite its protestations to the contrary, it is evident that Ardagh is a disappointed bidder that obtained its security interest in the assets of Consumers in order to participate in their restructuring and obtain a controlling equity position in the restructured entity. There is authority from this court that an unsuccessful bidder has no standing to appeal or to seek leave to appeal. As a general rule, unsuccessful bidders do not have standing to challenge a motion to approve a sale to another bidder (or to appeal from an order approving the sale) because the unsuccessful bidders "have no legal or proprietary right as technically they are not affected by the order": see the statement of Farley J., dealing with a receiver's motion to approve a sale, that is quoted with approval by O'Connor J.A. of this court in *Skyepharma plc v. Hyal Pharmaceutical Corp.* (2000), 47 O.R. (3d) 234 at 238 (C.A.). O'Connor J.A. went on to say at p. 242:

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

[8] The position of Ardagh is not advanced by the fact that it did not challenge the order of Farley J. of June 18, 2001 which set out the parameters for the bidding. Instead it participated in the bidding process which it now attacks as being *ultra vires* the CCAA.

[9] Finally, while we do not propose to become involved in the merits of the appeal, 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 and flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered.

[10] Accordingly, leave to appeal is refused with costs.

Released: OCT 10 2001
RRM

Signed: "R.R. McMurtry C.J.O."

"G.D. Finlayson J.A."

"Austin J.A."

TAB 10

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **MAY 3, 2010**

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

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

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

And
ERNST & YOUNG INC.
Monitor

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

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

INTRODUCTION

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

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

THE MOTION AT ISSUE

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS AND DISCUSSION

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

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

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

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

[31] The Court's brief reasons follow.

3 Exhibits VB-1 and I-5.

THE SALE APPROVAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE STANDING ISSUE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR THESE REASONS, THE COURT:

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

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

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

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

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

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

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

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

- Hypothec dated February 17, 2000 registered under number 140 085 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency (legal construction);
- Hypothec dated April 1, 2008 registered under number 15 079 215 and assigned on January 21, 2010 under number 16 882 450 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;
- Hypothec dated August 18, 2008 registered under number 15 504 248 in the index of immovables with respect to lot 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;
- Hypothec dated October 30, 2008 registered under number 15 683 288 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency (legal construction);
- Hypothec dated April 20, 2009 registered under number 16 123 864 in the index of immovables with respect to lot 3 681 454 (legal construction) and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[15] **ORDERS** that notwithstanding:

(i) the proceedings under the CCAA;

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

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

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

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

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

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

[19] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C.

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

Me Avram Fishman
FLANZ FISHMAN MELAND PAQUIN
Attorneys for the Monitor

Me Robert E. Thornton
THORNTON GROUT FINNIGAN
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Me Nicolas Gagné
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Attorneys for Ville de Beaupré

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

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

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

Date of hearing: April 26, 2010

SCHEDULE "A"

ABITIBI PETITIONERS

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

SCHEDULE "B"

BOWATER PETITIONERS

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

SCHEDULE "C"
18.6 CCAA PETITIONERS

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

SCHEDULE "D"

FIRST CLOSING MONITOR'S CERTIFICATE

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No. : 500-11-036133-094

SUPERIOR COURT

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

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

ABITIBIBOWATER INC.,

and

ABITIBI-CONSOLIDATED INC.,

and

BOWATER CANADIAN HOLDINGS INC.,

and

the other Petitioners listed herein

Petitioners

and

ERNST & YOUNG INC.,

Monitor

CERTIFICATE OF THE MONITOR

RECITALS:

WHEREAS on April 17, 2009, the Superior Court of Quebec (the "**Court**") issued an order (as subsequently amended and restated, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**") in respect of (i) Abitibi-Consolidated Inc. ("**ACI**") and subsidiaries thereof (collectively, the "**Abitibi Petitioners**"),[1] (ii) Bowater Canadian Holdings Inc. and subsidiaries and affiliates thereof (collectively, the "**Bowater Petitioners**")[2] and (iii) certain partnerships[3]. Any undefined capitalized expression used herein has the meaning set forth in the Initial Order and in the Closed Mills Vesting Order (as defined below);

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

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

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

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

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

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

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

---

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

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

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

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

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

Name: ______________________________

Title: ______________________________

*****

SCHEDULE "E"

PERMITTED FIRST CLOSING ASSETS ENCUMBRANCES

1. Beaupré Mill

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. <u>Dalhousie Mill</u>

None

3. <u>Donnacona Mill</u>

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

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

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

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

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

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

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

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

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

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

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

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

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

*****

SCHEDULE "F"

SECOND CLOSING MONITOR'S CERTIFICATE

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTRÉAL

No. : 500-11-036133-094

SUPERIOR COURT

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

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

ABITIBIBOWATER INC.,

and

ABITIBI-CONSOLIDATED INC.,

and

BOWATER CANADIAN HOLDINGS INC.,

and

the other Petitioners listed herein

Petitioners

and

ERNST & YOUNG INC.,

Monitor

CERTIFICATE OF THE MONITOR

RECITALS:

WHEREAS on April 17, 2009, the Superior Court of Quebec (the "**Court**") issued an order (as subsequently amended and restated, the "**Initial Order**") pursuant to the *Companies' Creditors Arrangement Act* (the "**CCAA**") in respect of (i) Abitibi-Consolidated Inc. ("**ACI**") and subsidiaries thereof (collectively, the "**Abitibi Petitioners**"),[1] (ii) Bowater Canadian Holdings Inc. and subsidiaries and affiliates thereof (collectively, the "**Bowater Petitioners**")[2] and (iii) certain partnerships[3]. Any undefined capitalized expression used herein has the meaning set forth in the Initial Order and in the Closed Mills Vesting Order (as defined below);

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

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

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

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

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

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

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

---

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

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

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

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

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

Name: ______________________________

Title: ______________________________

*****

SCHEDULE "G"

PERMITTED FORT WILLIAM ASSETS ENCUMBRANCES

Section 1 Permitted Fort William Land Titles Assets Encumbrances

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

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

Section 2 Permitted Fort William Registry Assets Encumbrances

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

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

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

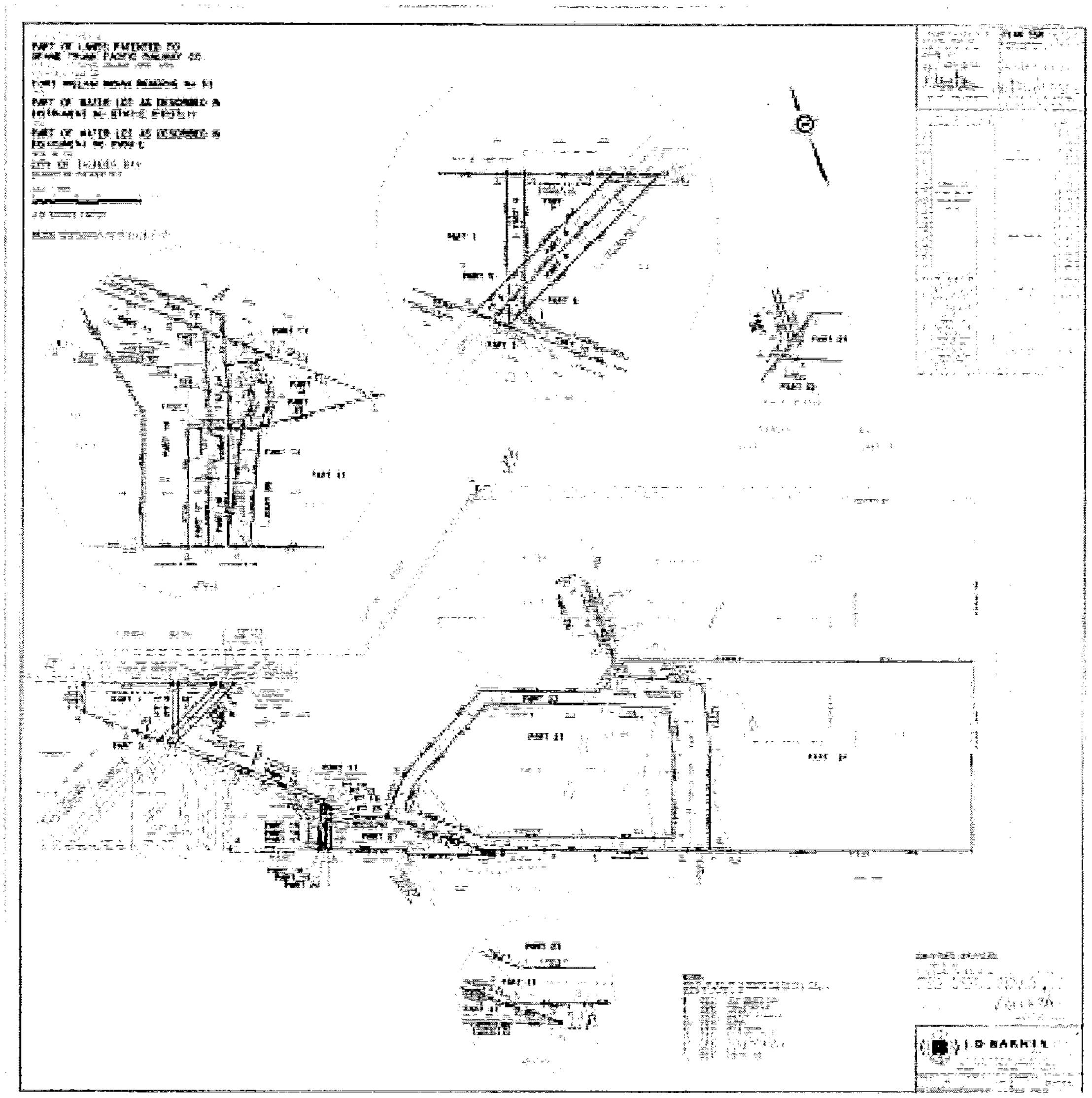
6. Easement in favour of Union Gas, registered on Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 20 and 25, 55R-13027

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

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

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

Annex A



SCHEDULE "H"

DALHOUSIE ASSETS

Municipal address:

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

Legal description (Property Identifier No.):

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

SAVE AND EXCEPT FOR

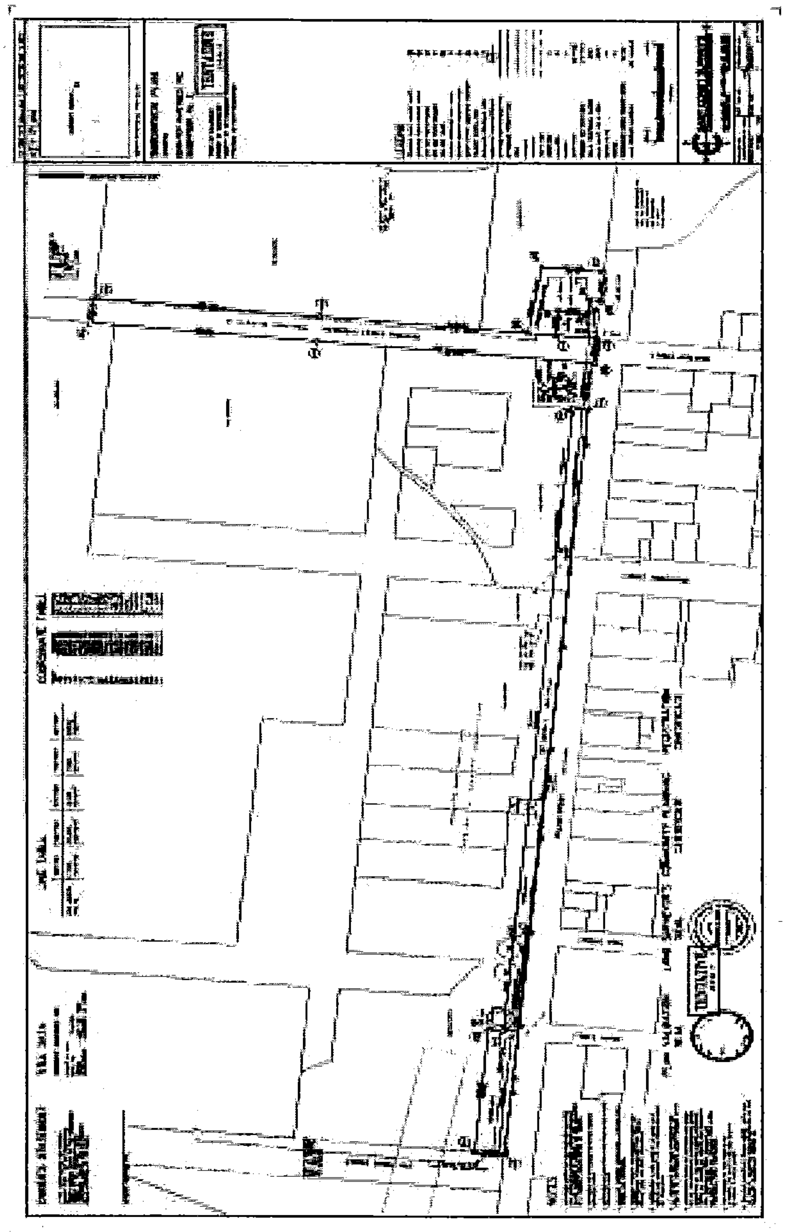
The surveyed land bounded by the bolded line in the plan attached in Annex A to this Schedule H (the "**Dalhousie Plan**").

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

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

Annex A

Dalhousie Plan



*****

SCHEDULE "I"

FORT WILLIAM ASSETS

Municipal address:

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

Legal description:

Section 1 Fort William Land Titles Assets

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

Section 2 Fort William Registry Assets

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

*****

TAB 11

CITATION: BDC Venture Capital Inc. v. Natural Convergence Inc., 2009 ONCA 637
DATE: 20090902
DOCKET: M37941/M37942 (C50876)

COURT OF APPEAL FOR ONTARIO

Lang J.A. (in chambers)

IN THE MATTER OF an Application under Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c.c.43, as amended, and Section 47 of the *Bankruptcy and Insolvency Act*, R.S.C.1985, c. B-3, as amended

BETWEEN

BDC Venture Capital Inc.

Applicant
(Respondent in Appeal)

and

Natural Convergence Inc.

Respondent
(Respondent in Appeal)

Graham D. Smith and Jason Wadden, for the moving party, Broadview Networks Inc.

Matthew J. Halpin, for the responding party, BluArc Communications Inc.

Sam Babe, for the creditor, MMV Financial Inc.

Ian B. Houle, for the interim receiver, PriceWaterhouseCoopers Inc.

Heard: September 1, 2009

On appeal from the orders of Justice Stanley J. Kershman of the Superior Court of Justice dated July 31, 2009 and on a motion and cross-motion to impose or cancel a stay pending appeal.

Lang J.A. (in chambers):

[1] The moving party, Broadview Networks Inc. (Broadview), seeks relief that will allow PriceWaterhouseCoopers (PwC), the interim receiver, to sell the assets of Natural Convergence Inc. (NCI) to Broadview. The respondent, BluArc Communications Inc. (BluArc) opposes that relief.

[2] In separate orders on July 31, 2009, the application judge appointed the receiver (the Receivership Order) and ordered the asset sale to Broadview (the Sale Order). BluArc appealed from these orders. On appeal, the Orders were stayed automatically pursuant to s. 195 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA). Broadview moves to cancel the stay. MMV Financial Inc. (MMV), a secured creditor, supports Broadview's motion. PwC also filed materials and made submissions on this motion.

[3] All parties agreed during argument that the appeal should be expedited. Accordingly, the appeal is expedited to be heard by this court on September 10, 2009. Forty-five minutes are allotted to the appellant BluArc and 40 minutes are allotted to the respondent Broadview. The parties agree they will be able to perfect the appeal in a timely manner because their facta for this motion can be readily adapted for the purposes of the appeal. However, no party to this motion filed the material that was before the

application judge or the application judge's reasons for granting the Orders. These materials must be included in the appeal book. Subject to any other order, I also note that the September 10 date may, if appropriate, allow for a panel review of this decision.

[4] I am advised that BluArc is seeking a variation of the Orders pursuant to s. 187(5) of the BIA and the parties are scheduled to appear before the application judge tomorrow, September 3, 2009. BluArc advises that it will deliver its material for that motion today.

[5] Although BluArc appealed both the Receivership and Sale Orders, it became clear during argument that it did not object to PwC's appointment as receiver; it merely challenged PwC's right to proceed with the asset sale. Thus, the real issue is not about the appointment of the receiver but about whether the sale proceeds pending the appeal. Broadview primarily seeks cancellation of the automatic stay of all appealed proceedings pursuant to s. 195 of the BIA. This court has a broad discretion to vary or cancel the automatic stay if "the appeal is not being prosecuted diligently, or for such other reason as the [court] may deem proper".

[6] While the moving party did not abandon its secondary "abuse of process" stay argument definitively, nor its argument for a stay of the appeal, neither did it pursue these issues in oral argument. In any event, I see no abuse of process arising from BluArc's stated intention to also bring a variation motion before the application judge. Accordingly, these reasons focus on whether the s. 195 automatic stay should be cancelled in the circumstances of this case.

[7] In light of the need to deliver a decision on this motion expeditiously, these reasons refer only to facts essential to the disposition. However, a brief overview will provide some context.

[8] NCI developed software that enabled its licensees, including Broadview and BluArc, to sell voice-over-internet-protocol telephone support services to customers. As early as March 2008, NCI was in financial straits and began attempting to market its business or to secure financing. As a way of providing financial assistance to NCI, Broadview purchased software licences from NCI in March 2009 for approximately $444,000.

[9] With financial problems continuing, on July 16, 2009, Broadview offered to purchase NCI's assets. NCI agreed with the terms. The offer included a "no shop" provision that prohibited NCI from seeking other purchasers. The offer was also said to include a premium on the purchase price.

[10] On July 22, 2009, BDC Capital Inc. (BDC), a secured creditor, served a Notice of Intention to Enforce Security on NCI pursuant to s. 244 of the BIA. On July 24, 2009, Broadview provided NCI with an unsecured loan to pay its remaining employees. The remaining employees were said to be necessary to maintain the software's source code.

[11] Although PwC initially asked for approval of the sale to Broadview, it apparently delivered an amended notice later on July 31 that simply asked the court for directions regarding the sale. In its accompanying report to the application judge about

Broadview's offer, PwC stated that it was "uncertain as to the level of interest" that other parties expressed in buying NCI's assets and that in the "absence of contacting" other interested parties, the receiver "cannot comment on the commercial reasonableness of the Agreement". PwC sought "the Court's direction with respect to the completion of the Agreement". The application judge granted both orders.

[12] While I do not have the benefit of any of the materials filed before the application judge, or the application judge's reasons, the material before me indicates that all NCI's senior secured creditors, including BDC and MMV and Comerica, agreed to the asset sale, even though the proceeds of sale would be less than NCI's total indebtedness to those creditors. No one opposed the sale. While PwC's second report, filed in this court, suggests that BDC is now amenable to a more open sale process, BDC did not appear on this motion. MMV, the only secured creditor who did appear, continues to support the Sale Order made by the application judge.

[13] In any event, Broadview argues that the stay should be cancelled because BluArc has no standing to challenge the Orders that it has appealed. Broadview describes BluArc as a "bitter bidder" and argues that the test for cancellation of the stay should be based on the following discussion in *Skyepharma PLC v. Hyal Pharmaceutical Corporation*, [2000] O.J. No. 467 (C.A.):

> [14] Although the issues considered in these cases are not identical to the case at bar, the reasoning applies to the issue raised on this appeal. If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added

as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.

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

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

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

> . . .
>
> [19] In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest is not sufficient.
>
> [20] There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

[14] Similarly, in *Consumers Packaging Inc. (Re)* (2001), 150 O.A.C. 384 (C.A.) this court stated at para. 7:

> Further, despite its protestations to the contrary, it is evident that Ardagh is a disappointed bidder that obtained its security interest in the assets of Consumers in order to participate in their restructuring and obtain a controlling equity position in the restructured entity. There is authority from this court that an unsuccessful bidder has no standing to appeal or to seek leave to appeal. As a general rule, unsuccessful bidders do not have standing to challenge a motion to approve a sale to another bidder (or to appeal from an order approving the sale) because the unsuccessful bidders "have no legal or proprietary right as technically they are not affected by the order": see the statement of Farley J., dealing with a receiver's motion to approve a sale, that is quoted with approval by O'Connor J.A. of this court in *Skyepharma plc v. Hyal*

Pharmaceutical Corp. (2000), 47 O.R. (3d) 234 at 238 (C.A.).

[15] On the basis of these authorities, Broadview asks me to conclude that BluArc is without standing to bring its appeal and that the appeal should be stayed and the s. 195 stay lifted. Both *Skyepharma* and *Consumers Packaging* were heard by a panel of this court and not by a single judge sitting in chambers. In my view, a single judge does not have the jurisdiction in the circumstances of this case to decide that an appellant lacks standing to bring an appeal and to stay the appeal. To do so would be tantamount to quashing the appeal. A motion to quash an appeal, which may result in the final disposition of the appeal, is heard by a panel of the court.

[16] An analogous situation arose in *1730960 Ontario Ltd. (Re)*, August 6, 2009, unreported (Ont. C.A. [In Chambers]). Based on *Skyepharma*, Juriansz J.A. was not satisfied in that case that the "prospective purchaser [who moved to stay a sale order] has any standing to bring this appeal". Since "the appeal is destined to be quashed", he dismissed the motion on the basis there was "no serious issue to be decided on the appeal". Juriansz J.A. would also have dismissed the motion on the basis of the merits of the appeal, irreparable harm and the balance of convenience.

[17] BluArc argues that the stay should not be lifted based on the relevant criteria referenced by Juriansz J.A. in *1730960 Ontario Ltd.* and discussed in *After Eight Interiors Inc. v. Glenwood Homes Inc.* (2006), 391 A.R. 202 (C.A.) at paras. 5-6, which provides for a variation of the test set out in *RJR-MacDonald Inc. v. Canada (A.G.),*

[1994] 1 S.C.R. 311. The criteria include whether there is a serious issue to be appealed, whether the moving party would suffer irreparable harm if the stay is not lifted, and whether the moving party would suffer greater harm than the responding party if the stay is not lifted. At the same time, in view of the broad discretion provided in s. 195 of the BIA, *After Eight* adopts a contextual approach.

[18] A consideration of these criteria necessarily includes consideration of whether the particular appellant can succeed on the appeal. Broadview has persuaded me that, whatever the merits of the underlying issues, it is highly unlikely that BluArc has the requisite standing. BluArc is neither a creditor nor a contingent creditor. At most, BluArc is a licensee of software. As such, it is entitled to the remedies set out in its licence. That licence requires NCI to provide the software's source code for the software to an Escrow Agent (the Agent) and for the Agent to provide the source code to BluArc in certain circumstances, which may well include the circumstances that have occurred in the past month. BluArc sought the source code from the Escrow Agent. The Agent declined to provide it on the basis of an e-mail from PwC that its consent was required to any such release. Apparently, BluArc has not sought PwC's consent, which may simply be because the Receivership Order is currently stayed. In any event, both in its material and in its submissions, Broadview has taken the position that it would not interfere with the Escrow Agent's obligation to comply with the licences because the licences are not part of the assets that Broadview has agreed to purchase.

[19] It follows that at its highest, BluArc has a licence agreement with NCI that, if breached, will give BluArc a potential cause of action against NCI. In my view, such a potential cause of action would not appear to warrant BluArc being added as a party to a motion to approve a sale of NCI's assets.

[20] In addition, on the material before me, BluArc's main interest in the sale appears to be that of a belated and disappointed potential purchaser. It does not appear to have a legal or proprietary right to either participate in the sale process or attack that process. In coming to this conclusion, I observe that the Sale Order proceeded with the consent of all secured creditors and without opposition from any entity entitled to notice of the application.

[21] In view of BluArc's agreement to fund the costs of a continuing stay pending appeal, Broadview has not persuaded me that it will suffer irreparable harm if the stay remains in force for the next eight days. However, Broadview has persuaded me that it does not appear that BluArc will suffer any undue harm if the stay is lifted. Indeed, it appears that BluArc will continue to have its contractual recourse to obtain the source codes that it claims are its primary interest. In any event, if I am wrong, it may well be that BluArc will be able to "unscramble the egg" if a panel of the court so decides next Thursday.

[22] For these reasons, I dismiss the responding party's cross-motion and grant the moving party's motion to cancel the stay under s. 195 of the BIA. This disposition, of

course, does not preclude the application judge from proceeding with the scheduled variation motion tomorrow. As well, since these reasons provide only a preliminary view of the matter, it does not dispose of the underlying appeal scheduled to be heard in eight days.

[23] For the purposes of the appearance in this court on September 10, 2009, counsel are directed to file the appeal book and appellant's factum by 4:30 pm on Friday, September 4, 2009 and the respondent's factum by noon on Tuesday, September 8, 2009.

[24] Costs of this motion are awarded to Broadview fixed in the amount of $12,000, inclusive of disbursements and GST.

"S.E. Lang J.A."

TAB 12

Court File No. 07-CL-6986
Date: 20070726

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

In The Matter of an Application under Section 182(5) Of The *Business Corporations Act* (Ontario), R.S.O. 1990, C. B-16, as amended, and Rules 14.05(2) And 14.05(3)(f) and Rule 38 Of The *Rules Of Civil Procedure*

And In The Matter of a Proposed Arrangement Involving Sterling Centrecorp Inc. and its Securityholders

STERLING CENTRECORP INC. (Applicant)	*S. Dale Denis, S. Infuso* for the Applicant
	Crawford Smith, E. Head, Andrew Gray for First Capital Realty Inc. and Gazit
	Eliot Kolers, Marie Isabelle Palacios-Hardy for SCI Acquisition Inc.
	R. Armstrong, Alan Merskey for the Special Committee
	HEARD: June 14, 2007

C. CAMPBELL J.

REASONS FOR DECISION

[1] An Order was made by this Court on June 14, 2007 approving the Plan of Arrangement proposed by the Applicant, Sterling Centercorp Inc. ("Sterling" or "the Applicant.") These are the reasons for that Order.

[2] Approval of the Plan was opposed only by First Capital Realty Inc. ("First Capital") (and its largest shareholder Gazit Canada Inc. ("Gazit")), which made a conditional takeover bid for the common shares of Sterling. One of the conditions was that the Plan of Arrangement that had already been approved by shareholders not receive Court approval.

[3] Most of the factual background is not in dispute.

[4] Sterling is incorporated under the *Business Corporations Act* (Ontario) ("OBCA") and is a real estate investment and management services company specializing in the retail

property sector, and traded on the TSX. The Company has three types of outstanding securities which are relevant to this hearing: Common Shares, Options to purchase Common Shares at various exercise prices, and Restricted Stock Units ("RSUs") which entitle the holders to purchase one Common Share for $0.01.

[5] First Capital (a competitor of the Applicant) currently owns 8% of the outstanding common shares of Sterling, the majority of those having been acquired after February 8, 2007 when the Plan was publicly announced.

[6] The shareholders of SCI Acquisition Inc. ("SCI" or "the Purchaser") consist of officers and directors of Sterling, who together own approximately 35.3% of the common shares of Sterling.

[7] On February 28, 2007, Sterling publicly announced that it had entered into an Arrangement Agreement with the Purchaser in respect of the Plan of Arrangement. Under the Agreement, the Purchaser sought to acquire all the common shares not already held by the group at $1.26 per share. With price adjustment, the acquisition was to include Outstanding Options and Restricted Stock Units.

[8] The Arrangement Agreement provided that those entitled to vote (the "Securityholders") must authorize and approve the Plan by two thirds of the votes cast by the Securityholders; and by a simple majority of the votes cast by Securityholders who are not members of the Acquisition Group.

[9] The consideration of $1.26 per Common Share payable under the Plan of Arrangement represented a 40% premium over the closing price of the Common Shares on February 7, 2007, the day prior to the announcement that the Company had entered into the Arrangement Agreement.

[10] Both the Arrangement Agreement and Plan of Arrangement provided that registered shareholders have the right to dissent from the Arrangement Resolution and require the Company to purchase their Common Shares for "fair value" by complying with the procedure set forth in s. 185 of the OBCA.

[11] The Order of Madam Justice Lax on March 6, 2007 set up the notice provisions for the meeting called for April 30, 2007.

[12] The Arrangement Resolution was to be effective if passed by two thirds of the votes cast by the Securityholders, and by a simple majority of the votes cast by Securityholders who are not members of the Acquisition Group. Registered shareholders were to be entitled to exercise rights of dissent with respect to the Arrangement Resolution by complying with the procedure set forth in s. 185 of the OBCA, as varied by the Interim Order.

[13] In April 2006, the Board of Directors was advised by the Owners of the Purchaser and David Kosoy that they were considering a proposal to take the Company private.

[14] David Kosoy is Co-Chairman and Co-CEO of the Company. He (and his company First National Investments Inc.) owns 3,451,320 Common Shares and 390,500 RSUs. Although in April 2006, David Kosoy had intended to be part of the Acquisition Group. In early January 2007 he decided to become a seller and the Special Committee was advised of this fact at its January 11, 2007 meeting.

[15] The Board of Directors established the Special Committee on May 9, 2006 to, among other things, make recommendations with respect to the proposed going private transaction, and to engage a professional valuator to prepare a formal valuation pursuant to Rule 61-501 and a fairness opinion (the "Valuation and Fairness Opinion").

[16] Between May 9, 2006 and February 9, 2007, the Special Committee met nine times. The dates and substance of these meetings are disclosed in the Circular.

[17] On May 24, 2006, the Special Committee engaged GMP Securities L.P. ("GMP") as its financial advisor to prepare the Valuation and Fairness Opinion. The valuation conclusion provides that "the fair value of the Common Shares is in the range of $1.15 to $1.27 per Common Share." The fairness conclusion provides that "the consideration to be received by the Minority Securityholders in connection with the arrangement is fair, from a financial point of view, to the Minority Securityholders."

[18] The Special Committee also engaged Ogilvy Renault LLP to act as its legal advisor throughout its mandate. Richard S. Sutin of Ogilvy Renault LLP acted as counsel and secretary to the Special Committee and participated in all their meetings with respect to this matter.

[19] The Meeting was held on April 30, 2007 in accordance with the Interim Order. The scrutineers of the Meeting reported that 165 Securityholders holding 35,525,456 securities were represented in person or by proxy, being 92.20% of the total issued and outstanding securities (38,529,857) of the Company.

[20] The vote of Securityholders in respect of the Arrangement Resolution was recorded on four ballots (the first two as required by the Interim Order), and the results were as follows:

(a) **All Securityholders** cast a total of 35,525,456 votes, 32,304,696 (90.93%) in favour, and 3,220,760 (9.07%) against.

(b) **Minority Securityholders** (*i.e.*, other than members of the Acquisition Group) cast a total of 21,412,206 votes, 18,191,446 (84.96%) in favour, and 3,220,760 (15.04%) against.

(c) **All Common Shareholders** cast a total of 32,624,668 votes, 29,403,908 (90.13%) in favour, and 3,220,760 (9.87%) against.

(d) **All Minority Common Shareholders** (*i.e.*, other than members of the Acquisition Group) cast a total of 20,051,668 votes, 16,830,908 (83.94%) in favour, and 3,220,760 (16.06%) against.

[21] The Respondents voted against the Arrangement Resolution and collectively held 2,884,600 Common Shares. Accordingly, apart from the votes of the Respondents, a total of only 336,160 votes were cast against the Arrangement Resolution, being less than one percent of the securities held by those represented at the Meeting.

[22] On June 4, 2007, the OSC released its order in respect of an application commenced by the Respondents herein (First Capital Realty Inc. and Gazit Canada Inc.), which was heard by the OSC on May 17, 2007.

[23] The Respondents had argued, among other things, that all of the fifteen Signatories should be excluded from the calculation of minority approval for the purposes of compliance with Rule 61-501. The OSC declined to do so, ruling instead that only one of the Signatories, David Kosoy (& First National Investments Inc.), should be so excluded.

[24] The total securities held by David Kosoy (& First National Investments Inc.) is 3,841,820, comprised of 3,451,320 Common Shares and 390,500 RSUs. Factoring in the OSC Order, the minority ballots provide as follows:

(a) **Minority Securityholders** (*i.e.*, other than members of the Acquisition Group, David Kosoy [& First National Investments Inc.]) cast a total of 17,570,386 votes, 14,349,626 (81.67%) in favour, and 3,220,760 (18.33%) against.

(b) **All Minority Common Shareholders** (*i.e.*, other than members of the Acquisition Group, David Kosoy [& First National Investments Inc.]) cast a total of 16,600,348 votes, 13,379,588 (80.60%) in favour, and 3,220,760 (19.40%) against.

[25] The OSC declined to order any other remedy, and dismissed the balance of the Respondents' application. Accordingly, the Arrangement Resolution received the approval of the majority of minority Securityholders of the Company, in accordance with both Rule 61-501 and the Interim Order.

[26] First Capital issued press releases on April 25 and April 29, 2007 indicating that it had sent letters to the Special Committee in respect of a *conditional* proposal to acquire the outstanding securities of the Company at a price of $1.62.

[27] The first press release stated, among other things, that the First Capital's proposal is "subject to completion of satisfactory due diligence and other customary conditions" and that First Capital has "requested access to due diligence materials in order to complete its assessment of [the Company] and to structure a definitive offer." The second press release

cites the first press release and states among other things that First Capital's proposal is "subject to customary conditions." Both letters were marked confidential.

[28] On May 11, 2007, the Company issued a Material Change Report announcing that the Company had on the previous day received written notification from the Attorney General's Office on behalf of the State of California, Department of Justice, advising of the filing of a complaint against the Company in respect of the "Lava Cap Superfund" site in Nevada City, California. The Complaint was to be filed on behalf of the California Department of Toxic Substances Control and concerns the operation of the Lava Cap Mine in Nevada City by the Company's predecessor in interest. The total amount of this claim is US $13,602,000, or US $0.38 per Common Share.

[29] On May 15, 2007, First Capital publicly issued an "Offer to Purchase for Cash" in respect of the securities of the Company. Despite the above Material Change Report, the consideration per security mentioned in this document remained $1.62. Further, the offer is subject to numerous conditions which First Capital "shall have determined in its sole judgment" have not occurred. As an example only, one of these conditions provides as follows:

> the Offeror shall have determined ***in its sole judgment*** that there ***shall not have occurred on or after <u>April 24, 2007</u>*** (or if there shall have occurred prior to April 24, 2007, there shall not have been generally disclosed or disclosed to the Offeror) ***any change*** (or any condition, event, circumstance or development involving a prospective change) ***in the*** business, assets, operations, capitalization, condition (financial or otherwise), prospects, results of operations, cash flows, properties, licenses, permits, rights, or privileges, whether contractual or otherwise, or ***liabilities*** (including any contingent liabilities that may arise through outstanding, pending or threatened litigation or otherwise), ***of any Sterling Company*** which, individually or in the aggregate, is or would be ***materially adverse to*** such Sterling ***Company*** (emphasis added)

[30] Irrespective of the fact that the May 15 "bid" provides that the occurrence of this condition is determined in the "sole judgment" of First Capital, the prior May 11, 2007 Material Change Report of the Applicant had disclosed a material change in the liabilities of the Company subsequent to April 24, 2007. The bid price of First Capital did not change.

[31] The May 15 "bid" is as conditional as the "bid" disclosed in First Capital's press release on April 25, five days before the Meeting. Completion is in the end as submitted by the Applicant subject to the absolute discretion of First Capital. It is suggested that these documents are merely an invitation to treat.

[32] In response to the May 15 "bid," and as required by applicable law, the Company issued a Directors' Circular setting out the recommendation of the Directors. As set out therein, the Directors made no recommendation to accept or not to accept the May 15 "bid" and unanimously recommended that Securityholders not tender to it, as a result of its highly conditional nature.

[33] The assessment of the Securityholders of the Company in respect of the attractiveness of First Capital's overtures of April 25, 2007 appears to have been reflected in

the vote on the second ballot at the April 30 Meeting. Although the 14,591,968 votes of the Signatories could not, under the terms of the Support Agreements, be cast against the Arrangement Resolution, the remaining 6,820,238 votes recorded on the second ballot could be cast for or against. However, apart from the 2,884,600 votes of the Respondents, only 336,160 of these votes were cast against the Arrangement Resolution. The remaining 3,599,478 were cast in favour. These votes were cast five days after First Capital's April 25 press release, which outlined a conditional proposal that is materially identical to the May 15 "bid."

[34] The position of the Applicant is set out in paragraphs 60-62 of its factum:

> [60] To date, First Capital has simply not made an unconditional bid. The Respondents have not in any way challenged the GMP Valuation which concluded that the fair value of the Common Shares is in the range of $1.15 to $1.27. If the Respondents had intended to make an *unconditional* offer at a price which is *above* that offered under the Plan of Arrangement, they could have done so based on the GMP Valuation. The selection of the figure "$1.62" by First Capital appears arbitrary.
>
> [61] Irrespective of the above, the Plan of Arrangement is a ripe opportunity whereby the Securityholders of the Company can obtain liquidity for their investment at a price that is incontestably fair and reasonable.
>
> [62] The only Securityholders of the Company to have objected to the Arrangement Resolution and indicated a desire to exercise their right of dissent are the Respondents.

[35] First Capital submits that the Arrangement should not be approved because it is not fair and reasonable to Sterling Shareholders since (a) the First Capital Bid, which is still outstanding, offers Shareholders 29% more consideration per Share than the Going Private Transaction; and (b) the process that has resulted in the hearing before this Court, seeking the approval of the Going Private Transaction has been fatally flawed and has resulted in a transaction significantly worse than the alternative still available to Shareholders, and therefore should not be approved by this Court.

[36] Both sides on this Application accept the proposition that in order for the Plan of Arrangement to be approved by this Court, it must be "fair and reasonable" to the shareholders of Sterling. See *St. Lawrence & Hudson Railway Co.,* [1998] O.J. No. 3934 (Gen. Div.)

[37] The issue is, did the directors of Sterling exercise reasonable business judgment in (a) proceeding with meeting in light of the press releases of First Capital received prior to the meeting, indicating a proposed conditional proposal to acquire all the shares of the Company at a price of $1.62 per share; (b) issuing a Directors' Circular in response to First Capital's "Offer to Purchase for Cash" dated May 15, 2007, recommending to Securityholders that they not tender to it as a result of its conditional nature?

[38] There is no question on the material before the Court that between May 9, 2006, when the Special Committee first met, engaged a financial advisor, obtained a fairness opinion in the range of $1.15 to $1.29 per common share and recommended to the Board of

Directors that the Company enter into the Arrangement Agreement, and April 30, 2007, when it recommended that the minority Securityholders vote in favour of the Plan, that the Company and its directors proceeded appropriately.

[39] There is no evidence to contest the process or conclusion of the Fairness Opinion included in the Circular. No fairness opinion was supplied by First Capital.

[40] First Capital applied to the Ontario Securities Commission ("OSC") on May 17, 2007 seeking exclusion from the calculation of minority approval various Securityholders. The effect of the OSC decision on June 4 was to exclude some 3.9 million shares so that 80.60% of the votes ended up in favour and 19.40 against.

[41] The unanimous recommendation of the Independent Directors of the Company that Securityholders not tender to the First Capital "bid" as set out in the May 30 Directors' Circular did in fact specifically state that this recommendation was as a result of the highly conditional nature of the First Capital "bid." Indeed, the May 30 Directors' Circular listed the following as the first factor upon which this recommendation was based:

> A majority of the conditions in the First Capital Offering Circular are subjective and allow First Capital to exercise its "sole judgment" in order to withdraw its offer and not take up and pay for any securities tendered. The Board of Directors believes that the subjective nature of these conditions and the lack of adequate reference to objective criteria do not afford holders of securities a clear and rational basis to make a reasonable determination as to whether First Capital will be obligated to take up and pay for securities in any number of the factual circumstances so contemplated by the First Capital Offering Circular.

[42] First Capital takes issue with the process undertaken by the Applicant, which is succinctly put in paragraph 67 of its factum:

> [67] Sterling established a Special Committee, but the Special Committee process failed utterly to maximize Shareholder value. From the time that Sterling was "in play" -- i.e., when the Special Committee was formed -- the Directors had an obligation to maximize Shareholder value. While the courts in Ontario have held that an auction is not the only method by which directors can fulfill their obligation to maximize shareholder value, they are clear that some process to maximize shareholder value is required in order for directors to fulfill their fiduciary duties.
>
> ...
>
> [69] ***Restricted mandate.*** The Special Committee's mandate was expressly restricted to considering the Going Private Transaction. In carrying out their role, the Special Committee did not at any time approach a single third-party potential buyer, including First Capital. This 'blinkered' approach to change of control transactions has recently been disapproved by the Delaware Chancery Court, and it is submitted that this Court should take a similar view. A blinkered approach to change of control transactions, and a single-minded focus on a privatization transaction, is inconsistent with the obligation of Sterling's Directors to maximize Shareholder value.
>
> [70] The Special Committee recommended the Going Private Transaction after it was aware of the Insiders' intentions to enter into Support Agreements that would severely restrict the ability of the Directors to consider a superior proposal. While the Arrangement Agreement contains a "fiduciary out", the provision is largely ineffectual.
>
> [71] At the time it made its recommendation, the Special Committee should have paused and conducted a market canvass or some other means of ensuring that there was not another transaction

available to maximize Shareholder value. Without conducting any such market canvass, the Special Committee continued in its already-formed view that there was no alternative transaction available. That view was wrong, as evidence by the First Capital Bid. On the basis of the Special Committee's recommendation, the Board approved the Going Private Transaction.

[72] In the circumstances, the determination of the Special Committee that there was no alternative transaction available to maximize Shareholder value is not entitled to any deference under the business judgment rule. The business judgment rule only protects directors to the extent that they are informed in terms of the decision under review. As Justice Lax held in *UPM-Kymmene Corp. v. UPM-Kymmene Miramichi Inc.,* [2002] O.J. No. 2412 at para. 153 (S.C.J.):

> The principle of deference presupposes that directors are scrupulous in their deliberations and demonstrate diligence in arriving at decisions. Courts are entitled to consider the content of their decision and the extent of the information on which it was based and to measure this against the facts as they existed at the time the impugned decision was made. Although Board decisions are not subject to microscopic examination with the perfect vision of hindsight, they are subject to examination.

[43] I am of the view that an auction process is not in the circumstances of this case the only basis for assuring shareholder value or indeed maximizing shareholder value.

[44] The Court of Appeal for Ontario in *Ventas Inc. v. Sunrise Senior Living Real Estate Trust*, [2007] O.J. No. 1083 confirmed the following statement at paragraph 56 of its decision:

> An auction process is well-accepted as being one – although only one – "appropriate mechanism to ensure that the board of a target company acts in a neutral manner to achieve the best value reasonably available to shareholders in the circumstances": *Maple Leaf Foods Inc. v. Schneider Corp.* 1998 CanLII 5121 (ON C.A.), (1999), 42 O.R. (3d) 177 at 200 (C.A.). …

[45] I accept the proposition that begins in paragraph 53 of the *Ventas* decision:

> [53] There is no doubt that the directors of a corporation that is the target of a takeover bid – or, in this case, the Trustees – have a fiduciary obligation to take steps to maximize shareholder (or unitholder) value in the process: see *CW Shareholdings Inc. v. WIC Western International Communications Ltd.* reflex, (1998), 39 O.R. (3d) 755, at 768 and 774 (Gen. Div.). That is the genesis of the "fiduciary out" clauses in situations such as the case at hand. They enable directors or trustees to comply with their fiduciary obligations by ensuring that they are not precluded from considering other *bona fide* offers that are more favourable financially to the shareholders or unitholders than the bid in hand.
>
> [54] It is not necessary – nor would it be wise, in my view – to go as far as HCPI suggests this court might go, and adopt the principle gleaned from some American authorities, that the target vendor can place no limits on the directors' right to consider superior offers and that any provision to the contrary is invalid and unenforceable: see *Paramount Communications, Inc. v. QVC Network Inc.* 637 A. 2d 34 (Del. 1994), and *ACE Ltd. v. Capital Re Corp.*, 747 A. 2d 95 at 105 (Del. Ch. 1999). That is not what happened in this case.

[46] Counsel for the Applicants rely on the language of the Court of Appeal in *Maple Leaf Foods*, which distinguished on a legal basis the application of the business judgment rule in Ontario from the decision of the Delaware Court in *Omnicare Inc. v. NCS Healthcare Inc.*, 818 A 2d 914 (Del Supreme Court, 2003).

[47] At pp. 191-192 of the *Maple Leaf Foods* decision, the Court said:

> The law as it has evolved in Ontario and Delaware has the common requirements that the court must be satisfied that the directors have acted reasonably and fairly. The court looks to see that the directors made a *reasonable* decision *not a perfect* decision. Provided the decision taken is within a range of reasonableness, **the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision**: *Paramount, supra,* at 45: *Brant Investments, supra,* at 320. *Themadel Foundation v. Third Canadian Investment Trust Ltd.* (1998), 38 O.R. (3d) 749 (Ont. C.A.) at 754 . This formulation of deference to the decision of the Board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrelevant **unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction**: *Brant Investments, supra,* at 314- 315. (emphasis added)

[48] In addition, the Applicant relies on a major factual distinction between *Omnicare, supra* and the case at hand, namely that in *Omnicare* the bidder "irrevocably committed itself to a transaction" with the company.

[49] Here, the Applicant takes the position that the evidence in this case unquestionably discloses that First Capital's "bid" remains highly conditional; First Capital, it is argued, does not intend to remove all of the subjective conditions which are part of the "bid" regardless of whether it is given access to due diligence, and the Independent Board and the Special Committee have concluded that the First Capital "bid" does not constitute a *bona fide* alternative to the Plan of Arrangement (see Appendix A).

[50] In my view, acting in a *bona fide* business judgment manner does not mean simply being responsive to the possibility of a higher price than the present offer without any further assessment of the risk associated with the higher offer.

[51] The process undertaken by the Directors and the Special Committee is set out in the Supplement to the May 30, 2007 Directors' Circular recommending that shareholders not tender to the First Capital Offer:

> BACKGROUND AND REASONS FOR THE RECOMMENDATION
>
> Subsequent to May 24, 2007 (which was the last date referenced in the section entitled "Background" of the Directors' Circular), the following events occurred.
>
> On June 5, 2007, Sterling issued a press release and filed a material change report which disclosed that the Ontario Securities Commission ("OSC") issued an order (the "Order") in connection with the hearing which was held on May 17, 2007. The Order, in effect, confirmed that the requisite majority of the minority shareholder vote was obtained at Sterling's Meeting of Securityholders held on April 30, 2007 in order to pass the resolution approving the Arrangement Agreement between the Company and SCI. The Order directed that Sterling exclude the votes attaching to the securities of the Company held by two of the parties to the support agreements from the calculation of the majority of the minority, but the vote was nevertheless carried. The Order otherwise dismissed the Application brought before the OSC by First Capital.
>
> As stated in the Directors' Circular, the Special Committee requested and received the approval of SCI to enter into initial discussions with First Capital to better understand and assess the scope of the conditions contained in the First Capital Offer. On June 4, 2007, Sterling requested and received the

> consent of SCI to permit due diligence access to First Capital for the purposes of maximizing shareholder value subject to the signing of a confidentiality agreement. In general terms, the confidentiality agreement was designed to allow First Capital due diligence access in order to remove all "subjective" conditions of its offer and to move as close to a bona fide unconditional offer as reasonably possible. The court fairness hearing was adjourned to permit due diligence subject to the signing of the confidentiality agreement however, Sterling and First Capital were unable to come to terms on a form of confidentiality agreement.
>
> Another third party has expressed interest and has executed a confidentiality agreement. The terms of that confidentiality agreement require the third party to specify whether it is prepared to pursue a bid for Sterling and outline its conditions by the close of business on June 13, 2007.
>
> Sterling is scheduling a court fairness hearing on SCI's Plan of Arrangement on the afternoon of June 14, 2007. If the Board of Directors is of the view that there exists no bona fide alternative to SCI, the fairness hearing will proceed and if the court approves the Plan of Arrangement, then by definition no other bids, other than SCI's, can succeed. Sterling intends to issue a press release advising as to the outcome of the fairness hearing immediately upon its conclusion.

[52] Each of First Capital and the Applicant accuse the other of lack of "*bona fides*" surrounding the conditions of the First Capital bid and the requirements of the Applicant in connection with the terms of the confidentiality agreement that First Capital was required to sign to obtain access to confidential data.

[53] The Court of Appeal in *Ventas, supra* recently dealt with the term in the context of a Standstill Agreement that was part of a bid process:

> [60]There was much debate about the meaning of "*bona fide*". The application judge viewed it as meaning acting "in good faith; sincere, genuine", relying upon *The Oxford English Dictionary*.[7] She found that the HCPI Acquisition Proposal was not *bona fide* because it was made in breach of the HCPI Standstill Agreement, which Sunrise was obliged by s. 4.4 to enforce. The appellants agree that *bona fide* means "genuine" or "made in good faith" but submit that a *bona fide* Acquisition Proposal, as contemplated by the Purchase Agreement, is one that is "genuine" or "authentic" in the sense that it is not a sham and is reasonably capable of becoming a Superior Proposal, and that this decision must be made in the context of the entire situation.
>
> [61] In the end, there is not much difference between the parties as to the meaning of the term "*bona fide*". As with the principles of contract interpretation, they differ on the application of the term in the circumstances of this case. Given the language of the Purchase Agreement, and the context in which it was negotiated – particularly the language "that did not result from a breach of this Section 4.4" in sections 4.4(2) and 4.4(3) – I do not think the application judge erred in her assessment and use of the term "*bona fide*" here.

[54] I am satisfied that at least the Applicant proceeded in "*bona fide*" manner in respect of the terms of the confidentiality agreement, given both the confidential nature of the First Capital bid and the previous history between it and the Applicant as witnessed by the third party, which did enter into such an agreement later decided not to make a bid.

[55] It is to be noted that between the time of the first First Capital press release on April 25, 2007 and the fairness hearing before this Court on June 14, 2007, which time period includes both the OSC hearing and Directors' Circular, that no other Securityholder has

come forward to be added to the shares of First Capital and the small number supporting) in dissent of the Plan.

[56] The essence of the First Capital attack on the business judgment of the Independent Directors of the Applicant is that they failed in their duty by failing to "test the market."

[57] In addition to the foregoing, which I consider reasonable considerations, the Special Committee of the Board had taken into consideration the following factors in reaching its conclusion that it was not likely that a third party bidder would provide a competitive offer for the Applicant:

(a) the Company is a TSX listed company with a substantial portion of its assets in the United States, with the corresponding multi-jurisdiction tax and commercial issues and complications;

(b) the Company owns only partial interests in substantially all of its assets and its interests are subject to various partnership and other co-ownership agreements;

(c) a large portion of the Company's assets are longer-term land development holdings as opposed to income-producing properties;

(d) a substantial portion of the Company's assets which were ready for sale had already been disposed of in the past two years;

(e) a substantial portion of the Company's property management contracts were short term and/or in respect of assets owned by entities controlled by John Preston and other related parties and/or dependent upon the continued involvement of certain management personnel; and

(f) certain senior officers of the Company are entitled to severance payments in the event of a termination of their employment resulting from a change of control.

[58] I am satisfied that the exercise of business judgment by the Independent Directors who recommended to the Securityholders of the Applicant that they not tender to the First Capital proposal, was reasonable or at the very least within a "range of reasonableness" for the following reasons:

(1) the assets of the Applicant are illiquid, making a competitive bidding process difficult;

(2) the Directors of the Applicant did prior to proceeding with the Plan explore other alternatives;

(3) the only valuation that is before the Court is the one commissioned by the Company on which the Plan is founded;

(4) The only Securityholders of the Company to have objected to the Arrangement Resolution and indicated a desire to exercise their right of dissent are the Respondents.

(5) the Acquisition Group controlled more than one third of the outstanding shares (sufficient to determine the vote outcome) such that the Applicant was never "in play," such that the words of Farley J. in *Benson v. Third Canadian General Investment* (1993), 14 O.R. (3d) 493 (Gen. Div.) are apt:

> I would also observe that the "in play" concept only becomes relevant in the aspect of concentrating on maximizing shareholder value when a corporation is truly in play. **If there is a veto block of shareholders who are entitled to ignore, disregard and/ or reject an offer, then if that be the circumstances under the prevailing law, how can one say that the corporation is in play?** The ball game would only be played if the veto block were disqualified in some legal way. If not, the first pitch is not thrown. If not in play, then it is my view that maximizing shareholder values is only a subset of the best interests of the corporation for which the directors must have regard. (emphasis added)

(6) the First Capital "bid" is significantly conditional.

[59] The concept of "maximizing shareholder value" as that term is used in the cases referred to above, does involve a number of factors including price. In my view, "maximizing shareholder value" does not necessitate accepting the merest possibility of a higher prices and ignoring other factors that may contribute to that value.

[60] I am satisfied, to adopt the words of the Court of Appeal in *Maple Leaf Foods, supra* at p. 191, "Provided the directors have acted honestly and reasonably, the Court ought not to substitute its own business judgment for that of the Board of Directors," as applicable in this case.

[61] I adopt the words in *Re Trizec Corp* (1994), (1994) 20 B.L.R. (2d) 202 also as applicable here:

> Based on this evidence, I had no difficulty concluding that the Plan was proposed fell within the range of what is a reasonable and fair allocation of value among the stakeholders in this case. Accordingly, I found the plan was one that a reasonable business person would have approved barring the availability of any advantageous amendment.

[62] The actions of First Capital, which seeks to have this Court determine that the Plan of Arrangement is unfair and should not be approved, bring to mind the following words of Farley J. in *Benson, supra*:

> In my view AGF is not a Quixotic knight trying to right wrongs. It may say that it is a better bidder, but having been turned down it seems to me that it is a bitter bidder. I would not think on discretionary exercise of judgment principles that it would be entitled to the extraordinary relief it claims.

[63] For the foregoing reasons, I conclude that the Plan is fair and reasonable and so approve.

C. CAMPBELL J.

Released:

Court File No. 07-CL-6986
Date: 20070726

ONTARIO

SUPERIOR COURT OF JUSTICE

STERLING CENTRECORP INC.

(Applicant)

REASONS FOR DECISION

C. CAMPBELL J.

Released: July 26, 2007

Court File No.: **CV-11-9283-00CL**

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 UNIQUE BROADBAND SYSTEMS, INC.

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT TORONTO

BRIEF OF AUTHORITIES OF UNIQUE BROADBAND SYSTEMS, INC. AND UBS WIRELESS SERVICES INC.

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