Court File No. CV-16-11389-00CL

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 URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (Collectively the "Applicants") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

BOOK OF AUTHORITIES OF THE MONITOR
(Motion for Sale Approval Returnable December 7, 2021)

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto Canada M5V 3J7

Robin B. Schwill (LSO# 38452I)
rschwill@dwpv.com
Tel: 416.863.5502

Robert Nicholls (LSO# 75180A)
rnicholls@dwpv.com
Tel: 416.367.7484

Lawyers for the Monitor
KSV Restructuring Inc.

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CITATION: URBANCORP TORONTO MANAGEMENT INC., 2021 ONSC 4262
COURT FILE NO.: CV-16-11389-00CL
DATE: 2021-06-30

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 URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (Collectively the "Applicants") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Kenneth Kraft and Neil Rabinovitch,* for Guy Gissin, Israeli Court Appointed Functionary Officer and the Foreign Representative of Urbancorp Inc.

Robin Schwill and Robert Nicholls, for the Monitor, KSV Restructuring Inc.

Matthew Gottlieb, Sapna Thakker and Jane O. Dietrich, for Mattamy (Downsview) Limited

ENDORSEMENT

Background

[1] This endorsement addresses two motions.

[2] KSV Restructuring Inc. ("KSV"), in its capacity as court-appointed Monitor (the "Monitor") of the Applicants and the Affiliated Entities listed on Schedule "A" ((collectively, the "CCAA Entities"), and each individually (a "CCAA Entity")), pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C–36, as amended (the "CCAA") seeks an order approving the sales process (the "Sales Process") for Urbancorp Downsview Park Development Inc.'s ("Downsview") interest in Downsview Homes Inc. ("DHI") and the related project agreements (the "Downsview Interest"), and sealing the confidential appendices (the "Confidential Appendices") to (i) the Forty-Fourth Report of the Monitor dated February 11, 2021 (the "Report") and (ii) the supplement to the Report dated March 8, 2021 (the "Supplement").

[3] The second motion is brought by Guy Gissin, in his capacity as foreign representative of Urbancorp Inc. ("UCI") (the "Foreign Representative") for an order that KSV deliver a Notice of Request to Arbitrate to Mattamy (Downsview) Limited, and related companies (collectively, "Mattamy") (with UCI as an interested party) (the "Notice to Arbitrate"). Alternatively, UCI is seeking an order permitting it to take an assignment of Downsview's rights to arbitrate the issues with Mattamy and adjourn the Sales Process motion until after the completion of the arbitration.

[4] The Downsview Interest is a 51% joint venture interest in a residential development project being managed and controlled by its co-owner, Mattamy. The Downsview Interest is subject to (i) transfer restrictions in favour of Mattamy; and (ii) related agreements governing the co-ownership of the Project (as defined below).

[5] Mattamy is also the DIP Lender to Downsview and is currently owed over $9 million. The DHI Facility (defined below) matured on February 3, 2021. Downsview does not have the ability to repay the DHI Facility. Mattamy takes the position that it is entitled to appoint a receiver over Downsview and has made approval of the Sales Process a condition precedent to extending the Maturity Date of the DHI Facility.

[6] There have been many disputes over the interpretation of the Project related agreements that date back almost to when Mattamy first became involved in the Project.

[7] UCI has been attempting to have two issues arbitrated, namely: (i) is Mattamy entitled to an additional payments in priority over Downsview in respect of future profits from DHI; and (ii) the quantum of management fees Mattamy received during Phase 1 of the Project.

[8] The Monitor is of the view that the Sales Process can be conducted without having to first arbitrate the issues, and even if there was a prior arbitration, a sales process may be required in any event to substantiate the market value of the Downsview interest. Further, the Sales Process may also illustrate that the issues to be arbitrated are of no practical relevance (and, therefore, need not be arbitrated).

[9] The Foreign Representative believes that the proposed Sales Process will materially impair value as potential purchasers may be dissuaded from doing due diligence or submitting bids while these issues remain outstanding.

The Facts

[10] The relevant facts with respect to the KSV motion are set out in the Report and the Supplement.

[11] DHI owns land located at 2995 Keele St. in Toronto, on the former Downsview airport lands. It is developing a residential construction project comprised of condominiums, townhomes, semi-detached homes and rental units (the "Project").

[12] Downsview holds a 51% ownership interest in DHI. The remaining 49% is held by Mattamy. Downsview has rights and obligations under a co-ownership agreement (the "Co-ownership Agreement") between Downsview and Mattamy, as amended by various related agreements (the "Agreements") which, among other things, impose certain transfer restrictions on Downsview's shares of DHI in favour of Mattamy. The Monitor has characterized these

restrictions as providing Mattamy with an effective veto on any potential purchaser of the Downsview Interest.

[13] On June 15, 2016, the court approved a debtor-in-possession facility (the "DHI Facility") in the amount of $8 million between Mattamy, as lender and Downsview as borrower, secured by a charge (the "DHI Facility Charge") in favour of Mattamy over Downsview's property, including the Downsview Interest (the "Mattamy DIP Order"). The DHI Facility was used by Downsview to fund its portion of the required equity injection in the Project to secure construction financing for Phase 1.

[14] The DHI Facility was subsequently amended and increased to $9.05 million, plus interest and costs. The DHI Facility matured on February 3, 2021 (the "Maturity Date").

[15] The Monitor reports that Downsview does not have the ability to repay the DHI Facility and Mattamy has advised the Monitor that is not prepared to further extend the Maturity Date unless a Sales Process is conducted for the Downsview Interest.

[16] Pursuant to the terms of the DHI Facility and the Mattamy DIP Order, Mattamy is entitled to seek the appointment of a receiver over the Downsview Interest upon a continuing event of default under the DHI Facility. Failing to repay the DHI Facility by the Maturity Date is an event of default.

[17] UCI raised approximately $64 million through public offering of debentures in Israel and made certain unsecured loans to certain of the CCAA Entities (the "Shareholder Loans"). One of the Shareholder Loans was advanced by UCI to Downsview the amount of $10,094,562 (the "Downsview Shareholder Loan"), which remains outstanding

[18] There is a disagreement between the Monitor, the Foreign Representative and Mattamy with respect to certain accounting matters related to the Project. As a result, on January 25, 2021, the Foreign Representative served its motion

[19] The central issues in the arbitration are whether Mattamy has already received payment as provided in s.8.4(d) and 8.5(d) of the Co-ownership Agreement or whether these amounts remain payable to Mattamy and an accounting of management fees.

Position of the Parties

[20] The Foreign Representative takes the position that Mattamy has paid itself all amounts that it claims to be entitled.

[21] The Foreign Representative also takes the position that the issues in dispute could be resolved expeditiously and this would then allow Downsview's interest to be properly marketed for sale in an open and transparent sales process or allow alternative financing to replace the DHI Facility.

[22] The Monitor, in consultation with Mattamy, has proposed a Sales Process. Mattamy has advised the Monitor that it consents to the terms of the Sales Process and, if the Sales Process is not approved, Mattamy intends to seek the appointment of a receiver over the Project.

[23] The proposed Sales Process provides that at the end of the sixth week, each bidder will be required to submit letters of intent ("LOIs"). If no LOIs are submitted, the Monitor shall be entitled

to terminate the Sales Process and convey the Downsview Interest to Mattamy in full satisfaction of all obligations of Downsview owing to Mattamy.

[24] The Monitor contends that the timelines in the Sales Process are intended to provide the Monitor with an appropriate amount of time to canvass prospective purchasers and to allow for due diligence. The Monitor will have the right to extend or amend the Sales Process timelines should it feel it is warranted.

[25] The Monitor further advised that Mattamy has agreed to pay the Monitor's fees and costs to conduct the Sales Process if the proceeds are insufficient to cover these costs.

[26] The Monitor is of the view that given the efficiencies and cost savings, no better, viable alternative to the proposed Sales Process in respect of the Downsview Interest is available or otherwise acceptable to Mattamy as DIP Lender.

[27] The Foreign Representative is of the view that it will be practically impossible for any interested bidder to properly assess or conduct due diligence on the likely outcome of the issues as between Downsview and Mattamy and it is unlikely any party will spend the time and funds and undertake due diligence for the Project when such uncertainty exists. The Foreign Representative contends that the magnitude is such that the outcome could determine whether there is any value in Downsview's interest in DHI. Further, resolving these issues is critical in the event a Sales Process is to be commenced so that potential purchasers have a clear understanding of whether Mattamy has payments outstanding under the Co-ownership Agreement and the status of the Project management fees, as well as full information regarding the financial condition of the Project.

[28] From the standpoint of the Foreign Representative, conducting a Sales Process in the absence of a determination of issues as between Downsview and Mattamy is likely to cause irreparable harm to UCI, as it will be nearly impossible to determine which potential bidders were dissuaded from conducting serious due diligence and potentially submitting offers as a result of the material uncertainty over this issue. If the payment issue is resolved in favour of Downsview, the calculations of both of Monitor and the Foreign Representative show positive value for Downsview's interest in the Project.

Issues

[29] From the standpoint of the Monitor, the issues are as follows:

(a) should the Sales Process be approved?;

(b) should the court grant a sealing order in respect of the Confidential Appendices to the Report and Supplement?

[30] From the standpoint of the Foreign Representative, the issues are as follows:

(a) should the Monitor be directed to assign to UCI the rights to proceed with arbitration?

(b) alternatively, should the Monitor be directed to initiate the Notice to Arbitrate with UCI as an interested party?

(c) should the Monitor's motion to initiate the Sales Process be adjourned pending the arbitration?

Analysis

[31] In my view, it is appropriate to first address the issues raised by the Foreign Representative.

[32] The creditors of Downsview have a vested interest in ensuring that there is a fair and transparent determination of the issues referenced in the Notice to Arbitrate.

[33] In most CCAA proceedings, it is the Monitor who is charged with reviewing issues of this type. However, if the Monitor, when requested, is unwilling to review the issues, the creditors should, in most circumstances, have the ability to ensure that a review can take place. A procedure that can be modified and adapted is similar to that set out in section 38 of the *Bankruptcy and Insolvency Act* (the "BIA").

[34] In a BIA proceeding, if a creditor requests the trustee to take a proceeding that would be of benefit to the estate and the trustee refuses or neglects to do so, the creditor may move under s. 38 of the BIA for an order permitting it to, in essence, step into the shoes of the trustee, and take the proceeding. The creditor must, of course, offer the opportunity to other creditors to participate in this venture.

[35] In the circumstances of this case, the Monitor has been requested to take the steps necessary to establish the value of Downsview's interest in UCI. In my view, this necessitates an examination of the issues involved in the arbitration. It could be, in the final analysis, that the interest may have no value, but that does not mean that the issue can be ignored, especially when creditors of Downsview want the issue determined. The Monitor has the option of either taking steps to proceed with an arbitration or, in the alternative, to assign to UCI the rights to proceed with an arbitration.

[36] Although this is a CCAA proceeding, I agree with the submission of counsel on behalf of the Foreign Representative, that there is no principled reason to distinguish between a trustee in bankruptcy and a Monitor, at least where the Monitor is itself in charge of the debtor's affairs. The trustee has obligations to maximize the assets in the estate, as does the Monitor in this case.

[37] Following the reasoning (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para. 24), which states that, to the extent possible, aspects of insolvency law that are common to the BIA and CCAA should be harmonized, it seems to me that it is appropriate to provide for an equivalent process in CCAA proceedings.

[38] Accordingly, the Monitor is directed to issue the Notice to Arbitrate to Mattamy. However, if the Monitor determines that it is not willing to issue such notice, it should assign its right to do so to UCI, in a process that follows the structure as set out in s. 38 of the BIA.

[39] In this case, I am satisfied that the facts as alleged in the Notice to Arbitrate are such that there is threshold merit to the proceeding and that the proceeding could benefit the creditors of Downsview.

[40] The final issue to consider on the Foreign Representative's motion is whether the Monitor's motion should be adjourned until the arbitration has proceeded and an award granted (if the parties

settle), or in light of my conclusion on the arbitration issue, whether the Sales Process can be run concurrently with the arbitration.

[41] The Foreign Representative submits that the Sales Process contains significant uncertainty as a result of two material outstanding issues, referenced in the Notice to Arbitrate, which could have the effect of chilling or dooming the Sales Process. Further, if the Sales Process fails, Mattamy would simply take Downsview's interest in the Project in satisfaction of its DIP Loan. The Foreign Representative contends that the Monitor has not engaged any industry-specific advice to determine whether the outstanding material issue would likely chill or doom the Sales Process to fail.

[42] The Foreign Representative also points out that the Monitor has proposed to give Mattamy veto rights over who can sign a nondisclosure agreement and thereby access the data room. Mattamy says that this restriction is built into the Mattamy DIP Order. The Foreign Representative submits that the Mattamy DIP Order deals with the conveyance of the interest over which Mattamy appears to have veto rights and that Mattamy has no veto rights on who can participate in the Sales Process by signing a non-disclosure agreement.

[43] Paragraphs [4] and [5] of the Mattamy DIP Order read as follows:

> [4] **THIS COURT ORDERS** that UC Downsview shall be and is hereby restricted from transferring or attempting to transfer any of its shares or any economic, right, title or interest in Downsview Homes Inc. ("DHI") to any party prior to obtaining the prior written consent of MDL, which consent is not to be unreasonably withheld. For greater certainty, the restrictions contained in this paragraph 4 will survive the repayment of the DHI Facility.
>
> [5] **THIS COURT ORDERS** that the rights, remedies and recourses provided to and in favour of MDL under or pursuant to this Order and the DHI Term Sheet are in addition to, not in substitution for and without prejudice to, any rights, remedies or recourses provided to MDL under any other agreements with any of the Applicants, including, without limitation, UC Downsview.

[44] The provisions of paragraph [4] impose certain restrictions on Downsview, which in turn, impact the Monitor on any sales process relating to Downsview's interest in DHI. In conducting any sales process, the Monitor has to describe the assets being offered for sale and to do so in a transparent manner. In my view, this includes an obligation to fully describe any restrictions or potential restrictions that may affect the transfer of Downsview's interest in DHI. In my view, such disclosure is required as it falls within the phrase "attempting to transfer any of its shares …" as referenced in [4]. The failure to disclose these restrictions at the outset of the Sales Process, or to defer addressing the issues until the time of conveyance could result in an increased degree of uncertainty in the entire Sales Process, which is undesirable.

[45] In the circumstances of this case, I have concluded that the Monitor should inform potential purchasers of the requirement to obtain the prior written consent of Mattamy, which consent is not to be unreasonably withheld. Any party seeking such consent is directed to do so on a timely basis,

so as to minimize the time and expense of due diligence and, if necessary, a review of the issue by the court.

[46] In response to the argument that the Sales Process should be adjourned, the Monitor points out that the court has the power to approve a sale of assets in the CCAA proceeding as codified in s. 36 of the CCAA, which sets out the list of non-exhaustive factors for the court to consider in determining whether to approve the sale of the debtor's assets outside the ordinary course of business.

[47] The Monitor further points out that a distinction is drawn between the approval of the Sales Process and the approval of an actual sale. Section 36 of the CCAA is engaged when the court determines whether to approve a sale transaction arising as a result of the sales process. It does not address the factors the court should consider when deciding whether to approve a sales process.

[48] In *(Re) Brainhunter*, 2009 CarswellOnt 8207 at paragraphs 13 – 17, the court considered the criteria to be applied on a motion to approve a stalking horse process under the CCAA, citing *(Re) Nortel Networks Corp*., 2009 CarswellOnt 467 at para. 49 where the court determined the following four factors to be considered by the court in the exercise of its discretion to determine if the proposed Sales Process should be approved (the "Nortel Criteria"):

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

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

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

(d) is there a better viable alternative?

[49] The Monitor contends that the Sales Process is warranted at this time for number of reasons.

[50] First, Mattamy as the DIP Lender, is entitled to exercise its rights over the Downsview Interest in the event that the amounts owing under the DHI Facility are not repaid in full by the Maturity Date. Mattamy has consented to the Sales Process to be undertaken by the Monitor and, absent the commencement of the Sales Process, Mattamy intends to seek the appointment of a receiver to carry out a similar Sales Process.

[51] Second, Downsview's obligations under the DHI Facility continue to accrue. Phase 2 is not expected to be complete for several years and will require additional infusions of capital. If the Sales Process is not implemented, Mattamy's indebtedness will continue to increase, thereby decreasing potential recoveries, if any, for other creditors, including UCI.

[52] Third, the Sales Process can be conducted without requiring a determination of the arbitration in advance. The Sales Process contemplates that bidders will be required to submit two offers: one assuming that Mattamy has already received the payments contemplated by the Agreements and the other assuming Mattamy has not received such payments.

[53] The Monitor and Mattamy are in agreement that the Sales Process will benefit the whole of the economic community and the Sales Process could result in a sale transaction for the Downsview Interest, and Downsview's creditors may be provided with certain recoveries.

[54] The Monitor submits that conditions that have given rise to a concern of a "chilling effect" on the market usually involve (i) significant break fees in a stalking horse agreement, or (ii) significant restrictions in the future sale of the assets, by a right of first refusal or otherwise. (See *Brainhunter*, *supra*, at para 12; *Mecachrome Canada Inc*., 2009 Carswell 9963 at para. 35 (Sup. Ct.); *Re Quest University Canada*, 2020 Carswell BC 3091 (SC) at para 63; *(Re) Endurance Energy Limited*, 2016 Carswell Alta 1130 (QB). The Monitor submits that these issues are not present in this case. I agree.

[55] The Monitor is also the view that potential bidders are sufficiently sophisticated such that a requirement to provide two bids prices will not be confusing and thus will not have a "chilling effect" on the market for potential bidders for the Downsview Interest.

[56] The Monitor submits that no creditor has come forward with any *bona fide* concerns. The Monitor also addresses the concerns of the Foreign Representative to the effect that the Sales Process ought not to be initiated until after the arbitration and that to do so beforehand will impair the Sales Process. The Monitor submits that these are conclusory statements made by the Foreign Representative and that the Monitor, on the other hand, has articulated reasons for supporting the Sales Process in its Report. The Monitor's evidence is that, in its opinion, requesting interested parties to provide two bid prices will not be confusing to the market, will not be a disincentive to providing offers, and may illustrate that the issue of the Mattamy receivable and the management fee are of no practical relevance (and therefore need not be arbitrated). The Monitor submits that the Sales Process is an open and transparent process designed to thoroughly canvass the market with a view to accepting the best offer for the Downsview Interest.

[57] In addition, the Monitor submits that the concerns expressed by the Foreign Representative with respect to the accounting of the Project are not *bona fide* as they do not reflect steps taken by the Monitor to become reasonably comfortable with same. The Monitor, Pelican Woodcliffe Inc. and Altus Group have engaged in a review of the accounting of the Project and have not identified any material concerns.

[58] Finally, the Monitor submits that there is no better or viable alternative to the Sales Process.

[59] In its Reply Factum, the Monitor submits that many of the "facts" pertaining to the Project and the agreements as referenced in the Foreign Representative's Factum are simply direct references to the Foreign Representative's own characterizations contained in its own Notice to Arbitrate and, therefore, are not evidence of anything other than the statements made by the Foreign Representative and, accordingly, should be afforded no weight. I agree with this submission. The concerns raised by the Foreign Representative are, at best, speculative and accordingly I discount the statements referenced in the Foreign Representative's factum.

[60] I have been persuaded by the arguments of the Monitor that the Sales Process should be approved and proceed at this time. In considering this issue, I have taken into account the comments of Jamal J.A. in *Marchant Realty Partners Inc.* v. *2407553 Ontario Inc.*, 2021 ONCA 375 at para. 19.

> [19] As already noted, commercial court judges also give substantial deference to the decisions and recommendations of a receiver as an officer of the court. If the receiver's decisions are within the broad bounds of reasonableness and the receiver proceeded fairly, after considering the interests of all stakeholders, the court will

> not intervene: *Ravelston Corp. Ltd. (Re)*, 2007 ONCA 135, at para. 3; *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355 (C.A.), at para. 23. A court will "assume that the receiver is acting properly unless the contrary is clearly shown": *Regal Constellation Hotel*, at para. 23.

[61] I am satisfied that the Receiver has given due consideration to the issues relating to the proposed Sales Process and that its decisions and recommendations are reasonable in the circumstances. The Sales Process is approved.

Sealing Order

[62] Finally, the Monitor requests a sealing order in respect of the Confidential Appendices. The Monitor's submissions are set out in paragraphs 53 – 60 of the factum, which reads as follows:

> [53] Section 137(2) of the *Courts of Justice Act (Ontario)* provides courts with the discretion to order that any document filed in a civil proceeding be treated as confidential, sealed, and not form part of the public record, notwithstanding the general principle that court hearings should be open to the public.
>
> [54] In *Sierra Club of Canada* v. *Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:
>
> > (a) the order is necessary to prevent serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk and;
> >
> > (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.
> >
> > *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 at para. 53.
>
> [55] In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders.
>
> [56] The Monitor is seeking a sealing order in respect of the Confidential Appendices to the Report containing (i) the most recent budget provided by Mattamy to the Monitor as to the distribution of proceeds from the sale of the Downsview Interest as between Mattamy and Downsview; (ii) the Foreign Representative's estimate of the value of the Downsview Interest; and (iii) the Monitor's estimate of the value of the Downsview Interest.

> [57] The Monitor is also seeking a sealing order in respect of the Confidential Appendices to the Supplement containing (i) various iterations of the waterfalls reflecting the distribution of cash flows from the phases of the Project provided by the Foreign Representative on the one hand and the Monitor on the other; (ii) the decision from the prior confidential arbitration before the Honourable Frank Newbould in September 2019 (the "Prior Arbitration"); and (iii) an affidavit sworn by Chris Strzemiecz in the course of the Confidential Prior Arbitration.
>
> [58] The Confidential Appendices contain highly sensitive commercial information of Downsview and the Downsview Interest that could undermine the integrity of the Sale Process and the potential arbitration of the Provisions. The disclosure of the Confidential Appendices prior to the completion of a transaction (or multiple transactions) under the Sale Process would pose a serious risk to the Sale Process in the event that the transaction (or multiple transactions) does not close, as it could jeopardize dealings with any future prospective purchasers or liquidators of the Downsview Interest. With respect to the Confidential Appendices relating to the Prior Arbitration, their disclosure would breach the relevant confidentiality agreement.
>
> [59] If granted, the sealing order will protect the commercial interests of Downsview and its stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the Confidential Appendices, namely the lack of immediate public access to all documents filed in these proceedings.
>
> [60] As a result, it is submitted that the test for a sealing order has been met and the Court should make an order that the Confidential Appendices be treated as confidential, sealed and not form part of the public record in the within proceedings pending the completion of these proposal proceedings.

[63] The considerations involved in the granting of a sealing order must take into account the recent Supreme Court decision in *Sherman Estate v. Donovan*, 2021 SCC 25 at paras. 37 – 38, where Kasirer J. wrote that:

> [37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

(1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness – for example, a sealing order, a publication ban, an order excluding the public from a hearing, or redaction order – properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspaper Ltd. v. Ontario*, 2005, SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[64] Having reviewed the Confidential Appendices, I am satisfied that the three prerequisites have been satisfied. There is a public interest in ensuring the integrity of the Sales Process and any arbitration. There is no reasonable alternative measure to preserve the integrity of the Sales Process and any arbitration. Finally, as a matter of proportionality, I am satisfied that the benefits of the order outweigh its negative effects. As such, the Sealing Order should be granted, pending further order of the court.

Disposition

[65] In the result, the Foreign Representative's motion is granted, in part. The arbitration can proceed at this time. If the Monitor is not prepared to undertake steps necessary to initiate the arbitration, the Foreign Representative can request an assignment of the Monitor's rights to initiate such arbitration. The request of the Foreign Representative to adjourn the Sales Process motion until after the completion of the arbitration is dismissed.

[66] The Monitor's motion to approve the Sales Process and for a sealing order of the Confidential Appendices is granted.

Chief Justice G.B. Morawetz

Date: June 30, 2021

SCHEDULE "A'

LIST OF NON-APPLICANT AFFILIATES

URBANCORP POWER HOLDINGS INC.

VESTACO HOMES INC.

VESTACO INVESTMENTS INC.

228 QUEEN'S QUAY WEST LIMITED

URBANCORP CUMBERLAND 1 LF

URBANCORP CUMBERLAND 1 GP INC.

URBANCORP PARTNER (KING SOUTH) INC.

URBANCORP (NORTH SIDE) INC.

URBANCORP RESIDENTIAL INC.

URBANCORP REALTYCO INC.

COURT OF APPEAL FOR ONTARIO

CITATION: Urbancorp Toronto Management Inc. (Re), 2021 ONCA 613
DATE: 20210909
DOCKET: M52721
(M52689)

Miller J.A. (Motions Judge)

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 Urbancorp Toronto Management Inc., Urbancorp (St. Clair Village) Inc. Urbancorp (Patricia) Inc., Urbancorp (Mallow) Inc., Urbancorp (Lawrence) Inc., Urbancorp Downsview Park Development Inc., Urbancorp (952 Queen West) Inc., King Residential Inc., Urbancorp 60 St. Clair Inc., High Res. Inc., Bridge on King Inc. (Collectively the "Applicants") and the Affiliated Entities Listed in Schedule "A" Hereto

Kenneth Kraft, Neil Rabinovitch and Michael Beeforth, for the moving party, Guy Gissin, in his capacity as the Foreign Representative of Urbancorp Inc.

Robin Schwill, Matthew Milne-Smith and Robert Nicholls, for the responding party, KSV Restructuring Inc., in its capacity as Monitor

Matthew Gottlieb, James Renihan and Jane Dietrich, for the responding party, Mattamy Homes Limited

Heard: August 26, 2021 by video conference

ENDORSEMENT

[1] This motion arises out of long-running CCAA proceedings involving a group of companies ultimately owned by Urbancorp Inc. ("UCI"). The moving party, the

Foreign Representative of UCI, seeks a stay pending its motion for leave to appeal an order of the supervising judge. That order authorized a process for the sale of a 51% interest in a real estate development project called Downsview Homes Inc. ("DHI"), owned by Urbancorp Downsview Park Development Inc. ("Downsview"), a subsidiary of UCI. The responding party, Mattamy Homes Limited ("Mattamy"), owns the other 49% of DHI.

[2] Mattamy is the lender to Downsview under a debtor-in-possession facility (the "DHI Facility"), which matured eight months ago, on February 3, 2021. Downsview owes Mattamy over $9 million pursuant to the terms of the DHI Facility and the order approving the DHI Facility (the "DIP Order"). Downsview cannot repay the debt, and Mattamy will not extend the deadline for payment any further unless a sales process is conducted for Downsview's interest in DHI.

[3] There is also a dispute as to whether Mattamy is entitled to a substantial payment from Downsview under the co-ownership agreement they entered into with respect to DHI. The supervising judge ordered arbitration of that payment dispute. The outcome of the arbitration will have a material impact on the value of Downsview's interest in the project. If Mattamy is entitled to the payment, Downsview's interest in the project will be essentially worthless. If Mattamy is not entitled, then Downsview's interest will be worth millions of dollars, even after the repayment of the DHI Facility.

[4] Downsview argued before the supervising judge that the sale process for Downsview's interest proposed by the Monitor be postponed until the question of the disputed payment could be arbitrated. Downsview was (and remains) concerned that the uncertainty about the value of its interest in DHI will have a chilling effect on the sale process. It is conceivable, Downsview says, that no bidder will step forward because of the difficulty they would encounter conducting due diligence and ascertaining the probable value of DHI in light of the disputed payment. If the sale process fails and no bidder is found, Mattamy could, under the proposed terms of the sale process, seize Downsview's interest. This would result in a windfall to Mattamy – even if the arbitration of the disputed payment were to be resolved in Downsview's favour later.

[5] The supervising judge was persuaded by the arguments of the Monitor and decided that the sale process should not be postponed until after the arbitration. He highlighted three of the Monitor's arguments. First, that Mattamy, as the debtor-in-possession lender, was entitled to assert its rights over Downsview's interest in DHI in the event Downsview did not repay the DHI Facility. Second, that Downsview's obligations under the DHI Facility continued to accrue. Third, that the proposed sale process could be conducted without knowing the outcome of the arbitration, because the process contemplated the bidders submitting two offers – one on the basis that Mattamy was entitled to the additional payment and one on the basis that it was not.

[6] The Monitor had considered and rejected Downsview's concerns that the proposed sale process would create a "chilling effect" on potential bidders. The Monitor concluded that potential bidders would be sophisticated enough to conduct due diligence and assess both possible outcomes of the disputed payment issue, and would not be dissuaded or confused by being asked to submit separate bids for both possible outcomes. It argued that Downsview was merely speculating that potential bidders would be dissuaded from bidding.

[7] The supervising judge agreed with the Monitor that Downsview's concerns were speculative and ought to have been given no weight.

[8] Downsview is seeking leave to appeal to this court. It will argue that the supervising judge erred in concluding that its concerns were speculative, and erred in not ordering the sale process to be delayed until after the conclusion of the arbitration.

[9] Downsview argues for a stay of the sale process until the leave application can be decided. If leave to appeal is denied, then that will be the end of things and the sale process can unfold. However, if leave is granted, Downsview will seek a motion for a further stay of the order – and the sale process – pending the disposition of the appeal.

ANALYSIS

[10] The test for staying an order pending appeal is analogous to the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 334 for granting an interlocutory injunction: (i) is there a serious issue to be determined on appeal; (ii) will the moving party suffer irreparable harm if the stay is not granted; and (iii) does the balance of convenience favour the granting of the stay: *Belton v. Spencer*, 2020 ONCA 623, paras. 20-21.

A. A SERIOUS QUESTION TO BE DETERMINED ON APPEAL

[11] The moving party set out four issues that it characterized as important, both to the parties and to the CCAA process as a whole: (i) the level of deference owed by the court to a "Super Monitor"; (ii) the extent to which a Super Monitor needs to obtain independent evidence to support the fairness and viability of a proposed sale process; (iii) whether the evidentiary onus regarding fairness and viability of the sale process remains with the Super Monitor or shifts to the party objecting to the sale process; and (iv) the extent to which a court can rely on a decision that is released after the parties' hearing.

[12] Although it may seem unlikely the moving party will succeed on a motion for leave to appeal, the first two issues are at least arguable, if weak. The latter two issues would be highly unlikely to attract leave. First, although there seems to be little reason why a "Super Monitor" should be given less than the substantial

deference that a supervising judge gives to the decisions and recommendations of a receiver, there is no authority from this court settling the issue. Second, the idea that a Monitor must obtain independent evidence as to the fairness and viability of the sale process seems premised on the idea that an independent party would have greater expertise than the Monitor. Were the moving party correct, it would seem to undermine the speed at which the process is meant to operate. Third, the question of whether there was a shift in evidentiary onus is not a genuine issue – the supervising judge found that the Monitor had satisfied the evidentiary burden necessary to establish that the sale process was fair and reasonable. Fourth, the question of whether the supervising judge ought not to have cited a decision subsequently released by this court is of no importance. The decision in question did not change the law, and the ground is further weakened by the moving party's failure to outline the submissions on the decision that it would have made before the supervising judge if it had the opportunity.

[13] Above all, the moving party faces the high hurdle of the standard of review applicable to a decision of the supervising judge in a CCAA proceeding. The supervising judge had to determine whether the Sale Process ought to commence immediately or wait until the arbitration was concluded. The supervising judge applied the appropriate criteria set out in *(Re) Brainhunter* (2009), 62 C.B.R. (5th) 41 (Ont. Sup. Ct.), at para. 13, in deciding whether to order a particular sale process, all of which are factual in nature. The findings of the supervising judge

will be entitled to deference on appeal, should leave be granted. The decision to order the sale process was itself made on the recommendations of the Monitor within the context of a long-running CCAA proceeding, compounding the nature of the deference owed by this court: *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375, 90 C.B.R. (6th) 39, at para 19.

[14] Given the weakness of the grounds for appeal that have been articulated, as well as the unlikelihood that the moving party will satisfy the other grounds of the test for leave to appeal, the moving party is unlikely to obtain leave to appeal. This factor weighs in favour of dismissal.

B. IRREPARABLE HARM

[15] As the moving party argued, the criterion of irreparable harm refers to the nature of the harm rather than its magnitude: *RJR-MacDonald*, at p. 341. The question is whether refusal to grant relief would so adversely affect the moving party's interests that the harm could not be remedied were the moving party to lose the motion but succeed on the appeal: *RJR-MacDonald*, at p. 341.

[16] The moving party argues that if the sale process is not deferred until after the arbitration is completed, and Downsview's interest in DHI is sold, it will be impossible to know whether a higher purchase price could have been obtained had the sale process been deferred. Additionally, if the stay motion is not granted

and a sale is concluded prior to the appeal being heard, the moving party's appeal will have been rendered moot.

[17] Mattamy argues in reply that the supervising judge already adjudicated the issue of whether the sale process constitutes irreparable harm to the moving party. The supervising judge dismissed as speculative the argument that the sale process would generate a chill that would result in a lower sale price. Mattamy argues that if I were to find the prospect of irreparable harm, I would be finding that the prospect of a chill is more than speculative, and effectively would be reversing a factual finding of the supervising judge, contrary to the role of this court on a stay motion: *Hodgson v. Johnston*, 2015 ONCA 731, at para. 9.

[18] In addition, if the sale process is frustrated, Mattamy would be entitled, as a result of the moving party's default under the terms of the DHI Facility, to simply enforce its security and run another sale process, involving additional time and expense.

[19] I agree with the submissions of Mattamy. There is no basis on which I can substitute my evaluation of the efficacy of the sale process over that of the supervising judge and find that not granting the stay could result in irreparable harm to the moving party.

C. THE BALANCE OF CONVENIENCE

[20] Determining the balance of convenience requires an inquiry into which of the two parties will suffer the greater harm from granting or refusing the stay: *RJR-MacDonald*, at p. 342.

[21] The moving party argues that it will suffer the greater harm if a stay is refused, because it owns the 51% interest in DHI at issue, and therefore bears the risk of the interest being sold for a lower price than what otherwise could have been obtained. It also bears the risk of the sale process failing to attract any bids, which could result in Mattamy foreclosing on its interest. It argues that Mattamy faces no conceivable harm in delaying the sale process until such time as this court decides whether to grant leave to appeal.

[22] Mattamy and the Monitor argue to the contrary that Mattamy will suffer irreparable harm if there is further delay, and that the balance of convenience favours Mattamy. Mattamy has presented evidence on this motion that it has approached eight potential bidders since the sale process order was issued, and is concerned that those potential bidders will lose interest and faith in the sale process if it continues to be bogged down in litigation. Mattamy attests that the current market is favourable for investments of this nature because of favourable interest rates. These market conditions can change at any time, and prospective

bidders can lose faith in the process because of procedural delay and decline to participate.

[23] Comparing the potential commercial prejudice to Mattamy from delaying the sale process against what the supervising judge concluded to be an absence of genuine prejudice to the moving party in proceeding with the sale process prior to the conclusion of the arbitration, I find that the balance of convenience favours Mattamy. I would dismiss the motion.

D. SEALING ORDER

[24] All parties request a sealing order on the same basis and on analogous terms as the sealing order granted by the supervising judge, in order to preserve the integrity of the sale process and the pending arbitration. I am prepared to grant that order.

E. DISPOSITION

[25] The motion to stay is dismissed. The request for a sealing order is granted. If parties are unable to agree on an order for costs for this motion, I will receive submissions from each party not exceeding three pages within 10 days of these reasons.

"B.W. Miller J.A."

SCHEDULE “A’
LIST OF AFFILIATED ENTITIES

Urbancorp Power Holdings Inc.

Vestaco Homes Inc.

Vestaco Investments Inc.

228 Queen’s Quay West Limited

Urbancorp Cumberland 1 LP

Urbancorp Cumberland 1 GP Inc.

Urbancorp Partner (King South) Inc.

Urbancorp (North Side) Inc.

Urbancorp Residential Inc.

Urbancorp Realtyco Inc.

CITATION: Canwest Global Communications Corp., 2010 ONSC 2870
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100521

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

APPLICANTS

COUNSEL: *Lyndon Barnes, Alex Cobb and Betsy Putnam* for the Applicant LP Entities
Mario Forte for the Special Committee of the Board of Directors
David Byers and Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.
Andrew Kent and Hilary Clarke for the Administrative Agent of the Senior Secured Lenders Syndicate
M.P. Gottlieb and J.A. Swartz for the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
Robert Chadwick and Logan Willis for 7535538 Canada Inc.
Deborah McPhail for the Superintendant of Financial Services (FSCO)
Thomas McRae for Certain Canwest Employees

PEPALL J.

ENDORSEMENT

Relief Requested

[1] The LP Entities seek an order: (1) authorizing them to enter into an Asset Purchase Agreement based on a bid from the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders ("the AHC Bid"); (2) approving an amended claims procedure; (3) authorizing the LP Entities to resume the claims process; and (4) amending the SISP procedures so that the LP Entities can advance the Ad Hoc Committee transaction (the AHC Transaction") and the Support

Transaction concurrently. They also seek an order authorizing them to call a meeting of unsecured creditors to vote on the Ad Hoc Committee Plan on June 10, 2010. Lastly, they seek an order conditionally sanctioning the Senior Lenders' CCAA Plan.

AHC Bid

[2] Dealing firstly with approval of the AHC Bid, in my Initial Order of January 8, 2010, I approved the Support Agreement between the LP Entities and the Administrative Agent for the Senior Lenders and authorized the LP Entities to file a Senior Lenders' Plan and to commence a sale and investor solicitation process (the SISP). The objective of the SISP was to test the market and obtain an offer that was superior to the terms of the Support Transaction.

[3] On January 11, 2010, the Financial Advisor, RBC Capital Markets, commenced the SISP. Qualified Bids (as that term was defined in the SISP) were received and the Monitor, in consultation with the Financial Advisor and the LP CRA, determined that the AHC Bid was a Superior Cash Offer and that none of the other bids was a Superior Offer as those terms were defined in the SISP.

[4] The Monitor recommended that the LP Entities pursue the AHC Transaction and the Special Committee of the Board of Directors accepted that recommendation.

[5] The AHC Transaction contemplates that 7535538 Canada Inc. ("Holdco") will effect a transaction through a new limited partnership (Opco LP) in which it will acquire substantially all of the financial and operating assets of the LP Entities and the shares of National Post Inc. and assume certain liabilities including substantially all of the operating liabilities for a purchase price of $1.1 billion. At closing, Opco LP will offer employment to substantially all of the employees of the LP Entities and will assume all of the pension liabilities and other benefits for employees of the LP Entities who will be employed by Opco LP, as well as for retirees currently covered by registered pension plans or other benefit plans. The materials submitted with the AHC Bid indicated that Opco LP will continue to operate all of the businesses of the LP Entities in substantially the same manner as they are currently operated, with no immediate plans to discontinue operations, sell material assets or make significant changes to current management.

The AHC Bid will also allow for a full payout of the debt owed by the LP Entities to the LP Secured Lenders under the LP credit agreement and the Hedging Creditors and provides an additional $150 million in value which will be available for the unsecured creditors of the LP Entities.

[6] The purchase price will consist of an amount in cash that is equal to the sum of the Senior Secured Claims Amount (as defined in the AHC Asset Purchase Agreement), a promissory note of $150 million (to be exchanged for up to 45% of the common shares of Holdco) and the assumption of certain liabilities of the LP Entities.

[7] The Ad Hoc Committee has indicated that Holdco has received commitments for $950 million of funded debt and equity financing to finance the AHC Bid. This includes $700 million of new senior funded debt to be raised by Opco LP and $250 million of mezzanine debt and equity to be raised including from the current members of the Ad Hoc Committee.

[8] Certain liabilities are excluded including pre-filing liabilities and restructuring period claims, certain employee related liabilities and intercompany liabilities between and among the LP Entities and the CMI Entities. Effective as of the closing date, Opco LP will offer employment to all full-time and part-time employees of the LP Entities on substantially similar terms as their then existing employment (or the terms set out in their collective agreement, as applicable), subject to the option, exercisable on or before May 30, 2010, to not offer employment to up to 10% of the non-unionized part-time or temporary employees employed by the LP Entities.

[9] The AHC Bid contemplates that the transaction will be implemented pursuant to a plan of compromise or arrangement between the LP Entities and certain unsecured creditors (the "AHC Plan"). In brief, the AHC Plan would provide that Opco LP would acquire substantially all of the assets of the LP Entities. The Senior Lenders would be unaffected creditors and would be paid in full. Unsecured creditors with proven claims of $1,000 or less would receive cash. The balance of the consideration would be satisfied by an unsecured demand note of $150 million less the amounts paid to the $1,000 unsecured creditors. Ultimately, affected unsecured creditors

with proven claims would receive shares in Holdco and Holdco would apply for the listing of its common shares on the Toronto Stock Exchange.

[10] The Monitor recommended that the AHC Asset Purchase Agreement based on the AHC Bid be authorized. Certain factors were particularly relevant to the Monitor in making its recommendation:

- the Senior Lenders will received 100 cents on the dollar;
- the AHC Transaction will preserve substantially all of the business of the LP Entities to the benefit of the LP Entities' suppliers and the millions of people who rely on the LP Entities' publications each day;
- the AHC Transaction preserves the employment of substantially all of the current employees and largely protects the interests of former employees and retirees;
- the AHC Bid contemplates that the transaction will be implemented through a Plan under which $150 million in cash or shares will be available for distribution to unsecured creditors;
- unlike the Support Transaction, there is no option not to assume certain pension or employee benefits obligations.

[11] The Monitor, the LP CRA and the Financial Advisor considered closing risks associated with the AHC Bid and concluded that the Bid was credible, reasonably certain and financially viable. The LP Entities agreed with that assessment. All appearing either supported the AHC Transaction or were unopposed.

[12] Clearly the SISP was successful and in my view, the LP Entities should be authorized to enter the Ad Hoc Committee Asset Purchase Agreement as requested.

[13] The proposed disposition of assets meets the section 36 CCAA criteria and those set forth in the *Royal Bank of Canada v. Soundair Corp.*[1] decision. Indeed, to a large degree, the criteria overlap. The process was reasonable and the Monitor was content with it. Sufficient efforts were made to attract the best possible bid; the SISP was widely publicized; 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. The logical extension of that conclusion is that the AHC Transaction is as well. The LP Entities' Senior Lenders were either consulted and/or had the right to approve the various steps in the SISP. The effect of the proposed sale on other interested parties is very positive. Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors. The consideration to be received is reasonable and fair. The Financial Advisor and the Monitor were both of the opinion that the SISP was a thorough canvassing of the market. The AHC Transaction was the highest offer received and delivers considerably more value than the Support Transaction which was in essence a "stalking horse" offer made by the single largest creditor constituency. The remaining subsequent provisions of section 36 of the CCAA are either inapplicable or have been complied with. In conclusion the AHC Transaction ought to be and is approved.

Claims Procedure Order and Meeting Order

[14] Turning to the Claims Procedure Order, as a result of the foregoing, the scope of the claims process needs to be expanded. Claims that have been filed will move to adjudication and resolution and in addition, the scope of the process needs to be expanded so as to ensure that as many creditors as possible have an opportunity to participate in the meeting to consider the Ad

[1] [1991] O.J. 1137.

Hoc Committee Plan and to participate in distributions. Dates and timing also have to be adjusted. In these circumstances the requested Claims Procedure Order should be approved. Additionally, the Meeting Order required to convene a meeting of unsecured creditors on June 10, 2010 to vote on the Ad Hoc Committee Plan is granted.

SISP Amendment

[15] It is proposed that the LP Entities will work diligently to implement the AHC Transaction while concurrently pursuing such steps as are required to effect the Support Transaction. The SISP procedures must be amended. The AHC Transaction which is to be effected through the Ad Hoc Committee Plan cannot be completed within the sixty days contemplated by the SISP. On consent of the Monitor, the LP Administrative Agent, the Ad Hoc Committee and the LP Entities, the SISP is amended to extend the date for closing of the AHC Transaction and to permit the proposed dual track procedure. The proposed amendments to the SISP are clearly warranted as a practical matter and so as to procure the best available going concern outcome for the LP Entities and their stakeholders. Paragraph 102 of the Initial Order contains a comeback clause which provides that interested parties may move to amend the Initial Order on notice. This would include a motion to amend the SISP which is effectively incorporated into the Initial Order by reference. The Applicants submit that I have broad general jurisdiction under section 11 of the CCAA to make such amendments. In my view, it is unnecessary to decide that issue as the affected parties are consenting to the proposed amendments.

Dual Track and Sanction of Senior Lenders' CCAA Plan

[16] In my view, it is prudent for the LP Entities to simultaneously advance the AHC Transaction and the Support Transaction. To that end, the LP Entities seek approval of a conditional sanction order. They ask for conditional authorization to enter into the Acquisition and Assumption Agreement pursuant to a Credit Acquisition Sanction, Approval and Vesting Order.

[17] The Senior Lenders' meeting was held January 27, 2010 and 97.5% in number and 88.7% in value of the Senior Lenders holding Proven Principal Claims who were present and voting voted in favour of the Senior Lenders' Plan. This was well in excess of the required majorities.

[18] The LP Entities are seeking the sanction of the Senior Lenders' CCAA Plan on the basis that its implementation is conditional on the delivery of a Monitor's Certificate. The certificate will not be delivered if the AHC Bid closes. Satisfactory arrangements have been made to address closing timelines as well as access to advisor and management time. Absent the closing of the AHC Transaction, the Senior Lenders' CCAA Plan is fair and reasonable as between the LP Entities and its creditors. If the AHC Transaction is unable to close, I conclude that there are no available commercial going concern alternatives to the Senior Lenders' CCAA Plan. The market was fully canvassed during the SISP; there was ample time to conduct such a canvass; it was professionally supervised; and the AHC Bid was the only Superior Offer as that term was defined in the SISP. For these reasons, I am prepared to find that the Senior Lenders' CCAA Plan is fair and reasonable and may be conditionally sanctioned. I also note that there has been strict compliance with statutory requirements and nothing has been done or purported to have been done which was not authorized by the CCAA. As such, the three part test set forth in the *Re: Canadian Airlines Corp.*[2] has been met. Additionally, there has been compliance with section 6 of the CCAA. The Crown, employee and pension claims described in section 6 (3),(5), and (6) have been addressed in the Senior Lenders' Plan at sections 5.2, 5.3 and 5.4.

Conclusion

[19] In conclusion, it is evident to me that the parties who have been engaged in this CCAA proceeding have worked diligently and cooperatively, rigorously protecting their own interests but at the same time achieving a positive outcome for the LP Entities' stakeholders as a whole.

[2] 2000, A.B.Q.B. 442, leave to appeal refused 2000, A.B.C.A. 23, affirmed 2001, A.B.C.A. 9, leave to appeal to S.C.C. refused July 12, 2001.

As I indicated in Court, for this they and their professional advisors should be commended. The business of the LP Entities affects many people – creditors, employees, retirees, suppliers, community members and the millions who rely on their publications for their news. This is a good chapter in the LP Entities' CCAA story. Hopefully, it will have a happy ending.

Pepall J.

Released: May 21, 2010

CITATION: Canwest Global Communications Corp., 2010 ONSC 2870
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100521

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

APPLICANTS

REASONS FOR DECISION

Pepall J.

Released: May 21, 2010

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**

ENDORSEMENT

[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

Nortel Networks Corp. (Re)

Ontario Judgments

Ontario Superior Court of Justice

Commercial List

G.B. Morawetz J.

Heard: June 29, 2009.

Judgment: June 29, 2009.

Released: July 23, 2009.

Court File No. 09-CL-7950

[2009] O.J. No. 3169 | *55 C.B.R. (5th) 229* | *2009 CanLII 39492* | *2009 CarswellOnt 4467*

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 Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Applicants APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

(59 paras.)

Counsel

Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al.

Lyndon Barnes and Adam Hirsh, for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited.

J. Carfagnini and J. Pasquariello, for Ernst & Young Inc., Monitor.

M. Starnino, for the Superintendent of Financial Services and Administrator of PBGF.

S. Philpott, for the Former Employees.

K. Zych, for Noteholders.

Pamela Huff and Craig Thorburn, for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P.

David Ward, for UK Pension Protection Fund.

Leanne Williams, for Flextronics Inc.

Alex MacFarlane, for the Official Committee of Unsecured Creditors.

Arthur O. Jacques and Tom McRae, for Felske and Sylvain (de facto Continuing Employees' Committee).

Robin B. Schwill and Matthew P. Gottlieb, for Nortel Networks UK Limited.

A. Kauffman, for Export Development Canada.

D. Ullman, for Verizon Communications Inc.

G. Benchetrit, for IBM.

ENDORSEMENT

G.B. MORAWETZ J.

INTRODUCTION

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

States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

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

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

4 The following are my reasons for granting these orders.

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

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

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

BACKGROUND

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

9 At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries,

with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

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

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

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

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

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

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

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

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

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

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

15 Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction

process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

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

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

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

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

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

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

22 Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global

Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

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

ISSUES AND DISCUSSION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3rd) 165 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

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

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants

submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra*, *Re PSINet, supra*, *Re Consumers Packaging, supra*, *Re Stelco Inc.* *(2004), 6 C.B.R. (5th) 316* (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* *(2005) 9 C.B.R. (5th) 315*, *Re Caterpillar Financial Services Ltd. v. Hardrock Paving Co.* *(2008), 45 C.B.R. (5th) 87* and *Re Lehndorff General Partner Ltd.* *(1993), 17 C.B.R. (3rd) 24* (Ont. Gen. Div.).

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

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

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

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

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

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

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

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

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

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

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

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

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering L.P. v. Forest and Marine Financial Limited Partnership*, *2009 BCCA 319*.

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

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring" ... Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in Meridian Developments Inc. v. Toronto Dominion Bank *(1984) 11 D.L.R. (4th) 576* (Alta. Q.B.):
>
> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]
>
> 25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged ...

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

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

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

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

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

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

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

(d) is there a better viable alternative?

I accept this submission.

50 It is the position of the Applicants that Nortel's proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that

in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

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

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

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

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

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

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

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

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

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

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

DISPOSITION

54 The Applicants are part of a complicated corporate group. They carry on an active international business. I have accepted that an important factor to consider in a CCAA process is whether the case can be made to continue the business as a going concern. I am satisfied having considered the factors

referenced at [49], as well as the facts summarized at [51], that the Applicants have met this test. I am therefore satisfied that this motion should be granted.

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

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

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

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

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

G.B. MORAWETZ J.

CITATION: Re Grant Forest Products Inc., 2010 ONSC 1846
Court File No. CV-09-8247-00CL
Date: 20100330

ONTARIO
SUPERIOR COURT OF JU.S.TICE
(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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP	*Sean Dunphy, Kathy Mah* for the Monitor *Daniel Dowdall, Jane O. Dietrich* for the Applicants Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., Grant U.S. Holdings GP *Kevin McElcheran* for the Toronto-Dominion Bank, Agent for First Lien Lenders *Fred Myers, Joe Pasquariello* for Bank of New York Mellon, Agent for SLL *Sheryl Seigel* for Georgia-Pacific LLC *Richard Swan for Peter Grant Sr.* *Aubrey Kauffman* for Independent Directors of Grant Forest Products Inc. **Heard**: February 1 and 8, 2010

C. CAMPBELL J.:

REASONS FOR DECISION

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

[2] Approval of the transaction is opposed by the Second Lien Lenders ("SLL")[1] under an Inter-Creditor Agreement (the "ICA") of which Grant Forest is a party, on the basis that this Court does not have jurisdiction to, in effect, convey real property assets located in the United States.

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

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

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

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

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

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

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

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

First Lien Creditor Agreement

[10] As at May 31, 2009, the First Lien Lenders ("FLL")[2] were owed the principal amount of $399 million plus accrued interest of approximately $5.3 million pursuant to a credit agreement dated October 26, 2005 and amended March 21, 2007. An additional $8.7 million was owed to one or more of the FLL pursuant to interest rate swap agreements the liability of which was secured to the FLL Agent.

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

Second Lien Creditor Agreement

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

[12] GFP and the Grant U.S. Partnership are in default under the FLL Agreement and the Grant U.S. Partnership is in default under the SLL Agreement. Both the FLL and SLL Agents hold various security in Canada over each of their respective property and assets.

Inter-Creditor Agreement

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

The Marketing Process

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

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

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

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

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

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

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

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

> 56. It is the Monitor's view that the Marketing Process included a structured, fair, wide and effective canvassing of the market as demonstrated by the following:
>
> a. contact by the Investment Offering Advisor of 91 interested parties comprising both financial and strategic parties located in North America, South America, Europe and Asia;
>
> b. the execution of 32 NDAs by interested parties who were then granted access to review the Data Room and the subsequent submission of 13 EOIs at the end of *Phase 1*;
>
> c. the EOIs of eight interested parties that were invited to participate in *Phase II* provided a value range which was market derived and tested, and as such, supported the conclusion that the consideration included in Georgia Pacific's bid reflected fair value;
>
> d. of the eight interested parties that were invited to *Phase II*, five submitted improved bids in respect of consideration and/or closing conditions at the close of *Phase II* and of the three interested parties that were invited through to *Phase IIb*, each party again improved its bid in terms of consideration and/or closing conditions at the end of *Phase IIb*.
>
> e. the selection of Georgia Pacific to negotiate a PSA was based on a thorough analysis of all of the financial and commercial terms presented in all of the bids, was recommended by the Monitor and the CRA and was approved by the First Lien Lenders Steering Committee and the Independent Directors Committee; and
>
> f. the Second Lien Lenders were consulted, and their views and questions were taken into account in the final selection of Georgia Pacific.

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

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

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

[25] Counsel for the SLL sought and was granted access to the correspondence but Mr. Grant was not, due to his involvement in a bid as per the terms of the Investment Offering Protocol.

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

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

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

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

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

[31] The leading case in Ontario, which confirms the importance of integrity of process, is *Royal Bank of Canada v. Soundair Corp* (1991), 7 C.B.R. (3d) 1, a decision of the Court of Appeal for Ontario. At issue was the power of the Court to review a decision of a receiver to approve one offer over another for the sale of an airline as a going concern. In reinforcing the importance of integrity of process, the Court quoted from Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 92 adopted the following:

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

2. It should consider the interests of all parties.

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

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

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

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

Motion to Add Applicants

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

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

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

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

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

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

[40] The position of the FLL, supported by the Applicants and the Monitor, is that the only way in which the transaction can be accomplished with the price that the FLL and the Applicants are prepared to accept is with the proposed structure that would include a transfer of the Grant

U.S. Partnership interests as partnership interests, rather than a direct transfer of the assets of Grant U.S. Partnership.

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

Position of SLL

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

[43] It is urged that there is no jurisdiction on which the FLL can seek an unlimited judicial release. The FLL cannot add the SLL as a party for any purpose that is to seek avoiding prior scrutiny in the U.S. courts of the merits of its actions and of the U.S. affiliates of the Original Applicants and the SLL.[3]

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

[45] This is said to occur without delivering any originating process or meeting tests for the exercise of jurisdiction of this Court over U.S. parties concerning U.S. property. SLL submits that the FLL failed to provide any of the legal and procedural safeguards required by the Rules of Civil Procedure to any foreign or proposed defendant.

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

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

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

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

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

Inter-Creditor Agreement

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

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

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

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

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

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

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

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

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

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

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

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

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

Comity and U.S. Chapter 15

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

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

[65] Comity, as expressed by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*[4], is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." Comity balances "international duty and convenience" with "the rights of (a nation's) own citizens... who are under the protection of its laws."[5]

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

4 [1971] 2 S.C.R. 1077 at 1096
5 Ibid.

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

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

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

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

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

[72] I am satisfied that this Court does have jurisdiction to provide the relief requested, which is the product of the marketing process that was not only approved by this Court, but not objected to by any party when it was initiated.[6]

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

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

[75] There are many instances in which Canadian courts have granted vesting orders in relation to assets situated in the United States. Some of the orders are referred to in the factum of the FLL, including *Re Maax Corporation et al*.,[7] *Re Madill Equipment Canada*,[8] *Re ROL Manufacturing (Canada) Ltd*.,[9] *Re Biltrite Rubber Inc.*[10] and *Re Pope and Talbot, Inc. et. al.*[11]

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

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

8 *Re Madill Equipment Canada*, Case No. 08-41426, Distribution and Vesting Orders of the Supreme Court of British Columbia; Order of the US Bankruptcy Court (Western District of Washington at Tacoma) Granting Motion

[76] Decisions on both sides of the border have recognized that the United States and Canada have a special relationship that allows bankruptcy and insolvency matters to proceed with relative ease when assets lie in both territories. As the U.S. Bankruptcy Court for the Southern District of New York acknowledged in ABCP's *Metcalfe & Mansfield Alternative Investments et al*,.[12] both systems are rooted in the common law and share similar principles and procedures. Bankruptcy proceedings in the United States acknowledge international proceedings and work alongside, rather than over, foreign matters. Chapter 15 of the U.S. Bankruptcy Code exemplifies this in its foreign bankruptcy proceedings: "the court should be guided by principles of comity and cooperation with foreign courts."[13]

[77] In the cross-border case of *Re Muscletech Research and Development Inc*,[14] COMI was found to be in Canada despite factors indicating the U.S. would also be a suitable jurisdiction. Particularly, most of the creditors were located in the U.S., as was the revenue stream. Most of the major decisions regarding the company were made in Canada, its directors and officers were located in Ontario, banking was done in Ontario, etc. Justice Farley noted the positive relationship between Canada and the U.S. and credited this relationship to the adherence to comity and common principles. Judge Rakoff, presiding over the Chapter 15 proceedings, agreed with Farley J.'s endorsement, specifically noting that the factors outlined in the Canadian endorsement persuaded him over the factors in favour of U.S. COMI. Farley J. noted at paragraph 4 of his endorsement, and Judge Rankoff implicitly agreed, that "the courts of Canada and the U.S. have long enjoyed a firm and ongoing relationship based on comity and commonalities of principles as to, *inter alia*, bankruptcy and insolvency."

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

> Courts routinely enforce Canadian judgments in banluptcy, respecting our similar common law traditions including our respect for comity and restraint. In enforcing the decision of this Honourable Court in Metcalfe & Mansfield Alternative Investments et al., ("ABCP") the US Bankruptcy Court for the Southern District of New York, wrote:
>
> > The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportnity to be heard in a manner consistent with standards of U.S. due process. u.s. federal courts have repeatedly granted comity to Canadian proceedings. United Feature Syndicate, Inc. v. Miler Features

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Authorizing Sale of Assets, TD Supplementary Brief of Authorities, Tab 2.
9 *Re. ROL Manufacturing (Canada) Ltd., et al.*, unreported, Order of the Quebec Superior Court (Commercial Division) Approving the Sale of the PSH Division, TD Supplementary Brief of Authorities, Tab 3a; Order of the US Bankruptcy Court, Southwestern District of Ohio, Authorizing and Approving Sale of PSH Division, TD Supplemental Brief of Authorities, Tab 3c.
10 *Re Biltrite Rubber Inc.*, Case No. 09-31423 (MAW), Sale Approval and Vesting Order and Distribution Order of the Ontario Superior Court of Justice, TD Supplemental Brief of Authorities, Tabs 4a-b; Order of the US Bankruptcy Court for the Northern District of Ohio Western Division Enforcing the Orders of the Ontario Court, TD Supplementary Brief of Authorities, Tab 4c.
11 *Re. Pope and Talbot, Inc. et al*., Case No. 08-11933 (CSS), Orders of the US Bankruptcy Court for the District of Delaware, TD Supplementary Brief of Authorities, Tab 5.
12 United States Bankruptcy Court (S.D.N.Y.), Case No. 09-16709, January 5, 2010, Martin Glenn J.
13 *Metcalfe* at 18
14 . (2006) 19 C.B.R. (5th) 54 (*Muscletech*), titled *Re RSM Richter Inc. v. Aguilar* 2006 U.S. Dist. LEXIS 57595 (S.D.N.Y.) (*Re RSM Richter*)

> Syndicate, Inc., 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002) ("There is no question that bankruptcy proceedings in Canada-a sister common law jurisdiction with procedures akin to our own-are entitled to comity under appropriate circumstances.") (internal quotation marks and citations omitted); Tradewell, Inc. v. American Sensors Elecs., Inc., No. 96 Civ. 2474(DAB), 1997 WL 423075, at *l n.3 (S.D.N.Y. 1997) ("It is well-settled in actions commenced in New York that judgments of the Canadian courts are to be given effect under principles of comity.") (internal quotation marks and citation omitted); Cornjeldv. Investors Overseas Servs., Ltd., 47l F. Supp. 1255, l259 (S.D.N.V. 1979) ("The fact that the foreign country involved is Canada is significant. It is wellsettled in New York that the judgments of the Canadian courts are to be given effect under principles of comity. Trustees in bankruptcy appointed by Canadian courts have been recognized in actions commenced in the United States. More importantly, Canada is a sister common law jurisdiction with procedures akin to our own, and thus there need be no concern over the adequacy of the procedural safeguards of Canadian proceedings.") (internal quotation marks and citations omitted)15

[79] *MAAX Corporation* (*MAAX*) provides some assistance on the U.S. treatment to CCAA proceedings in asset sales. The salient elements in *MAAX* included the fact that the sale was conducted prior to entering CCAA protection, only the Canadian entity ultimately sought protection under the Act and no concurrent U.S. proceedings were initiated at first. The MAAX companies operated extensively in the U.S. and internationally, and were eventually brought into the U.S. via Chapter 15. The Canadian court approved the move into the U.S. and granted the sale. While there were some operating companies based almost solely in the U.S. (opening bank accounts to qualify under the CCAA, as was done in the present case), the U.S. Bankruptcy Court looked at the entity as a whole and granted the petition.[16] The American court approved of a flexible approach to the U.S. asset sale, allowing it to go forward without a competitive bidding process, stalking horse or auction.

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

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

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

Conclusion

[83] For the foregoing reasons, I am satisfied:

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

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15 See footnote 12, *supra*.
16 *In re MAAX Corp., et al.*, No. 08-11443 (Bankr. D. Del. Aug. 6, 2008)

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

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

C. CAMPBELL J.

Released:

Appendix A

Applicable Provisions of the Inter-Creditor Agreement

Section 3.1

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

Section 5.1(a)

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

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

Section 5.1(c)

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

CITATION: Re Grant Forest Products Inc., 2010 ONSC 1846
Court File No. CV-09-8247-00CL
Date: 20100330

SUPERIOR COURT OF JU.S.TICE
ONTARIO
(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 GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

REASONS FOR DECISION

C. CAMPBELL J.

Released: March 30, 2010

COURT OF APPEAL FOR ONTARIO

CITATION: Marchant Realty Partners Inc. v. 2407553 Ontario Inc., 2021 ONCA 375
DATE: 20210531
DOCKET: M52417, M52418 & M52419

Jamal J.A. (Motions Judge)

DOCKET: M52417

BETWEEN

Marchant Realty Partners Inc., as agent

Responding Party

and

2407553 Ontario Inc., 2384648 Ontario Inc., 2384646 Ontario Inc., 24000196 Ontario Inc. and 2396139 Ontario Inc.

Moving Parties

DOCKET: M52418

AND BETWEEN

Marchant Realty Partners Inc., as agent

Responding Party

and

4544 Zimmerman Avenue LP and 4544 Zimmerman Avenue GP Inc.

Moving Parties

DOCKET: M52419

AND BETWEEN

Marchant Realty Partners Inc., as agent

Responding Party

and

4267 River Road LP and 4267 River Road GP Inc.

Moving Parties

Steven L. Graff, Miranda Spence and Stephen Nadler, for the moving parties

Sara-Ann Wilson and Kenneth Kraft, for the responding party Zeifman Partners Inc.

Heard: May 20, 2021 by video conference

REASONS FOR DECISION

[1] The moving parties are debtors ("Debtors") over whose assets, undertakings, and real property the responding party Zeifman Partners Inc., ("Receiver") is the court-appointed receiver and manager. The Debtors seek leave to appeal to this court under s. 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), from orders of Cavanagh J. ("motion judge") of the Superior Court of Justice (Commercial List) dated March 25, 2021, approving the Receiver's proposed sale process and list prices for five commercial properties in downtown Niagara Falls, Ontario ("Properties").

[2] For the reasons that follow, the motions for leave to appeal are dismissed.

Background

[3] Marchant Realty Partners Inc. ("Agent"), as agent for a group of lenders ("Lenders"), commenced three related receivership proceedings before the

Commercial List concerning loans the Lenders made to the Debtors. The loans matured over three years ago, some loans more than four years ago. As of October 2020, the Debtors owed more than $16 million under the loans.

[4] The three receivership applications were originally scheduled for September 2018 but were adjourned five times to give the Debtors more time to refinance the Properties. The refinancing never happened.

[5] With no refinancing or repayment plan on the horizon, the Agent moved forward with the receivership applications. In August 2020, Gilmore J. of the Commercial List appointed the Receiver as receiver and manager over the Debtors' Properties, although the appointment was stayed for just over two months to give the Debtors one last chance to repay the loans. They could not do so, and the Receiver's appointment became effective in mid-October 2020.

[6] The Properties are about 4 km from the tourist area of Niagara Falls. The Properties are mixed-use commercial properties (most needing repairs), a seasonal operating motel (closed because of the pandemic), and vacant land.

[7] The Receiver is authorized to market the Properties, including advertising them for sale, soliciting offers to buy them, and negotiating such terms as the Receiver deems appropriate.

The Motion Judge's Decision

[8] The Receiver recommended list prices for the sale of Properties based on: (1) independent appraisals from two local appraisers, Humphrey Appraisal Services Inc. and Jacob Ellens & Associates Inc.; (2) recommended list prices for the Properties from three real estate brokerages; and (3) discussions with Jones Lang LaSalle Real Estate Services, the proposed listing brokerage, which has expertise selling properties around Niagara Falls. Even with these list prices, the Lenders will lose money on their loans to the Debtors.

[9] The Debtors opposed the proposed list prices and relied on competing appraisals of Colliers, a commercial real estate firm. Colliers' appraisals — which focussed on the development potential of the Properties — were almost 300% higher than the Receiver's list prices. The Debtors asked the motion judge to direct the Receiver to list the Properties at Colliers' proposed prices for 60 days to see what the market will bear.

[10] By order dated March 25, 2021, the motion judge approved the Receiver's proposed sale process and list prices for the Properties. The motion judge found:

> The Receiver is an officer of the court with duties to all stakeholders. In my view, the Receiver has shown that it is acting in good faith and diligently to discharge its duties to deal with the [Properties] in a commercially reasonable manner. The Receiver has reviewed the Colliers appraisals and the information upon which Colliers relies for its appraisals of the [Properties]. The Receiver has explained why it does not agree with the Colliers

> appraisals, and why it has recommended that the sale process be approved. I have considered the process which the Receiver has followed and the information upon which it relies to support its recommendations. The [Debtors] have not shown that the Receiver followed a flawed procedure. I am not satisfied that this is an exceptional case where it is proper for me to reject the business judgment made by the Receiver.

The Test for Leave to Appeal Under s. 193(e) of the *BIA*

[11] The moving parties seek leave to appeal from the motion judge's orders under s. 193(e) of the *BIA*. This provision provides that, unless an appeal lies as of right or as otherwise expressly provided, an appeal lies to the Court of Appeal "from any order or decision of a judge of the court … by leave of a judge of the Court of Appeal".

[12] In deciding whether to grant leave under s. 193(e) of the *BIA*, this court considers the following principles:

- Granting leave is "discretionary and must be exercised in a flexible and contextual way": *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29.
- In exercising its discretion, the court should examine whether the proposed appeal: (1) raises an issue of general importance to bankruptcy/insolvency practice or the administration of justice, and is one this court should address; (2) is *prima facie* meritorious; and (3) would not unduly hinder the progress

of the bankruptcy/insolvency proceedings: *Pine Tree Resorts*, at para. 29; *McEwen (Re)*, 2020 ONCA 511, 452 D.L.R. (4th) 248, at para. 76.

Should this Court Grant Leave to Appeal?

(1) *Does the proposed appeal raise an issue of general importance to bankruptcy/insolvency practice or the administration of justice?*

[13] The Debtors assert that the proposed appeal raises an issue of general important to bankruptcy/insolvency practice. They frame the issue on the proposed appeal as "the extent of the deference that the Court owes to a receiver's business judgment when approving a sale process." They claim the appeal "will provide guidance to receivers as they consider the level of scrutiny they may expect from the Court, and to other stakeholders as they consider whether to challenge the actions taken by any given receiver."

[14] The Receiver frames the issue on appeal much more narrowly. It claims the appeal "is highly fact-specific and concerns, in essence, the appropriate list prices" of the Properties. It says no legal principles are in dispute and the appeal will have "no bearing or importance for the practice of insolvency and the administration of receivership proceedings."

[15] I agree with the Receiver. Although on any appeal the court would consider and apply the principles of deference applicable to a receiver's business judgment, those principles are not in dispute. They were correctly stated by the motion judge,

who cited this court's decision in *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355 (C.A.), at para. 23:

> Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances — particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).

[16] On the Debtors' argument, the appeal would involve the application of these settled principles. However, applying settled principles of deference to the Receiver's business decisions here would not raise an issue of general importance to bankruptcy/insolvency practice or the administration of justice.

[17] The Debtors also say the motion judge failed to apply the correct legal test for evaluating whether a receiver has acted properly in selling a property, as stated in *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.). This issue relates to the deference issue because the Debtors claim the motion judge failed to cite or apply the *Soundair* test and instead was unduly deferential to the Receiver. I will consider this argument below in evaluating whether the proposed appeal is *prima facie* meritorious.

(2) *Is the proposed appeal* prima facie *meritorious?*

[18] In evaluating whether the proposed appeal has *prima facie* merit, I begin by noting that this court gives substantial deference to the discretion of commercial court judges supervising insolvency and restructuring proceedings and does not intervene absent demonstrable error: *Ravelston Corp. Ltd. (Re)*, 2007 ONCA 135, 85 O.R. (3d) 175, at para. 3.

[19] As already noted, commercial court judges also give substantial deference to the decisions and recommendations of a receiver as an officer of the court. If the receiver's decisions are within the broad bounds of reasonableness and the receiver proceeded fairly, after considering the interests of all stakeholders, the court will not intervene: *Ravelston*, at para. 3; *Regal Constellation Hotel*, at para. 23. A court "will assume that the receiver is acting properly unless the contrary is clearly shown": *Regal Constellation Hotel*, at para. 23.

[20] The Debtors assert, however, that this court would overcome the deference shielding the receiver's business judgments and the motion judge's review of those judgments because the motion judge made an extricable error of law. The Debtors say the motion judge erred in law by failing to state or apply the *Soundair* test for evaluating whether a receiver has acted properly in recommending list prices for the Properties.

[21] The *Soundair* test in the context of a sale involves consideration of:

- Whether the receiver made sufficient effort to obtain the best price and did not act improvidently;
- The interests of the parties;
- The efficacy and integrity of the process by which offers were obtained; and
- Whether there has been unfairness in the working out of the process: *Soundair*, at p. 6; *Regal Constellation Hotel*, at para. 24.

[22] The Debtors claim that the motion judge did not cite or apply the *Soundair* test but instead applied a new, two-part test: (1) the respondent on a motion to approve a sale process must show the receiver followed a flawed process in developing its sale process; and (2) only if that hurdle is cleared may the respondent challenge the sale process itself.

[23] I do not accept the Debtors' submission. Although I agree the motion judge did not expressly set out the *Soundair* test, he cited *Soundair* elsewhere in his reasons. As an experienced commercial judge, he was familiar with the *Soundair* test and applied it in his reasons:

- *Whether the receiver made sufficient effort to obtain the best price and did not act improvidently* — The motion judge found that the Receiver made sufficient effort to obtain the best and most realistic list price and did not act improvidently. He noted that the Receiver "reviewed the Colliers appraisals and the information upon which Colliers relies for its appraisals of the

[Properties]. The Receiver has explained why it does not agree with the Colliers appraisals, and why it has recommended that the sale process be approved." The motion judge also noted that the Receiver explained why listing the Properties for 60 days at Colliers' proposed list prices could "result in little to no interest in the sale process, with the result that properties languish on the market and ultimately require drastic price reductions to generate interest." This could lead to "lower recoveries than what would have been possible had the property [been] listed for sale at an appropriate price at the outset."

- *The interests of the parties* — The motion judge found that the Receiver considered the interests of all parties in proposing the suggested list prices. He noted that "[t]he Receiver is an officer of the court with duties to all stakeholders", which included the interests of the Debtors. He found that "the Receiver has shown that it is acting in good faith and diligently to discharge its duty to deal with the [Properties] in a commercially reasonable manner."
- *The efficacy and integrity of the process by which offers were obtained* — The motion judge considered the integrity of the process by which the list prices were recommended. He "considered the process which the Receiver has followed and the information upon which it relies to support its

recommendations." He found that "[t]he [Debtors] have not shown that the Receiver followed a flawed procedure".

- *Whether there has been unfairness in the working out of the process* — The motion judge found no unfairness in the process that the Receiver followed. He found the Receiver properly considered and responded to Colliers' appraisals. The proposed list prices did not result from any unfairness.

[24] I thus conclude the motion judge applied the *Soundair* test. I see no extricable error of law or any basis to interfere with his decision.

[25] The proposed appeal therefore lacks *prima facie* merit.

(3) *Would the proposed appeal unduly hinder the progress of the receivership proceedings?*

[26] Lastly, the Debtors assert that the proposed appeal would not unduly hinder the progress of the receivership proceedings. They say the Debtors have no other assets, so all the Receiver has left to do is list and sell the Properties. The Debtors agree to expedite the appeal and claim that any minor delay in the sale process is not enough to deny leave to appeal.

[27] I disagree. All the loans in issue matured at least three years ago, some four years ago. Over two years have passed since the original return date of the receivership applications. There have been further delays to allow the Debtors to refinance the Properties, which they could not do. Substantial property taxes are accruing on the Properties and the Receiver is responsible for their ongoing

carrying costs, which rank ahead of the Lenders' mortgages and are thus eroding their potential recovery. Further delay in the Receiver's ability to sell the Properties will only further degrade the Lenders' security position and should not be permitted.

[28] I thus conclude the proposed appeal would unduly hinder the progress of the receivership proceedings.

Disposition

[29] The motions for leave to appeal are dismissed. As agreed by the parties, there shall be no order as to costs.

[30] As jointly requested by the parties, pending further order the unredacted versions of the Debtors' factums shall remain under seal and will not be publicly available because they contain commercially sensitive and confidential information about the Receiver's and Debtors' proposed list prices for the Properties.

"M. Jamal J.A."

2009 CarswellOnt 5450
Ontario Superior Court of Justice [Commercial List]

Eddie Bauer of Canada Inc., Re

2009 CarswellOnt 5450, [2009] O.J. No. 3784, 57 C.B.R. (5th) 241

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 EDDIE BAUER OF CANADA, INC. AND EDDIE BAUER CUSTOMER SERVICES INC. (Applicants)

C. Campbell J.

Heard: July 22, 2009
Judgment: July 30, 2009
Docket: CV-09-8240-00CL

Counsel: Fred Myers, L. Joseph Latham, Christopher G. Armstrong for Applicants
Jay Swartz for RSM Richter
Linda Galessiere for Landlords
Maria Konyukhova for Everest Holdings
Alexander Cobb for Bank of America

Headnote

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

Company commenced reorganization under Chapter 11 of US Bankruptcy Code — Two subsidiaries of company were granted protection under Companies' Creditors Arrangement Act — Stalking horse process and bidding procedures were approved by court — Bid by purchaser was deemed best offer yielding highest net recovery for creditors — Bid included assignment of real property leases, offers of employment to all Canadian employees, and assumption of ordinary course liabilities — Monitor was of opinion that value allocated to purchased assets exceeded net value on liquidation basis — Application was brought for approval of sale and vesting order in respect of asset purchase agreement — Application granted — Process was fair and reasonable and produced fair and reasonable result — No party opposed order sought — Sale and purchase of assets assured compromise of debt accepted by debtholders which preserved value of name and reputation of business as going concern — Once sales process is put forward, court should to extent possible uphold business judgment of court officer and parties supporting it.

Table of Authorities

Cases considered by *C. Campbell J.*:

Bakemates International Inc., Re (2004), 2004 CarswellOnt 2339 (Ont. C.A.) — referred to

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — considered

Eddie Bauer of Canada Inc., Re (2009), 2009 CarswellOnt 3657, 55 C.B.R. (5th) 33 (Ont. S.C.J. [Commercial List]) — referred to

Ivaco Inc., Re (2004), 2004 CarswellOnt 3563 (Ont. S.C.J. [Commercial List]) — referred to

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

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

Statutes considered:

Bankruptcy Code, 11 U.S.C.

Chapter 11 — referred to

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

Generally — referred to

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

1 A joint hearing between this Court and the United States Bankruptcy Court for the District of Delaware was held on July 22, 2009 for Sale Approval and a Vesting Order in respect of an Asset Purchase Agreement dated as of July 17, 2009 among Everest Holdings LLC as buyer and Eddie Bauer Holdings Inc. ("EB Holdings") and each of its subsidiaries.

2 These are the reasons for approval of the Order granted.

3 On June 17, 2009, Eddie Bauer Canada Inc. and Eddie Bauer Customer Services Inc. (together, "EB Canada"), two of the EB Holdings subsidiaries, were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended ("CCAA") in an Initial Order of this Court, with RSM Richter Inc. appointed as Monitor.

4 On the same day, EB Holdings commenced reorganization under Chapter 11 of the United States Code in bankruptcy. A cross-border protocol was approved by this Court [2009 CarswellOnt 3657 (Ont. S.C.J. [Commercial List])] and the U.S. Court on June 25, 2009.

5 The purpose of what is described in the Orders as "Restructuring Proceedings" was a process to enable the Eddie Bauer Group to have an opportunity to maximize the value of its business and assets in a unified, Court-approved sale process.

6 EB Holdings is a publicly traded company with shares trade on the NASDAQ Global Market. Eddie Bauer branded products are sold at over 300 retail outlets in the United States and 36 retail stores and one warehouse store throughout Canada, together with online and catalogue sales employing 933 individuals in Canada.

7 The joint hearing conducted on June 29, 2009 before the U.S. Court and this Court approved a Stalking Horse process and certain prescribed bidding procedures. Rainer Holdings LLC, an affiliate of CCMP Capital Advisors and indirectly of the buyer, became the Stalking Horse bidder.

8 The Stalking Horse offer of US$202.3 million was for substantially all of the assets, property and undertaking of the Eddie Bauer Group.

9 The Bidding Procedure Order provided that the Stalking Horse offeror would be entitled to a break fee and to have its expenses of approximately $250,000 reimbursed and would offer employment to substantially all of the Company's employees, assume at least 250 U.S. retail locations and all Canadian locations and pay all of the Group's post-filing supplier claims.

10 The bidding was completed in the early hours of July 17, 2009. The three stage basis of the auction process included (1) the best inventory offer from Inventory Bidders; (2) the best intellectual property offer of the IP bidders; and (3) the best going-concern offer from Going-Concern Bidders. The best inventory and intellectual offers were to be compared against the best going-concern offer.

11 The US$286 million bid by Everest (a company unrelated to Rainer) was deemed the best offer, yielding the highest net recovery for creditors (including creditors in consultation.) A US$250 million back-up bid was also identified.

12 The Canadian real property leases are to be assigned, assuming consent of landlords, and offers of employment to all Canadian employees to be made and ordinary course liabilities assumed.

13 The value allocated to the Canadian Purchased Assets of US$11 million exceeds in the analysis and opinion of the Monitor the net value on a liquidation basis, particularly as the only two material assets are inventory and equity (if any) in realty leases.

14 All parties represented at the joint hearing, including counsel for the landlords, either supported or did not oppose the Order sought.

15 The process that has been undertaken in a very short time is an example of a concerted and dedicated effort of a variety of stakeholders to achieve a restructuring without impairing the going-concern nature of the Eddie Bauer business.

16 The sale and purchase of assets assures a compromise of debt accepted by those debtholders (with a process of certain leases not taken up in the US), which to the extent possible preserves the value of the name and reputation of the business as a going concern.

17 Had it not been for the cooperative effort of counsel for the parties on both sides of the border and a joint hearing process to approve on an efficient and timely basis, the restructuring regime would undoubtedly have been more time-consuming and more costly.

18 I am satisfied that the statement of law that set out the duties of a Court in reviewing the propriety of the actions of a Court officer (Monitor) are applicable and have been met here.

19 The duties were set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at pp 92-94 and are as follows:

1. It should consider the interests of all parties.

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

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

20 Galligan J.A. for the majority in the Court of Appeal in Ontario in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at p. 8 further accepted and adopted the further statement of Anderson J. in *Crown Trust* at p. 551 that "its decision was made as a matter of business judgement on the elements then available to it. It is 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."

21 What have come to be known as the *Soundair* principles have been accepted in a number of Ontario cases, including *Bakemates International Inc., Re* [2004 CarswellOnt 2339 (Ont. C.A.)], 2004 CanLII 59994. The same principles have been accepted to approval of Asset Purchase Agreements and Vesting Orders. See *Ivaco Inc., Re* [2004 CarswellOnt 3563 (Ont. S.C.J. [Commercial List])] 2004 CanLII 21547. In *Tiger Brand Knitting Co., Re* [2005 CarswellOnt 1240 (Ont. S.C.J.)] 2005 CanLII 9680, I declined to extend the time for a bid and directed the Monitor not to accept a bid it had received and to negotiate with another party.

22 The concern in *Tiger Brand*, as in this case, is that once a sales process is put forward, the Court should to the extent possible uphold the business judgment of the Court officer and the parties supporting it. Absent a violation of the *Soundair* principles, the result of that process should as well be upheld.

23 A Stalking Horse bid has become an important feature of the CCAA process. In this case, the fact that the Stalking Horse bidder promoted other bids and put in the highest bid satisfies me that the process was fair and reasonable and produced a fair and reasonable result.

24 One can readily understand that the goodwill attached to a recognized name such as Eddie Bauer will likely only retain its value if there is a seamless and orderly transfer.

25 For the foregoing reasons the draft Orders of Approval and Vesting will issue as approved and signed.

Application granted.

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANALYSIS AND DISCUSSION

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

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

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

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

[31] The Court's brief reasons follow.

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3 Exhibits VB-1 and I-5.

THE SALE APPROVAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE STANDING ISSUE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FOR THESE REASONS, THE COURT:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[15] **ORDERS** that notwithstanding:

(i) the proceedings under the CCAA;

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

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

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

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

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

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

[19] **WITHOUT COSTS.**

_____
CLÉMENT GASCON, J.S.C.

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

Me Avram Fishman
FLANZ FISHMAN MELAND PAQUIN
Attorneys for the Monitor

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

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

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

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

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

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

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

Date of hearing: April 26, 2010

SCHEDULE "A"

ABITIBI PETITIONERS

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

SCHEDULE "B"

BOWATER PETITIONERS

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

SCHEDULE "C"

18.6 CCAA PETITIONERS

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

SCHEDULE "D"

FIRST CLOSING MONITOR'S CERTIFICATE

CANADA	**SUPERIOR COURT**
PROVINCE OF QUEBEC **DISTRICT OF MONTRÉAL**	Commercial Division (Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)
No. : 500-11-036133-094	

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. Dalhousie Mill

None

3. Donnacona Mill

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

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

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

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

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

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

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

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

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

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

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

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

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

*****

SCHEDULE "F"

SECOND CLOSING MONITOR'S CERTIFICATE

CANADA	**SUPERIOR COURT**
PROVINCE OF QUEBEC **DISTRICT OF MONTRÉAL**	Commercial Division (Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended)
No. : 500-11-036133-094	

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

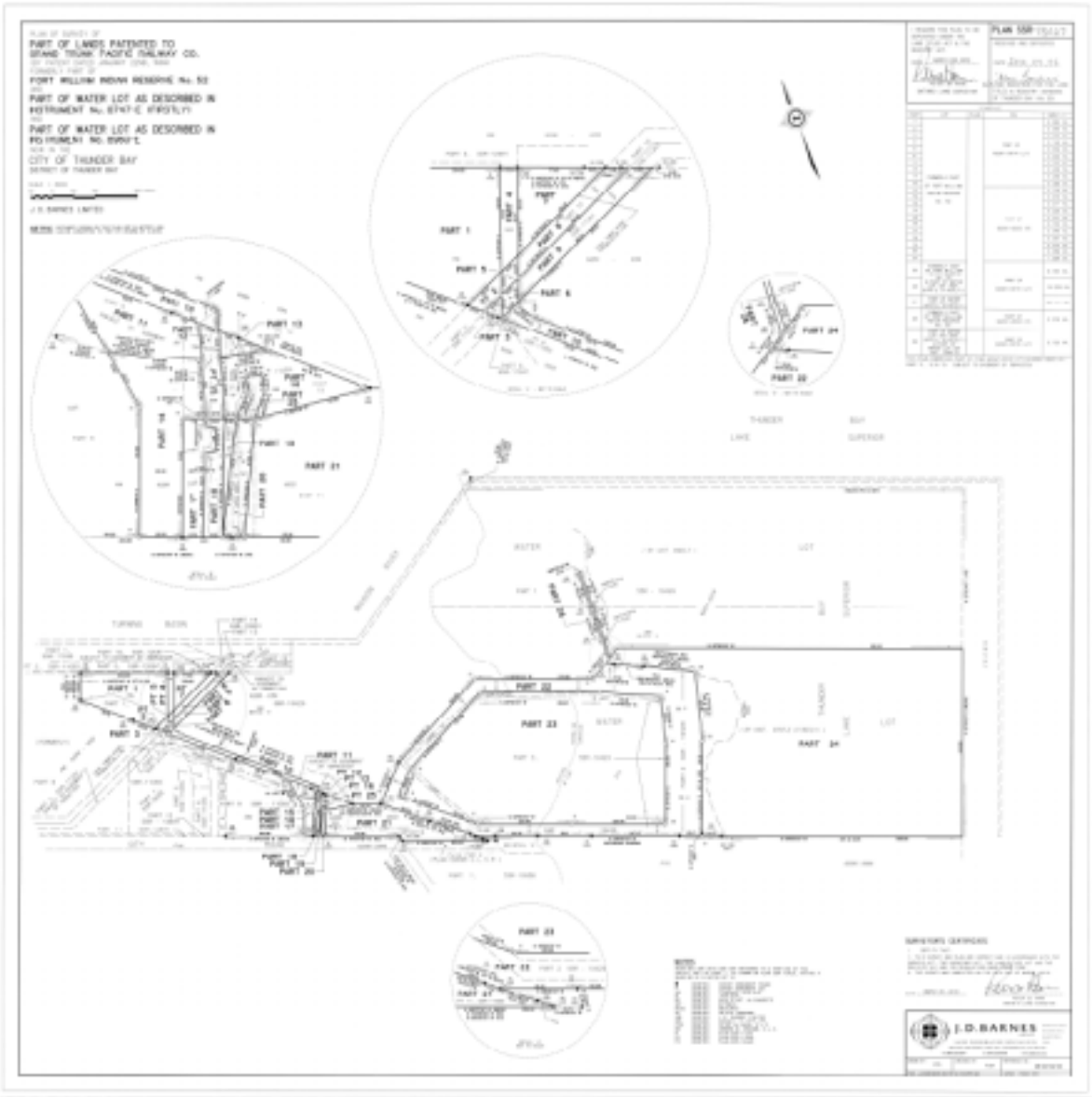
6. Easement in favour of Union Gas, registered on Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 20 and 25, 55R-13027

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

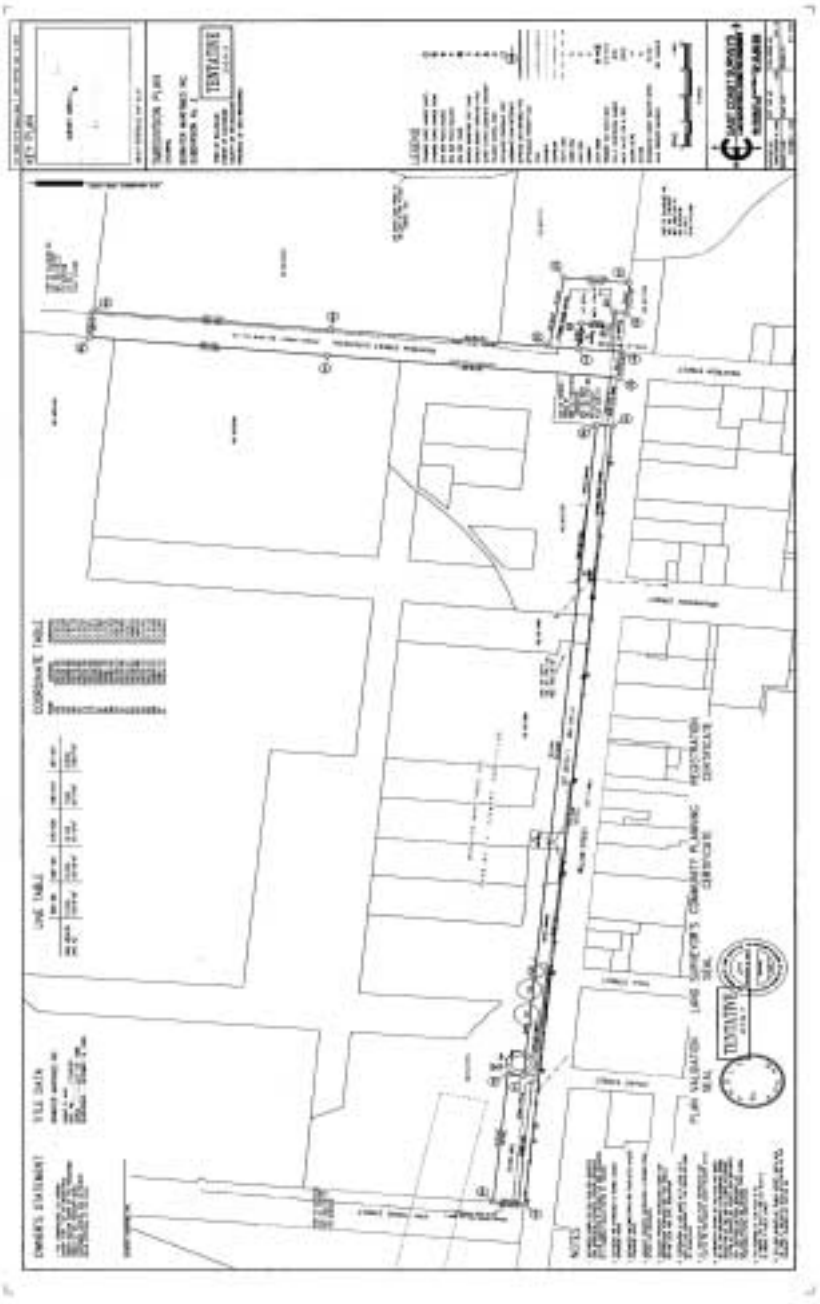
The surveyed land bounded by the bolded line in the plan attached in Annex A to this Schedule H (the "**Dalhousie Plan**").

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

*****

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 URBANCORP TORONTO MANAGEMENT INC., ET AL.

Court File No. CV-16-11389-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

BOOK OF AUTHORITIES
OF THE MONITOR
(RETURNABLE December 7, 2021 – Sale Approval and Vesting Order)

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto Canada M5V 3J7

Robin B. Schwill (LSO# 38452I)
Tel: 416.863.5502
rschwill@dwpv.com

Robert Nicholls (LSO# 75180A)
Tel: 416.367.7484
rnicholls@dwpv.com

Lawyers for the Monitor
KSV Restructuring Inc.